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Texas Law Review

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Texas Law Review

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In Memoriam: Hans Wolfgang Baade*

Remarks from James Baaden

Hans-Wolfgang Baade was born on the 16th of December, 1929, in Berlin, capital of Germany at the time—and capital again today. At the time of his birth, the stock market crash had only just taken place in New York about six weeks earlier. The number of unemployed in Germany stood at 2.8 million. The country's banks collapsed in the summer of 1931, and a year later, elections in 1932 established the National Socialist German Workers Party, the Nazis, as the strongest party in the Reichstag, the German parliament. By this point, there were over 6 million unemployed in Germany. A few weeks after Hans-Wolfgang's third birthday, the Nazis' leader, Adolf Hitler, assumed power as Chancellor in January 1933. A bare month later, the Reichstag building was all but destroyed in a huge fire, and all Communist Party deputies were thereafter excluded from the chamber. A month after that, on the 23rd of March, Hitler demanded that the remaining Reichstag members pass an Enabling Act, the *Ermächtigungsgesetz*, giving him power to rule by executive decree; some 444 members, representing a variety of conservative, liberal, Christian, and agrarian parties voted for it, and 94 voted against—all of them deputies of the Social Democratic Party. It was the end of any form of parliamentary democracy in Germany, and the beginning of Nazi dictatorship.

Hans-Wolfgang's father, Dr. Fritz Baade, was one of the 94 Social Democrats who cast their votes against the Enabling Act. Meanwhile, his mother, Edith Grünfeld-Wolff, Fritz Baade's third wife, a member of the Berlin Jewish community, immediately lost her job as a journalist working for a leading Berlin daily, the *Berliner Börsen-Courier*. In due course, it was time for Fritz, Edith, and their young son Hans-Wolfgang to get out of Germany. First they got out of Berlin, retreating to a cottage on an island in a lake in Brandenburg. The main thing he remembered about the island was that it was also the home of a single sheep called Rebekka. Not long after, it

*The following tributes summarize remarks from the November 28, 2016 memorial honoring the late Professor Hans Baade.

was time to bid farewell to Rebekka, and the family succeeded in emigrating to Turkey at the beginning of 1934. (Hans-Wolfgang's much older half-siblings Aenne and Peter subsequently made their way to Turkey, and another sister, later in life the noted Columbia University biochemist Ruth Benesch, was one of thousands of Jewish children brought to Britain in the *Kindertransport*.)

He grew up in Turkey, a young republic. Until only a few years earlier, it had been the capital of the Ottoman Empire. He learned Turkish almost as his first language—speaking it naturally and fluently for the rest of his life—and grew up savouring the diversity of the old Ottoman order, the vast range of ethnic, national, and religious minorities who at that point continued to make Constantinople—recently renamed Istanbul—their home. These include Ladino-speaking Sephardic Jews, plus Armenians, Bulgarians, Russians, Poles, Kurds, Circassians, Georgians, Arabs, Greeks, Bosnians, Croats, and Italians. After the end of World War II, he and his parents set out for another great port city populated by a host of varied communities: New York. Hans W. Baade, as he chose to be known, went to Syracuse University as an undergraduate and then served in the U.S. Army at Fort Bragg in North Carolina. Something about this state captivated him, and it was there that he went to law school, at Duke University in Durham, in the mid-1950s. He then revisited Europe, though only long enough to pick up a diploma from the Academy of International Law in the Hague and to meet and marry his Scottish wife, Anne. Through that marriage, a lasting, lifetime love affair with his wife's homeland, Scotland, came about, a shimmering tartan cord winding through the rest of his life. However, with Anne, he quickly returned to Duke and soon played a prominent role in its law school—still warmly acknowledged by Duke today. In 1968, a prolonged sabbatical enabled Hans Baade to experience political drama in the streets and lecture halls of West Berlin—and relative peace and quiet in Cambridge, England. A short-lived Canadian interlude at the University of Toronto followed. He retained a respectful affection for Canada forever afterwards—but it was just too cold. A somewhat warmer spot had captured his attention: Austin, Texas. When he arrived there in the early 1970s, he was 43. And there he remained for another 43 years, the rest of his life.

In common with other refugees and exiles, Hans Baade knew extreme instability. It took a long time to settle down. And what was agreeable (or not) in this place or that had to be ascertained first-hand. His parents and he had fled from the destruction of constitutional democracy, and its protection and advancement, and the paramount ideal of the rule of law, were central elements in his consciousness. That commitment found expression in zealous hard work: as scholar, writer, editor, and teacher. This was, perhaps, a lesson which was especially taken to heart by the Central European Jewish emigrés of the 1930s. You live by your wits. This awareness can lead on occasion to a certain arrogance or single-mindedness. Scholarship is a high calling—and

any sloppiness is intolerable. Nonetheless, academic work is not a series of dour, punctilious tasks; for many who have had a close brush with genocide, it is the way of freedom, providing true refuge and making possible the constant thrill of discovery. In Hans Baade's case, something which arose from his own background and experience of life, namely a profound curiosity about all dimensions of Jewish culture, led in some interesting directions. His acquaintance with Ladino, the "Judeo-Spanish" of the Jews of Istanbul, prompted engagement with Spanish language and texts, immersion in the field of Latin American legal history, and a warm friendship with a now legendary UT figure, Nettie Lee Benson. And at some point Yiddish, which he'd first encountered in New York in the '40s, rather suddenly arrived on the scene and almost became an obsession; his knowledge of Yiddish literature was prodigious and his office door was memorably plastered in decals and stickers from the National Yiddish Book Center. But life's simple pleasures were also appreciated fully: foods from feta cheese to radishes, from matjes herring to Texas barbecue; being out in the elements, especially walking in Scotland; enjoying the company of his grandsons in Austin, Alan and Miles; and exploring old Texas county courthouses.

And though he was sometimes not the easiest person to work with, he was dedicated to the language of human relationships. Students were very important to Hans Baade and they in turn valued his knowledge intensely: responding to their demands, he continued to teach his art law seminar at UT until he was 85. Friendships and warm, stimulating collegial relations were of equally central significance. He was particularly influenced by a number of elder legal scholars—nearly all of them exactly twenty years older—who came from the same German-speaking Jewish refugee milieu as he did. Carl Fulda, his predecessor in the Hugh Lamar Stone chair, played a major role in bringing Hans Baade to Texas: he died all too soon and was bitterly missed for decades afterwards. An even more shattering loss was the murder—on the streets of Manhattan, in 1972—of a deeply respected intellectual companion, Wolfgang Friedmann of Columbia. Others, fortunately, enjoyed longer lives: notably David Daube of Berkeley, and Rudolf Schlesinger, mainly associated with Cornell. All four of these men happen to have been born in the same year, 1909. In everyday life, no one could touch the role of Russell Weintraub of UT Austin, his trusted and admired colleague and best friend for over four decades—born in late 1929, he and Hans Baade were almost exactly the same age. But the friends and sages in his life also came from other, non-Jewish, American backgrounds: above all, Jack Latty of Duke (born in 1903) and Page Keeton of UT Austin (yet another representative of the year 1909).

Remarks from David Anderson

Hans Baade knew more about more subjects than anyone I've known. He knew comparative law, international law, conflicts of laws, and German law. He was often called on to testify as an expert on Spanish land grants, Mexican water rights, and Roman law. To many European judges, lawyers, and law professors, Hans was the face of UT Law.

He also knew a lot about subjects far removed from his academic interests, such as European history, American politics, Texas history, slavery, art, and antiquities. If you had a question, the person to ask was Hans. Before there was ask Siri, there was ask Hans. He was a scholar in the European mold, which is to say he was learned, well-read, and well-informed. He seemed to remember everything he had ever learned.

He kept up with developments in many jurisdictions and many forums. Our fields didn't overlap, but he would frequently bring to my attention some libel decision by the House of Lords or an article on free speech law in Europe. We were colleagues and friends for forty-four years, and he always seemed to know about things that I should have known about but didn't.

Hans was a bit cantankerous. He could judge people harshly, but with many others, he was generous and forgiving, even when he disagreed with them.

He had little patience for superficial expertise. Occasionally, some newly minted expert would come here to give a talk, assuming that there would be nobody at UT Law who would know enough to challenge him. But unless that speaker knew his subject thoroughly, Hans could and would expose his ignorance.

He was a prolific scholar who published articles not only in English, but also in German and Spanish. The subjects he wrote about were wide-ranging, from commercial law to divorce and adoption, to arbitration, to statutory construction, women and the law, and the history of the Texas Supreme Court. He wrote about matters that were of interest to judges and lawyers, and he believed that we should all write stuff that would be helpful.

In the later years of a long career, most academics are content to continue teaching and writing about familiar subjects that require no new learning. Not Hans. In the last years of his career, he developed an entirely new course, a seminar on art law. Only a scholar as cosmopolitan as Hans would undertake a project demanding knowledge of so many different fields—international law, art history, conflict of laws, copyright law, and comparative law, among others.

The course was immensely popular, creating for Hans an entirely new constituency unlike the ones produced by his many years of teaching more conventional courses. More than those courses, it showed students the

breadth and depth of a sophisticated intellect and won him a new generation of fans.

His dearest friend on the faculty was the late Russell Weintraub. They had many common interests, most notably conflict of laws and comparative law. Their conversations about legal matters were models of scholarly dialogue. They each knew the other's mind so well that there was no need to waste time on preliminaries.

When Hans first came to UT Law, the faculty was a social community as well as a professional and intellectual community. There was a dinner-party circuit that included Hans and Anne, Russell and Zelda Weintraub, George and Lorraine Schatzki, and Mike and Sue Sharlot, among others. Academic visitors and newcomers to the faculty were often invited and made to feel welcome.

Students formed "The Hans Baade Society," initially as a tongue-in-cheek tribute to his generous grading, but eventually in recognition of his prodigious but gentle intellect. His work lives on, not only in his scholarship, but also in the students he taught.

Remarks from Jonathan A. Bush**

Let me begin by thanking the University of Texas for organizing its memorial for Hans Baade and for including me in a program along with those who knew Hans longer and better, and the *Texas Law Review* for publishing this selection of the tributes.[1]

Everyone who met Hans or read his work knew he was very learned and productive. Many of his colleagues had heard that Hans's father Fritz stood up to the Nazis in the Reichstag in March 1933, and that the maelstrom of the Thirties brought Hans to Turkey before Texas. Most who knew him inferred that his scholarship—and maybe his worldview—somehow derived from his family's flight. Each claim is true, but maybe we can say a little more about each by offering Hans the tribute of looking at his life, influences, and work. The task will be hard because Hans's work was of such breadth. Consider a few of the topics he wrote about: conflicts of law; federal courts', state courts', and German understandings of the law of other jurisdictions; the Eichmann trial; the Roman law of slavery; social science evidence in German courts; use of experts on foreign law by writing and in open court; Texas legal history; military benefits after a divorce; Spanish and New World inheritance law; water law in the Southwest; the U.N. civil service; statutory interpretation; an 18th-century German treatise by a forgotten rival of Edmund Burke; expropriation and compensation in internationallaw and practice in the '60s and '70s; retroactivity and nullification; elder law; law in Quebec; law in Africa; and so on. What unified these inquiries, and made Hans not just Isaiah Berlin's fox darting hither and yon, was the new discipline of comparative law, and I will conclude with a few thoughts about Hans as comparativist.[2]

Hans and I first became acquainted in 1995 when I helped organize a conference in New York at which he spoke. A few years later, I had the good fortune to come to Austin as a visiting professor, and we became friends. Of course he was intimidating, but I'd written a bit on common law history and a bit less on German and Austrian history. Maybe that was enough to get me in the door. I appreciated him and wanted to listen and I was willing to bring the scotch, and around this, a friendship formed.

** This piece is an excerpt of longer remarks shared by Professor Jonathan Bush. The full piece is available online at http://www.texaslawreview.org/.

1. The author also wishes to thank the editors of the *Texas Law Review* for skillful editing, Douglas G. Morris for help with the German context, and Jacob Theurer and Edward T. Popovici for research assistance.

2. Unless otherwise cited, statements about Baade's biography are drawn from the author's personal knowledge and conversations with the Baade family, especially Rabbi James Baaden. Citations are not given for each of Baade's many articles to which I allude unless specific claims are made or passages quoted.

I soon realized that whatever I'd written about, he had been there already and had much to teach me. It wasn't that I'd been consciously following him as much as that we had common interests that we'd independently been pursuing, albeit he longer, earlier, and with infinitely greater learning than I. I had written about Roman slave law, and of course, he'd written on it. I was turning to war crimes trials, and he had written about the Eichmann trial. I had done a few small projects with the eminent diplomatic historian, Gerhard Weinberg, and I learned that thirty years before, Hans had written a piece about public memory in German courts and administrative bodies based on a German defamation action brought against Weinberg for criticizing a Holocaust denier.[3] I'd often taught a complex case called *Elicofon* (E.D.N.Y.),[4] an art restitution case with no fewer than five parties: an East German museum, the East German government, the West German government, a despoiled princess, and the good-faith taker from a sticky-fingered GI, as some call them, and I learned that—naturally—Hans was an expert consultant in that case. Who else could have untangled it?

In reviewing his work for this memorial, I had the strong sense that, without realizing it, even in recent years I had been following Hans. I recently wrote a chapter about corporate social responsibility and found that he had written one of the first major critiques of CSR and its early iteration, 1970s multinational codes of conduct, long before activists embraced the doctrine.[5] I drafted an essay about Austrian restitution, and Hans, who knew the law well,[6] tore into mine and set me straight, for which I am grateful. I began researching 1950s McCarthyism, in particular one of its many cruel byways where the U.N. Secretariat acceded to pressure from the U.S. Congress and State Department to fire allegedly disloyal Americans working as international civil servants, and found that Hans had already written about this—his was the only contemporaneous scholarly piece about U.N. administrative discharge proceedings.[7]

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3. Hans W. Baade, *Hoggan's History—A West German Case Study in the Judicial Evaluation of History*, 16 AM. J. COMP. L. 391 (1968).

4. Kunstsammlungen Zu Weimar v. Elicofon & Elisabeth Mathilde Isidore Erbgross-Herzogin Von Sachsen-Weimar-Eisenach (Grand Duchess of Saxony-Weimar), Plaintiffs-Intervenors, and Federal Republic of Germany, Original Plaintiff, v. Elicofon, 358 F. Supp. 747 (E.D.N.Y.1972), *aff'd*,478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931, 94 S. Ct. 1443, 39 L. Ed. 2d 489, *reh. denied*, 416 U.S. 952, 94 S. Ct. 1962, 40 L. Ed. 2d 302 (1974) (dismissing East German museum as an instrumentality of a government not recognized by the U.S.), *rev'd and vacated*, 536 F. Supp. 813 (1978) (West Germany drops out, interlocutory rulings), and 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982) (ruling for East German museum).

5. Hans W. Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, 22 GERM. Y.B. INT'L L. 11 (1979).

6. Hans W. Baade, *"Reparationen" and "Restitutionen"*, *in* STAATSLEXIKON: RECHT WIRTSCHAFT GESELLSCHAFT (Görres–Gesellschaft, ed., 6th ed. 1961).

7. Hans W. Baade, *The Acquired Rights of International Public Servants: A Case Study in the Reception of Public Law*, 15 AM. J. COMP. L. 251, 286-89 (1966) (discussing McCarthy-era terminations of U.S. nationals employed at the U.N.).

* * *

I once asked Peter Gay, another eminent Berlin émigré and scholar, why he entitled his 1998 memoir "My German Question" rather than "My German Problem," and he replied "it's the same thing." Hans's father Fritz Baade, brave anti-Nazi parliamentarian and innovative agricultural economist, had a German Problem or Question, explored in the on-line text of this paper. Hans had a German Legacy, which made him formidably learned, fierce in his views and loyalties, serious about his work, and prolific. Let me turn to this work. If I've avoided doing so until now, it may be partly because of the impossibility of assessing all or most of his articles, but also because I'm not sure what to make of their unifying framework, the field of comparative law. Many who are not comparative lawyers, and I'm not, sometimes have a niggling question whether "there's a there, there." To some in the field, it's very old. They recall the medieval dialogues in which one speaker compares his legal tradition with the other to prove the superiority of his system, the "Doctor and Student" literature. Others see the starting point of comparative law in British courts that in the eighteenth century began to use and discuss civilian doctrines in admiralty, the law merchant, and other areas of law. For them, the origin of comparative law is found with Lord Mansfield or soon after in treatises by Justice Story or Chancellor Kent. There's even a goofy article—there's no other word for it—by Roscoe Pound around 1950 in which he asked what comparative law was and answered his own question by saying that it is something that comes in waves, those 19th-century eminences were an earlier wave (about which he says some odd things), and we're now ready for a new wave.[8]

If his wave theory was unconvincing, Dean Pound's chronology may have been right. Around 1950, the field was born or reborn. There are different measurements or milestones for this emergence: the two-week forum on comparative law hosted by Carnegie and the NYC Bar and publicized afterward in the Journal of Legal Education in 1948;[9] the founding of the first learned society dedicated to comparative, foreign, and private international law, the American Society of Comparative Law, in late 1951, and the first issue of its journal in 1952; the first casebook by Rudolf Schlesinger, which Hans later took over and co-edited, in 1950. Not surprisingly many of the adherents—approximately half, by my rough estimate—were émigré scholars who came to the U.S. in the 1930s and 1940s, mostly from Germany (Max Rheinstein, Heinrich Kronstein, Stefan Riesenfeld, Walter Derenberg, Kurt Nadelmann) or Austria (Albert Ehrenzweig). There were some from the younger generation, Hans's generation, who were not refugees: the present writer was surprised, in

8. Roscoe Pound, *Introduction*, 1 AM. J. COMP. L. 1 (1952).

9. Philip W. Thayer, *The Teaching of International and Comparative Law*, 1 J. LEG. ED. 449 (1949).

poking around in the literature, to find that someone who served on the AJCL board a few years later and compiled a few books on Swedish criminal procedure was then-Professor Ruth Bader Ginsburg, who learned Swedish for her comparative law investigations.[10] But Hans was, along with Mirjan Damaška, the best of the second generation of modern comparative lawyers, after the founding generation of Schlesinger, Rheinstein, and Yntema.

What did these new comparative lawyers do? What did the field aim at? As an outsider, I'm not sure. In the early years many of the comparisons were between private law doctrines of substance or procedure, usually concerning a complex area ready for reform or codification in the U.S., and usually the comparison was between material from a civil law tradition, often German, Swiss, or French, but occasionally Spanish, to common law, usually English or American. Because of the interests of John Hazard and Dave Cavers, there might occasionally be articles on Soviet law. Anyone looking for work on Asia, Africa, Latin America, or even the Commonwealth would have to look hard. Often the work wasn't altogether that comparative, and it was narrow. Seeking to avoid this cul-de-sac, Rheinstein wrote that the field shouldn't be about preparing checklists of the ways that predictable, usually Western, traditions handled a laundry list of familiar problems or rules. Comparative law at its best, he urged, should look broadly at sources, traditions, types of materials, ways of asking questions, and do so with rigor.[11] Myres McDougal spoke of its use for "value clarification,"[12] and if that can be translated, it might mean that comparative law could be not only programmatic, but also a rigorously conceived branch of the humanities. It could be eclectic and curious. And that, of course, is what Hans Baade was.

In his hands, this broad and ecumenical new discipline was given extraordinary life. Basil Markesinis's bibliography of Baade's work lists most of it,[13] and predictably one can find a few others because Hans wrote so much and published items in unexpected places. To an extent there are patterns to his topics. He was always interested in conflicts of law. At the start of his career, that often meant marriage and divorce and auto accidents because those are the two areas of law that systematically involved a multiplicity of jurisdictions: people with assets in one or more jurisdictions, marrying in another, living in yet another, and seeking a divorce wherever they could, which might not be recognized locally, or taking their cars across

10. THE SWEDISH CODE OF JUDICIAL PROCEDURE xvi (Anders Bruzelius & Ruth Bader Ginsburg eds. & trans., Gerhard O.W. Mueller intro., 1968) (Professor Mueller citing another Swedish treatise by the same editors and giving "particular praise" to Ginsburg for learning Swedish).

11. Max Rheinstein, *Teaching Comparative Law*, 5 U. CHI. L. REV. 615 (1938).

12. Myres S. McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 1 AM. J. COMP. L. 24 (1952).

13. Basil Markesinis, *Introduction: The Life and Work of Hans Wolfgang Baade*, 36 TEXAS INT'L L.J. 403, 406–14 (2001).

a border with a passenger from a different state and having an accident with a party from a third jurisdiction. Courts needed to have firm and defensible answers to the huge volume of crazy-quilt cases. Since the answers would never be consistent and were frequently unfair, scholars leapt in.[14] Then most of this litigation passed. There was no need to race to Haiti or Reno or Mexico as other jurisdictions accepted non-domiciliary divorces and then eased their own fault rules, and similarly auto liability drifted toward standardization as states accepted a contributory negligence regime. Hans's work in the area changed too, even though he wrote an article as late as 1972 on conflicts of law in marriage and divorce.[15] Late in his career he wrote a number of articles, four by my count, on Roman slave law, in both ancient Rome and the civil law jurisdictions including the U.S. (and Texas from its brief period as a Republic). He wrote on the Mexican heritage, Louisiana law, and imperial Spanish legal principles and on water and mineral rights. He had an unbroken interest in "reception" and transplant issues, particularly regarding his beloved Texas, in German law and legal problems, in international and Roman law.

If one feature of Hans's work was its diversity and breadth, another was its depth. In every article Hans wrote, he dug deeply, usually finding unexpected riches. They led, perhaps unexpectedly for this most ivory-tower of scholars, to a lively career as a consultant. His articles on proving foreign international law in domestic courts and on recommended strategies for transnational litigation show why he was in such demand.[16] If there is one reason that comparative lawyers are in constant demand by practitioners—at the other extreme from the Grand Tradition that glosses Roman law—it's that high-stakes litigants with a foreign law issue want to have a tactical edge. Should they bring their case here or there and what are the advantages of each? Hans knew that as well as anyone. He was lead or a major consultant in two dozen cases listed in Sir Basil's bibliography, and one can find a few more.

Even his book reviews and after-dinner speeches couldn't help but be insightful, and sometimes long. His review of MacCormick and Summer's book on statutory interpretation is, in my view, the single best piece on the issue of statutory interpretation regarding analogous, forgotten, or new

14. One of his earliest publications addressed non-domiciliary divorces. *See* Hans W. Baade, *Constitutional Checks on Collusive Invasion of Jurisdiction in Matrimonial Actions*, 4 DUKE BAR J. 55 (1954).

15. Hans W. Baade, *Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second)*, 72 COLUM. L. REV. 329 (1972).

16. Hans W. Baade, *An Overview of Transnational Parallel Litigation: Recommended Strategies*, 1 REV. LITIG. 191 (1980–81); Hans W. Baade, *Proving Foreign and International Law in Domestic Tribunals*, 18 VA. J. INT'L L. 619 (1977).

problems not expressly addressed in a statute.[17] It would be nice to think that followers of the late Justice Scalia and their counterparts adhering to Judge Robert Katzmann and Professor William Eskridge would read this closely, but I haven't seen it cited. In a similar vein, Hans's criticisms of originalism, and especially Raoul Berger's version, should, one might think, have firmly put that view to rest, but apparently not.[18] Hans's essay on the Eichmann trial, about which many dozens of lawyers and intellectuals wrote at the time and again in the 1990s, is the only one that explores the thinking within the German Foreign Office and its options and obligations at the time of the trial.[19] His essay on the case against Gerhard Weinberg is one of the best pieces about public memory and how courts respond to it with censuring, with denying of forums, funding, and so on, and it dates from the early '60s no less.

In one of his last essays on conflicts (once again on auto and plane wrongful death and matrimonial cases), Hans said, "I will spell out the basis of my views through what (cross my heart) started off as a brief critique of the recent work of the court of appeals in two areas."[20] He then went on for another 24 printed pages and 114 footnotes. Let me close by thanking Hans for not giving a brief critique, there or elsewhere, and for instead using his comparative law scholarship and discipline and his enthusiasm to pour so much into everything he wrote.

17. Hans W. Baade, *The Casus Omissus: A Pre-History of Statutory Analogy*, 20 SYRACUSE J. INT'L L. & COM. 45 (1994).

18. Hans W. Baade, *Original Intention: Raoul Berger's Fake Antique*, 70 N.C. L. REV. 1523 (1992); Hans W. Baade, *"Original Intent" In Historical Perspective: Some Critical Glosses*, 69 TEXAS L. REV. 1001 (1991).

19. Hans W. Baade, *The Eichmann Trial: Some Legal Aspects*, 1961 DUKE L.J. 400, 409–11 (1961) (discussing German legal obligations).

20. Hans W. Baade, *Judge Keating and the Conflict of Laws*, 36 BROOKLYN L. REV. 10, 16 (1969).

Remarks from Stanley Johanson

After reading Hans Baade's obituary written by his son James, which filled in even more remarkable details than we already knew about this man's life story, my wife Gerrie made an interesting observation. As Gerrie put it, "We all have *read* history, but Hans *lived* history."

Hans was born in Berlin, escaped Hitler's Germany with his parents by moving to Turkey, and then came to the United States after World War II, where Hans achieved distinction as a student at Syracuse and Duke, and then as a scholar.

Was Hans Baade an overachiever? No, that's the wrong word. Hans didn't *over*-achieve; Hans was *brilliant*, and he *achieved*. The international law community knew Hans as a capital-S scholar. But beyond the fields of international law and conflict of laws, Hans's range of interests was simply extraordinary, as is illustrated by some of his more recent publications, including articles on women and the law in 18th century Illinois, the history of the Texas Supreme Court in the Reconstruction Era, the Romanist tradition of slavery in Louisiana, and the history of Texas water law.

When Hans and Anne Baade came to Austin from Toronto in 1972, along with their young boys James and Hans, the law faculty was much smaller than it is today. It was a close-knit group and really was one big family, yet small enough for most of us to fit into one house . . . gatherings at Corwin and Evelyn Johnson's home on Monte Vista, or Parker and Marguerite Fielder's house in Westlake Hills, or Woody and Pat Butte's home overlooking Lake Austin.

Several weeks ago, when Gerrie and I visited Anne and James and Hans at 6002 Mountainclimb, we had great conversation—actually, a "trip down memory lane"—as we recalled some of the other names from those early years of growing up in the law school community. Bob and Dagmar Hamilton. Carl and Gaby Fulda. Charlie and Custis Wright. Millard and Barbara Ruud. Bill and Hugh Mae Huie. And of course Page and Madge Keeton.

We recalled not just the names but some of the activities and special memories of those wonderful people. Anne, James, and Hans recalled how welcoming everyone was, and how they reached out to make the Baades not just welcome, but appreciated, and giving advice on what doctors to go to—and what doctors *not* to go to—dentists, and so on. We were one big family, and Anne and Hans enjoyed being a part of that family.

One of the activities in which Hans participated for a number of years was the faculty poker game, which in those days was held pretty close to once a month. Then as now—although the poker games are not as frequent as they used to be—we played for stakes befitting of well-paid law professors: dollar limit, three-raise limit, with the favorite game being 7-card high-low stud. If Sandy Levinson was there, as he always was unless he was out of town, we

played a rather remarkable game—other adjectives come to mind—a game called Push. We had some interesting personalities at those games. Russell Weintraub always folded unless he had two really good hole cards, which meant that if Russell stayed in the game, it was time to guard your wallet. Barbara Aldave was pedal-to-the-medal and never folded despite bad cards, apparently on the Hope Springs Eternal principle. And the remarkable thing is that Hans Baade—this brilliant man with an IQ that was off the charts—was not very good at playing poker. The only saving grace is that he wasn't playing in the big leagues; nobody else at the table was particularly good either.

George Schatzki, one of our colleagues from the past, wrote this upon hearing of Hans's death: "I have to confess that my fondest memories of Hans have to do with playing poker every month or so, his cautious approach to a game that discourages such behavior, and his consistent habit of taking off his shoes and propping them up—one against the other. He was a delightful colleague who brought humor and insight into every discussion, whether serious or other. I shall remember him always."

There is one poker game—actually a game that didn't take place for Hans and me—that is worthy of mention. This was at the annual AALS meeting. It was in New York—I don't remember the year, but the meeting was at the Waldorf Astoria Hotel. The AALS poker games started around ten o'clock, but we Texans were tied up that night by our attendance at the annual Texas Party, which in those days went to midnight. Remarkably, the Texas Party was one of the most renowned and most exclusive events at the AALS convention even though there was never any food—not even pretzels, but only drinks. Attendance was by invitation only, and what made the party exclusive was that Charles Alan Wright was the doorman who tightly controlled access to the Texas Party as only Charles Alan Wright could do.

At this particular meeting at the Waldorf, during the Texas Party Hans and I got the word that a poker game was already going on in a room—something like Room 702, and so one of us wrote down the room number. Slightly after midnight, it was time to play poker, so Hans and I left the Texas party, took the elevator up to the 7th floor of the Waldorf Astoria, went down to Room 702, and knocked rather loudly on the door to Room 702. No one immediately answered, so after a minute or so, we made another loud knock, to which we heard, from the other side of the door, a delicate high-pitched response: "WHO IS IT?"

Needless to say, Hans and I scurried back to the elevator as fast as we could.

From time to time thereafter, when Hans and I would cross paths at the law school, one us would say, "WHO IS IT?"

Did Hans have a sense of humor? Yes he did. It was on the droll side, but if something tickled Hans's fancy, his reaction started with a dry smile, but then developed into a hearty laugh.

Did Hans know any jokes? Yes, he did. If Hans heard a joke, and it was a good joke by his high standards, Hans never forgot it. He would tell that joke with a deadpan delivery and with his slight accent; and as soon as the punch line produced a response, Hans would join in and let out a big laugh along with the rest of us. I would like to share one or two of these jokes with you, but more than a few of them would not be appropriate for this audience.

Virtually every summer, Anne and Hans went to their beloved Edinburgh in Anne's home country. I think Hans was even more proud to be seen as a Scotsman than Anne was, which is saying a lot. How many of you recall seeing Hans wearing a kilt? Needless to say, it was a sight to behold.

In the summer of 1991, Anne and Hans asked our son David, soon to be a third-year law student, to house-sit their home on Mountainclimb. This was a very good duty for David, and he was honored. We of course visited David from time to time that summer, giving us the opportunity to enjoy that remarkable view of Shinoak Canyon, out the back bay window, to a beautiful lush greenbelt which Hans and Anne enjoyed for so many years . . . and which comforted Hans during his last days of hospice care at their home on Mountainclimb.

Speaking of Scotland and Scotch: shortly after plans for the law school reception had been set, Hans's son Hans sent me an email: "Various UT law people at the memorial service told me that my Dad, though he no longer drank, was generous in providing and pouring whiskey at meetings, get-togethers, events, etc. at the law school. In fact, I found an empty box of Macallan 18 in his office last week. What do you think about having a few bottles of single malt at the November 28 celebration?"

Needless to say, the planning committee thought this was a really good idea. And that is why, at that reception, there were several bottles of Macallan 18 and another single malt scotch. The attendees were advised that even if Scotch was not their favorite libation, they should pour a wee bit and take a sip in honor and memory of Hans.

As for the attendees who preferred a beer, son Hans discovered that—incredibly—there is a pilsner that is named Hans Pils. And needless to say, there were plenty of cans of Hans Pils at the reception.

Yes, Hans was a brilliant and renowned scholar. But those of us who spent more than a modest amount of time with Hans knew that he was much more than that. He was a kind and decent man who led a rich life, with a loving family that now includes two grandsons, Alan and Miles. With Anne always by his side, supporting Hans and enabling him to travel and achieve his many accomplishments, Hans and Anne touched many lives. Our lives were enriched by knowing him. As is said somewhere in Ecclesiastes, his was a life well-lived.

Thank you, Hans.

Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?

Jed Rubenfeld*

It's an absurd and astonishing fact about current constitutional law that it still hasn't answered, and can't answer, the most basic questions about privatization.

We know the ratio between American soldiers and American private military contractors in the Iraq war: one to one.[1] We know the Central Intelligence Agency (CIA) used such contractors to interrogate—and in some cases apparently to torture—captives.[2] But thirteen years after Abu Ghraib, we still don't know whether the contractors working there[3] were "state actors."[4]

If a city privatized its entire police force, replacing it with private security contractors, existing Supreme Court case law suggests that the private officers would *not* be state actors, meaning they could arrest and

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1. CONG. BUDGET OFFICE, PUBL'N NO. 3053, CONTRACTORS' SUPPORT OF U.S. OPERATIONS IN IRAQ 8 (2008), https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/08-12-iraqcontractors.pdf [https://perma.cc/5G3Q-BPK6].

2. *See, e.g.*, S. SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288, at 84–85 (2014) (detailing certain enhanced interrogation techniques used by the CIA and its contractors on detainees); GEORGE R. FAY, U.S. DEP'T OF THE ARMY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 47–48 (2004) (observing that "[c]ontracting-related issues contributed to the problems at Abu Ghraib prison"); Simon Chesterman, *'We Can't Spy . . . If We Can't Buy!': The Privatization of Intelligence and the Limits of Outsourcing 'Inherently Governmental Functions'*, 19 EUR. J. INT'L L. 1055, 1062–64 (2008) (observing many allegations of abuse by contractors).

3. *See* FAY, *supra* note 2, at 47–48 ("Several of the alleged perpetrators of the abuse of detainees [at Abu Ghraib] were employees of government contractors.").

4. In 2009, a district court in Virginia stated that contract interrogators at Abu Ghraib were "private actors." Al Shimari v. CACI Premier Tech., Inc., 657 F. Supp. 2d 700, 704 (E.D. Va. 2009). Six years later, the same court found that the military had exercised "plenary" and "direct" control over the contractors—but therefore dismissed the case on political question grounds. Shimari v. CACI Premier Tech., Inc., 119 F. Supp. 3d 434, 443 (E.D. Va. 2015); *see* Laura A. Dickinson, *The State Action Doctrine in International Law*, *in* 56 STUDIES IN LAW, POLITICS, AND SOCIETY, SPECIAL ISSUE: HUMAN RIGHTS: NEW POSSIBILITIES/NEW PROBLEMS 213, 219 (2011) (concluding that it is unclear whether private military contractors are state actors under current U.S. constitutional law).

search with constitutional abandon.[5] I'm not saying courts would so hold. I assume they wouldn't. But current state action doctrine actually points to that Constitution-gutting conclusion.[6]

The privatization black hole at the heart of constitutional law is well known.[7] "There is no accepted constitutional theory," as Professor Kimberly Brown puts it, "that prohibits Congress or the President from handing off significant swaths of discretionary governmental power to wholly private entities that operate beyond the purview of the Constitution."[8] But the real-world effects of this black hole are often still missed.

Beginning in 2011, the federal government induced private colleges and universities all over the country to investigate, prosecute, adjudicate, and punish alleged law violations under Title IX of the Educational Amendments of 1972, conducting secretive trials according to specified procedures, including a government-dictated standard of proof.[9] In other words, the government induced private institutions to do law enforcement on its behalf, a result achieved not through contract, but by threatening to strip those institutions of billions of dollars in federal funding.[10] This too was a kind of privatization.[11]

The existence of state action in the new campus sexual assault trials should be obvious given that the government not only compelled schools to conduct them but mandated certain procedures for them.[12] The question is whether these trials have been violating due process. But courts have refused

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5. *See infra* Section II(A).

6. *See infra* Section II(A); Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 929–31 (2007) (explaining that the state action doctrine does not categorize private security guards as government actors); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1253–62 (1999) (summarizing cases holding that private police are not performing a "public function").

7. *See, e.g.*, Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1183 (1995) ("The probable consequences of the current doctrine are that the policies and decisions of enterprises which will be privatized in the future are not likely to be considered as state actions."); Kimberly N. Brown, *Government by Contract and the Structural Constitution*, 87 NOTRE DAME L. REV. 491, 496 (2011) (observing that "the Supreme Court . . . has failed to develop a doctrinal framework for meaningfully scrutinizing transfers of governmental power to private parties"); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1373 (2003) ("The inadequacies of current state action doctrine mean that private exercises of government power are largely immune from constitutional scrutiny, and therefore expanding privatization poses a serious threat to the principle of constitutionally accountable government.").

8. Brown, *supra* note 7, at 496.

9. *See infra* Sections I(A), I(B).

10. *See infra* Sections I(B), II(B).

11. *See* Metzger, *supra* note 7, at 1377–79 (discussing the "definitional challenge[s]" posed by the term *privatization* and pointing out that in "some privatization contexts, the government does not provide direct funding but nonetheless uses private entities to achieve its programmatic goals—for instance, by . . . relying on private actors for the content and enforcement of government regulations").

12. *See infra* Section I(B).

to answer that question on the ground that private colleges and universities are not state actors—and therefore due process doesn't apply.[13]

This result is not entirely surprising. If courts *did* find state action, every Title IX sexual assault hearing at every private school in the country could have been affected.[14] Findings of guilt might have to be revisited; expulsions might have to be vacated. District judges have excellent reasons to adhere to the no-state-action result.

Nevertheless, that result is wrong—and plainly so.

This conclusion will be opposed by Title IX activists, but the truth is it should be welcome to everyone who, like the author of this Article, backs stronger policies for, and punishments of, campus sexual assault. There's a reason the Constitution requires due process. No one is served by faulty, unreliable adjudication, and the campus trials conducted all over the country have been so unreliable—in some cases so incompetent, so Kafka-esque—they would almost be risible, if their effects on the lives of the people they touch, both alleged victims and alleged perpetrators alike, weren't as potentially devastating as they are.

Part I summarizes the 2011 Department of Education "Dear Colleague" letter that brought about the new Title IX campus sexual assault trials. Part II shows why, under well-established state action doctrine, due process applies even at private schools to at least some parts of these Title IX trials. But Part II leaves important questions open—questions that can't be answered without confronting the more general problem of privatization in constitutional law. Part III derives principles that would solve that problem, and Part IV applies these principles, identifying the most serious potential due process violations in post-2011 campus sexual assault hearings.[15]

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13. *See infra* Section I(C).

14. *See infra* Section IV(B).

15. On September 22, 2017, as this Article was being edited for publication, the Department of Education announced that it was "withdrawing" the controversial 2011 Dear Colleague letter. Office for Civil Rights, U.S. Dep't of Educ., Letter Withdrawing 2011 Dear Colleague Letter (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf [https://perma.cc/NT7N-28Z4]. Secretary of Education Betsy DeVos, emphasizing the due process failings of the current system of campus sexual assault trials, stated that the Department would "launch a transparent notice-and-comment process" aimed at replacing the provisions of the Dear Colleague letter with new, as-yet-unspecified regulations. Betsy DeVos, *Secretary DeVos Prepared Remarks on Title IX Enforcement*, U.S. DEP'T OF EDUC. (Sept. 7, 2017), https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement [https://perma.cc/3VLC-CAP7]; *DeVos Says She'll Rescind Obama's Title IX Sexual Assault Guidance*, CBS NEWS (Sept. 7, 2017), https://www.cbsnews.com/news/devos-to-rescind-obama-era-title-ix-order-on-withholding-school-funds-for-assault-inaction [https://perma.cc/TE84-J7B7]. The withdrawal of the 2011 Dear Colleague letter does not remedy any due process violations committed by schools in sexual assault trials that have taken place, or may still take place, under the flawed procedures imposed on schools as a result of that letter. The author of this Article hopes that the issues raised here will contribute to the debate over any new regulations that the Department of Education may adopt.

I. The Dear Colleague Letter

A. An Illustrative Case

It will be helpful to give readers a sense of what campus Title IX adjudications can look like in the real world.

The following facts are from *Doe v. Brandeis University*,[16] decided in March of 2016. In *Brandeis*,[17] a male student had been found guilty of repeated acts of "sexual violence" against another male student during their twenty-one-month relationship,[18] including multiple incidents in which the plaintiff "would occasionally wake [the complainant] up by kissing him," as well as an attempt to perform oral sex at a time when the complainant "did not want it."[19]

The plaintiff in *Brandeis* had not been expelled or suspended, but a permanent sex offense notation had been entered onto his academic record, which, he claimed, would adversely affect his future educational and employment opportunities.[20] According to the plaintiff, confidentiality had also been breached, and other students had referred to him "as an 'attacker' and a 'rapist' in social media postings and in comments to national and local media."[21]

What procedures had Brandeis followed to judge the plaintiff guilty of sexual violence? In the words of the district court, the university had used:

> essentially a secret and inquisitorial process. Among other things, under the new procedure,
>
> - the accused was not entitled to know the details of the charges;
> - the accused was not entitled to see the evidence;
> - the accused was not entitled to counsel;
> - the accused was not entitled to confront and cross-examine the accuser;
> - the accused was not entitled to cross-examine any other witnesses;
> - the Special Examiner prepared a detailed report, which the accused was not permitted to see until the entire process had concluded; and

16. 177 F. Supp. 3d 561 (D. Mass. 2016).
17. I use defendant names to identify cases because of the multiplicity of "Doe" plaintiffs.
18. *Brandeis*, 177 F. Supp. 3d at 567, 570–71.
19. *Id.* at 571.
20. *Id.* at 571–72.
21. *Id.* at 572.

- the Special Examiner's decision as to the "responsibility" (that is, guilt) of the accused was essentially final, with limited appellate review—among other things, the decision could not be overturned on the ground that it was incorrect, unfair, arbitrary, or unsupported by the evidence.[22]

This inquisitorial procedure was new to Brandeis. The school had adopted it in 2012, after receiving a communication from the Department of Education—the Dear Colleague letter referred to above.[23] The new process applied only to sex offenses.[24] For other alleged offenses, Brandeis still provided students with notice and a hearing, as it used to.[25]

The "Special Examiner" mentioned by the judge was the individual hired by Brandeis to investigate the complainant's allegations: "That same person was given complete authority to decide whether the accused was 'responsible' for the alleged violations; in other words, the Special Examiner was simultaneously the investigator, the prosecutor, and the judge who determined guilt."[26] To reach the conclusion that kissing-while-asleep constituted sexual violence, the Special Examiner "use[d] the definition of sexual violence provided by the U.S. Department of Education, Office for Civil Rights in its April 4, 2011 Dear Colleague letter."[27]

Many schools, after receiving the Dear Colleague letter, adopted similar inquisitorial processes—approvingly referred to by a White House task force in 2014 as the "innovative" "'single investigator' model," which can "bolster trust in the process."[28] Moreover, kissing a sleeping longtime partner would meet the new affirmative-consent definitions of sexual assault now in place at schools all over the country—sometimes forced on them by state statute.[29]

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22. *Id.* at 570.

23. *Id.* at 575, 577–78.

24. *Id.* at 577.

25. *Id.*

26. *Id.* at 579.

27. *Id.* at 588, 591 (quoting the Special Examiner's Report).

28. WHITE HOUSE, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 14 (2014) [hereinafter NOT ALONE: THE FIRST REPORT], http://www.whitehouse.gov/sites/default/files/docs/report_0.pdf [https://perma.cc/T8HX-Y6HY]; *see also, e.g.*, Prasad v. Cornell Univ., No. 5:15-cv-322, 2016 WL 3212079, at *10–12, *22–23 (N.D.N.Y. Feb. 24, 2016) (describing the "investigator model" procedure used at Cornell); Justin Dillon & Matt Kaiser, *Why It's Unfair for Colleges to Use Outside Investigators in Rape Cases*, L.A. TIMES (Sept. 16, 2015), http://www.latimes.com/opinion/op-ed/la-oe-0916-dillon-kaiser-campus-sex-assault-javert-20150916-story.html [http://perma.cc/JLL7-BSYF] ("[A] growing number of schools, including Harvard, Dartmouth, the University of Michigan and Boston College, are turning to the 'single investigator' model . . . .").

29. *See, e.g.*, CAL. EDUC. CODE § 67386(a)(4)(A) (West 2017) (requiring schools, as a funding condition, in their definition of sexual assault, to provide that a person's belief that the other party has consented to any "sexual activity" is invalid if the "complainant was asleep"); Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1386 (2013) (showing how kissing a sleeping partner would count as sexual assault under Yale's new sex code).

Nevertheless, the *Brandeis* facts are not offered as typical.[30] *Brandeis* simply illustrates what can happen when the federal government threatens schools with defunding unless they adjudicate all sexual assault allegations, induces them to define sexual assault broadly, pressures them to take strong action in such cases, tells them that Title IX does not require a hearing, and instructs them that they need not honor due process for the accused.[31]

The *Brandeis* court refused to dismiss plaintiff's suit, finding that plaintiff might succeed on a variety of contract and state law claims. But as to the most palpable violation—the constitutional due process violation—the court observed that due process applies only to state actors, and "Brandeis, of course, is not a governmental entity, or even a public university."[32]

B. The Letter

On April 4, 2011, the United States Department of Education's Office for Civil Rights (OCR) sent a nineteen-page letter to American colleges and universities.[33] Opening with the government-standard but peculiar salutation, "Dear Colleague"—as if the sender were a fellow academic, or, since that was not so, as if academics were fellow federal administrative agents—the letter set forth a new interpretation of what Title IX requires with respect to allegations of sexual assault on campus.[34]

By its terms, Title IX prohibits sexual discrimination at schools receiving federal funds.[35] By judicial interpretation, it prohibits "sexual harassment" that creates a "hostile environment" significantly interfering with educational opportunities.[36] As to allegations of sexual assault, however, Title IX had previously been interpreted *not* to require schools to conduct their own internal adjudications. In 2005, OCR expressly stated that a school "was under no obligation to conduct an independent investigation" in cases involving "a possible violation of the penal law, the determination of which is the exclusive province of the police and the office of the district attorney."[37]

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30. Schools vary considerably in their Title IX adjudication processes. *See infra* Section IV(B)(2).

31. *See infra* Section (I)(B).

32. *Brandeis*, 177 F. Supp. 3d at 572.

33. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE: SEXUAL VIOLENCE 1 (Apr. 4, 2011) [hereinafter DEAR COLLEAGUE LETTER], http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/LA6D-KHYG].

34. *See id.* at 1–3 (explaining "specific Title IX requirements applicable to sexual violence" and providing "guidance and practical examples").

35. Title IX, Education Amendments of 1972 § 901, 20 U.S.C. § 1681(a) (2012).

36. *See, e.g.*, Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 65 (1st Cir. 2002); *see also* Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 540 (1st Cir. 1995) (applying to a Title IX case the hostile environment concept from Title VII case law).

37. Letter from John F. Carroll, Compliance Team Leader, Region II, Office for Civil Rights, U.S. Dep't of Educ., to Muriel A. Howard, President, Buffalo State Coll., State Univ. of N.Y., Re:

Whether academic institutions should hold trials for serious alleged student crimes, without involving law enforcement, is a substantial question. If an apparent murder took place at a fraternity house, it would be extremely rare for a school to conduct its own murder trial and unheard-of to fail to bring in the police.[38] Rape, however, might be thought to require very different policies because of victims' reluctance to report the crime.[39] Citing this underreporting problem, the Dear Colleague letter reversed prior agency interpretations of Title IX—even though the letter purported only to be restating, not changing, the law—and directed schools to investigate and adjudicate every case of alleged sexual violence.[40]

The legal theory set out by the Dear Colleague letter is simple. "Sexual violence is a form of sexual harassment prohibited by Title IX,"[41] the letter reasons, and a "single instance" of student-on-student sexual violence can be sufficient to "create a hostile environment."[42] The letter went on to detail institutional, substantive, and procedural requirements for receiving, charging, investigating, and adjudicating sexual assault allegations.[43] Schools that did not comply would be subject to monetary penalties, including the loss of federal funding.[44]

According to the Dear Colleague letter, as well as later statements and directives issued by the government, schools were:

Case No. 02-05-2008 (Aug. 30, 2005) (on file with author); *see also* Jacob E. Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 901 (2016) (citing this OCR letter).

38. *See, e.g.*, Kathryn Andreoli, *Clemson Student Charged with Attempted Murder After Stabbing at Party*, WYFF 4 (Apr. 12, 2016), http://www.wyff4.com/article/clemson-student-charged-with-attempted-murder-after-stabbing-at-party/7021329 [http://perma.cc/7S3P-SJB6] (recounting police involvement in the investigation of an on-campus stabbing). Of course, schools can also discipline students in such cases. *See* Press Release, Mitchel B. Wallerstein, President, Baruch Coll., Baruch Response to Criminal Charges in Pi Delta Psi Hazing Investigation (Sept. 15, 2015), https://www.baruch.cuny.edu/president/messages/September_15_2015.htm [https://perma.cc/577B-WMCC] (stating that Baruch College had initiated disciplinary proceedings against students involved in a fraternity death). Note, however, that the disciplinary charges brought by Baruch were possibly for hazing, not homicide, and that the police were actively pursuing a murder investigation. *Id.*

39. *See* CHRISTOPHER P. KREBS ET AL., NAT'L INST. OF JUSTICE, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY xvii (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf [https://perma.cc/8CGW-434B] (stating that only 13% of claimed campus sexual assault victims said they had reported the incident to a law enforcement agency); *see also* Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014), http://time.com/2905637/campus-rape-assault-prosecution/ [https://perma.cc/PVE7-K6DF] ("For [victim] advocates, doing right by the victim often means respecting her or his wishes not to report the crime to the police and even telling the victim about the possible downsides of the criminal justice system . . . .").

40. *See* DEAR COLLEAGUE LETTER, *supra* note 33, at 8–12 (explaining the grievance procedures required for conformity with OCR guidance).

41. *Id.* at 3.

42. *Id.*

43. *Id.* at 8–12.

44. *Id.* at 16.

(i) required to investigate and adjudicate campus sexual assault allegations regardless of whether the complainant reported his or her allegations to the police;[45]

(ii) required to establish a coordinated and centralized investigative and prosecutorial process overseen by a Title IX "coordinator";[46]

(iii) required to protect the anonymity of complainants if the student making the allegations so requested;[47]

(iv) required to investigate and adjudicate in all cases where the school knew or had reason to know of a "possible" incident of sexual assault, regardless of whether the alleged victim had filed a complaint;[48]

(v) required to investigate and adjudicate student-on-student claims of sexual assault regardless of whether the assault allegedly occurred on campus or off;[49]

(vi) required to apply a preponderance of the evidence standard in all such cases;[50]

(vii) required to revise their disciplinary codes to reflect the OCR's interpretation of Title IX requirements, including prohibiting all "unwelcome conduct of a sexual nature";[51]

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45. *See id.* at 10 ("[A] criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably.").

46. *See id.* at 7 ("The coordinator's responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints.").

47. *Id.* at 5 ("If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation."). How schools are supposed to "take all reasonable steps to investigate . . . consistent with . . . [a] request not to pursue an investigation" is not explained. *Id.*

48. *Id.* at 4 ("Regardless of whether a harassed student, his or her parent, or a third party files a complaint under the school's grievance procedures or otherwise requests action on the student's behalf, a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred . . . .").

49. *Id.* ("If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures.").

50. *Id.* at 11 ("[I]n order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred).").

51. *Id.* at 6 (requiring recipients of the Dear Colleague letter to examine "current policies and procedures on sexual harassment and sexual violence" and to conform those policies to the requirements of the letter); *id.* at 3 (defining "sexual harassment" as "unwelcome conduct of a sexual nature"). The OCR has explicitly instructed schools that they must prohibit all such conduct, not merely harassment sufficient to create a hostile environment (which is necessary to violate Title IX). *See* Letter from Anurima Bhargava, Chief, Civil Rights Div., Educ. Opportunities Section, U.S. Dep't of Justice, & Gary Jackson, Reg'l Dir., Office of Civil Rights, Seattle Office, U.S. Dep't of Educ., to Royce Engstrom, President, Univ. of Mont., & Lucy France, Univ. Counsel, Univ. of

(viii) instructed that sexual assault includes all unconsented-to sexual activity;[52]

(ix) warned not to permit cross-examination of the complainant;[53] and

(x) warned that they must at least consider expulsion of students found to have committed sexual misconduct and that they can be placed under investigation if they fail to suspend or expel such students.[54]

With respect to due process, the Dear Colleague letter says that "public" schools (not private ones) "must provide due process to the alleged perpetrator."[55] However, "schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict . . . Title IX protections for the complainant."[56]

The latter sentence is troubling. Given the Constitution's priority over statutory law, one might have expected the opposite admonition: "Schools

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Mont. 8 (May 9, 2013), http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf [https://perma.cc/9XVN-6J6X] ("While [the University of Montana's definition of sexual harassment] is consistent with a hostile educational environment created by sexual harassment, sexual harassment should be more broadly defined as 'any unwelcome conduct of a sexual nature.'").

52. The definitions of sex offenses imposed by the federal government on schools are complex and various. For the most careful discussion, see Gersen & Suk, *supra* note 37, at 892–95. The Department of Education has defined sexual assault to include penetration or any other "sexual act" "without the consent of the victim," "including instances where the victim is incapable of giving consent." *Id.* at 893 (quoting federal regulations). It's a short step from this definition of sexual assault to the conclusion that kissing one's sleeping partner is sexual assault.

53. *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF JUSTICE, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 31 (Apr. 29, 2014) [hereinafter QUESTIONS AND ANSWERS ON TITLE IX], http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [https://perma.cc/YWT3-HA7C] (discouraging a school from "allowing the parties to personally question or cross-examine each other"); NOT ALONE: THE FIRST REPORT, *supra* note 28, at 19 ("[T]he parties should not be allowed to personally cross-examine each other.").

54. *See* Letter from Alice B. Wender, Reg'l Office Dir., Office for Civil Rights, U.S. Dep't Educ., to Teresa A. Sullivan, President, Univ. of Va. 21 (Sept. 21, 2015), http://www2.ed.gov/documents/press-releases/university-virginia-letter.pdf [https://perma.cc/F27S-CD6M] (noting that UVA's refusal to "consider expulsion as a possible sanction where a finding of sexual misconduct is based on a preponderance of evidence standard or even when there is no question as to the accused student's culpability because he or she has admitted to the conduct," provided "an additional basis for the existence of a hostile environment"); Jake New, *Expulsion Presumed*, INSIDE HIGHER ED (June 27, 2014), https://www.insidehighered.com/news/2014/06/27/should-expulsion-be-default-discipline-policy-students-accused-sexual-assault [https://perma.cc/DAZ5-SUUK] ("Several of the colleges currently under investigation by the Department of Education's Office for Civil Rights for Title IX violations are on that list because they allowed accused students to remain on campus with their alleged victims.").

55. DEAR COLLEAGUE LETTER, *supra* note 33, at 12. The letter also says that "state-supported schools" must protect due process, but "state-supported" does not refer to private colleges or universities. *Id.*; *see, e.g.*, Yu v. Vassar Coll., 97 F. Supp. 3d 448, 462–63 (S.D.N.Y. 2015) (quoting the letter and rejecting a student's due process claim against a private college).

56. DEAR COLLEAGUE LETTER, *supra* note 33, at 12.

should ensure that steps taken to accord Title IX protections for the complainant do not restrict the due process rights of the accused." By reversing this formulation, the Dear Colleague letter went beyond telling private schools they weren't obliged to respect due process; it warned them that trying to honor due process might violate Title IX.

In a follow-up communication, OCR emphasized that Title IX does not even "require a hearing."[57] Thus, private schools that choose to hold hearings and vindicate traditional due process values do so at their peril, and it's no surprise that some universities, like Brandeis, have responded by adopting the hearing-less single investigator model described above.

The amounts of money potentially involved in the threatened defunding deserve emphasis. The federal government spent an estimated $75.6 billion on major higher education programs in 2013, including Pell Grants, research grants, and other appropriations.[58] Colleges that don't comply with OCR directives risk their *entire* slice of this amount.[59] That can translate to

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57. QUESTIONS AND ANSWERS ON TITLE IX, *supra* note 53, at 25.

58. *See* PEW CHARITABLE TRS., FEDERAL AND STATE FUNDING OF HIGHER EDUCATION: A CHANGING LANDSCAPE 3 (2015), http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/06/federal-and-state-funding-of-higher-education [https://perma.cc/6V6K-QHNW].

59. DOE implied that noncompliance with OCR directives threatened *all* of a school's federal funding. *See, e.g.*, Press Release, U.S. Dep't of Educ. Press Office, U.S. Department of Education Finds Tufts University in Massachusetts in Violation of Title IX for Its Handling of Sexual Assault and Harassment Complaints (Apr. 28, 2014) [hereinafter U.S. Dep't of Educ.], http://www.ed.gov/news/press-releases/us-department-education-finds-tufts-university-massachusetts-violation-title-ix-its-handling-sexual-assault-and-harassment-complaints [https://perma.cc/TXM6-SZLT] (threatening to "move to initiate proceedings to terminate federal funding" of an allegedly noncompliant school). DOE's former Assistant Secretary for Civil Rights Catherine Lhamon made public statements suggesting that OCR could bring about a total termination of a school's federal funds. *See, e.g.*, Tyler Kingkade, *Senators Eye New Penalties for Colleges Mishandling Sexual Assault Cases*, HUFFINGTON POST (June 27, 2014), http://www.huffingtonpost.com/2014/06/27/colleges-mishandling-sexual-assault-penalties_n_5535458.html [https://perma.cc/CE3S-L4AV] (reporting on a Senate hearing at which several Senators described the possibility that universities could be "cut off from all federal funding" by OCR as a "nuclear option," to which Lhamon responded by calling it a "good nuclear option"). Nonetheless, it wasn't clear that OCR or DOE could have achieved this result. Title IX defunding can apply to all federal funds, but each agency is responsible for its own termination procedures. *See* 20 U.S.C. § 1682 (2012) (authorizing federal departments and agencies to effect compliance by terminating or refusing assistance but limiting termination or refusal to particular programs or parts of programs in which noncompliance is found). It would seem, then, that DOE could terminate only DOE-administered funds such as Pell Grants—which, however, at over $30 billion, made up more than 40% of all 2013 federal higher educational funding. *See* PEW CHARITABLE TRS., *supra* note 58, at 3 fig. 2. But other federal agencies have announced that they intend to "work with" DOE to "terminate funding to any institution found to be in noncompliance with Title IX . . . ." Press Release, Nat'l Sci. Found., The National Science Foundation (NSF) Will Not Tolerate Sexual Harassment at Grantee Institutions (Jan. 25, 2016), http://www.nsf.gov/news/news_summ.jsp?cntn_id=137466 [https://perma.cc/CZT9-MAFV]; *see also* Press Release, Nat'l Aeronautics and Space Admin., NASA Administrator Communicates Harassment Policies to Grantees (Jan. 15, 2016), https://www.nasa.gov/press-release/nasa-administrator-communicates-harassment-policies-to-grantees [https://perma.cc/RE3D-TSFX] (stating that NASA will "work closely" with OCR to ensure that no funds are given to entities violating Title IX). Hence, a DOE or OCR finding of a

hundreds of millions of dollars per school, representing in some cases 15%–20% of a school's overall operating revenue.[60]

Was the defunding threat serious? The government certainly tried to make schools believe so. Since 2011, over 200 schools have been placed under formal investigation by the Department of Education[61] and warned that they could "lose federal funding" if they fail to punish sexual assault assiduously or to comply with OCR directives.[62] In 2014, the head of OCR, Catherine Lhamon, stated she had personally threatened four schools in the last ten months with termination of federal funding.[63] "Do not think it's an empty threat," she said.[64]

By now schools all over the country have overhauled their disciplinary codes and processes to comply with the Dear Colleague letter's mandates.[65] Those that resisted were brought quickly into line. Events at Tufts University provide an example. After Tufts's president disputed OCR's finding that the university was in violation of Title IX and (very unusually) refused to agree to a list of OCR directives, the Department of Education published a statement warning that "OCR may move to initiate proceedings to terminate federal funding of Tufts."[66] Within ten days, Tufts had reversed itself and agreed to the terms OCR had sought.[67] As described in the Boston Globe, the

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university-wide Title IX violation could in theory result in termination of most or all federal funding. The author thanks Professor Kate Stith for emphasizing the issues addressed in this footnote.

60. For example, Yale University's federal funding exceeded $500 million in 2010 out of a total $2.72 billion of operating revenue (or roughly 18%). YALE UNIV., FINANCIAL REPORT 2009–2010, at 1 (2010), https://your.yale.edu/sites/default/files/2009-2010_annual_financial_report_0.pdf [https://perma.cc/J898-2PGW]. The University of Illinois's was around $600 million out of a total $3.56 billion (or roughly 17%). UNIV. OF IL., ANNUAL FINANCIAL REPORT 2015, at 11 (2015), https://www.obfs.uillinois.edu/common/pages/DisplayFile.aspx?itemId=391901 [https://perma.cc/EM7Y-EKDX]. The University of Virginia's was about $200 million in 2015 out of a total $938 million (or roughly 21%). UNIV. OF VA., FINANCIAL REPORT 2014–2015, at 14 (2015) http://www.virginia.edu/finance/finanalysis/docs/2015%20UVA%20FS%20FINAL.pdf [https://perma.cc/3KZV-Y6GJ].

61. *See Title IX Tracking Sexual Assault Investigations*, CHRON. HIGHER EDUC., http://projects.chronicle.com/titleix/ [https://perma.cc/3TFD-PQGZ] (listing schools that have been and are being investigated, including schools that are the subject of multiple investigations).

62. Press Release, Office for Civil Rights, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations [https://perma.cc/5RXZ-ETJY].

63. Tyler Kingkade, *Colleges Warned They Will Lose Federal Funding for Botching Campus Rape Cases*, HUFFINGTON POST (July 14, 2014), http://www.huffingtonpost.com/2014/07/14/funding-campus-rape-dartmouth-summit_n_5585654.html [https://perma.cc/3FFX-GQFW].

64. *Id.*

65. Gersen & Suk, *supra* note 37, at 902.

66. U.S. Dep't of Educ., *supra* note 59.

67. Letter from Tony Monaco, President, Tufts Univ., to Members of the Tufts Community, Affirming Tufts' Commitment to Sexual Misconduct Prevention (May 9, 2014), http://president.tufts.edu/blog/2014/05/09/affirming-tufts'-commitment-to-sexual-misconduct-prevention [https://perma.cc/AG6Z-4N6Q].

threatened defunding would have been "a result so catastrophic that it virtually required Tufts to reach some understanding with the government."[68]

C. *State Action Rulings*

The new Title IX sexual assault adjudications quickly began provoking outcry and litigation. Some students who say they were sexual assault victims have alleged that their claims were mishandled, their hearings biased, and their assailants falsely exonerated or inadequately punished.[69] Other students, found guilty of sexual assault, have alleged that the findings against them were false, unfairly reached, and biased.[70]

In the latter lawsuits, plaintiffs have sometimes filed constitutional due process claims against their schools. In cases where the defendant was a *private* college or university, every court to have reached the issue thus far has dismissed these claims for lack of state action.[71] A one-sentence rejection is typical. For example:

> As an initial matter, to the extent that Yu is claiming that Vassar's disciplinary proceedings denied him constitutional due process, this argument is without merit. Since Vassar is a private college, and not a

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68. Marcella Bombardieri, *Tufts Accepts Finding It Violated Law in Sex Assaults*, BOS. GLOBE (May 9, 2014), http://www.bostonglobe.com/metro/2014/05/09/reversal-tufts-accepts-finding-that-violated-title-sexual-assault-cases/AljGY7mlMlgZRXmPIgsIxI/story.html [https://perma.cc/3DTG-MGRM].

69. Emma Sulkowicz's "Carry That Weight" project at Columbia University is one of the most highly publicized of these protests. For an account, see Ariel Kaminer, *Accusers and the Accused, Crossing Paths at Columbia University*, N.Y. TIMES (Dec. 21, 2014), http://www.nytimes.com/2014/12/22/nyregion/accusers-and-the-accused-crossing-paths-at-columbia.html [https://perma.cc/3NE9-PT5T].

70. *See, e.g.*, Max Kutner, *The Other Side of the College Sexual Assault Crisis*, NEWSWEEK (Dec. 10, 2015), http://www.newsweek.com/2015/12/18/other-side-sexual-assault-crisis-403285.html [https://perma.cc/U89Q-F98G]; *Student Sues Georgia Tech After Expulsion for Sexual Misconduct*, USA TODAY (Nov. 27, 2015), http://college.usatoday.com/2015/11/27/expelled-student-sues-georgia-tech/ [https://perma.cc/43FB-75CL].

71. *See, e.g.*, Tsuruta v. Augustana Univ., No. 4:15-CV-04150-KES, 2015 WL 5838602, at *2 (D.S.D. Oct. 7, 2015) (noting that "[t]he courts that have considered [whether a private school's compliance with Title IX's complaint-resolution regulations make that entity a state actor] appear to agree that private colleges are not state actors by virtue of their adoption of Title IX grievance procedures"); Doe v. Washington & Lee Univ., No. 6:14-CV-00052, 2015 WL 4647996, at *8 (W.D. Va. Aug. 5, 2015) (stating that "[h]ad Plaintiff been enrolled at a public university, he would have been entitled to due process . . . [but] [u]nfortunately for Plaintiff, [Washington & Lee] is a private university, and as such, is generally not subject to the constitutional protections of the Fifth Amendment"); Doe v. Columbia Univ., 101 F. Supp. 3d 356, 368 n.5 (S.D.N.Y. 2015) (explaining that "[t]o the extent [the complaint states a constitutional due process claim] the claims fail, as such constitutional claims may be brought only against 'state actors' and Columbia is indisputably a private university"); Yu v. Vassar Coll., 97 F. Supp. 3d 448, 462 (S.D.N.Y. 2015) (rejecting due process argument for lack of requisite state action); Bleiler v. Coll. of Holy Cross, No. CIV.A. 11-11541-DJC, 2013 WL 4714340, at *4 (D. Mass. Aug. 26, 2013) (holding that "[s]ince there is no dispute that Holy Cross is a private school, the federal Constitution does not establish the level of due process that the College had to give [the plaintiff] in his disciplinary hearing" (citations omitted)).

> state actor, "the federal Constitution does not establish the level of due process that [Vassar] had to give [Yu] in his disciplinary proceeding."[72]

As mentioned above, this view was also expressed in the Dear Colleague letter itself.[73] This position is apparently so taken for granted that, according to a lawyer in the Ninth Circuit, one district judge not only dismissed his constitutional claims against a private college, but threatened him with Rule 11 sanctions for pleading them.[74]

But as Part II will show, this position is wrong.[75]

II. Why Due Process Applies to Today's Campus Sexual Assault Hearings

A. A State Action Primer

The Constitution's rights apply almost without exception against governmental actors, not private actors.[76] If you kick people out of your house because of their political opinions, you're not violating the First Amendment, because the First Amendment doesn't apply against you.[77] This fundamental structuring postulate of American constitutional law is called the "state action" doctrine,[78] where the word "state" means governmental (not Montana or Idaho).

Ascertaining the existence of state action is ordinarily unproblematic. You just look at who the actor was.[79] If the challenged action was taken by official governmental actors—whether legislative, executive, or judicial—

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72. *Yu*, 97 F. Supp. 3d at 462 (footnote omitted) (quoting *Bleiler*, 2013 WL 4714340, at *4).

73. *See supra* notes 55–56 and accompanying text.

74. Confidential communication on file with author (Oct. 19, 2015).

75. As this Article was being edited for publication, the Department of Education announced the withdrawal of the Dear Colleague letter and a plan to replace it with as-yet unspecified regulations to be issued through a notice-and-comment process. *See supra* note 15. If, as this Article argues, private (as well as public) schools have repeatedly violated the due process rights of students found guilty of sexual assault under procedures adopted as a result of the Dear Colleague letter, those rights should of course be vindicated notwithstanding the withdrawal of the letter. In addition, many schools will probably leave in place their recently adopted procedures until the new regulations are enacted; students tried under these procedures may also have due process claims that deserve to be vindicated.

76. *See, e.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) ("[T]he conduct of private parties lies beyond the Constitution's scope in most instances . . . .").

77. *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830, 837 (1982) ("[I]t is fundamental that the First Amendment prohibits *governmental* infringement on the right of free speech." (emphasis added)).

78. *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) ("As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments.'" (quoting Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978))).

79. *See, e.g.*, *id.* at 937 ("[T]he party charged . . . must be a person who may fairly be said to be a state actor.").

the state action requirement is satisfied[80] and ordinarily won't be mentioned. If not, constitutional restraints don't apply.

Occasionally, however, acts taken by nongovernmental parties are deemed state action for constitutional purposes. Speaking very generally, such cases fall into two categories.

In the first, the private party becomes a state actor because governmental authorities have involved or "entwined" themselves with that party in some unusual fashion—as, for example, by renting space in a public building to a privately owned coffee shop open only to whites, and profiting from its revenues.[81] There is no single test for this branch of the doctrine. What the Supreme Court has made clear, however, is that certain relationships between government and private parties are *not* sufficient. For example, being a government contractor is insufficient.[82] Receiving almost all of one's revenue from the government is not sufficient.[83] Nor is the fact of being highly regulated.[84] Private utility companies are as highly regulated as any commercial entity could be, and often under contract with governments, yet the Court has consistently held that they are not state actors.[85]

In the second category, private parties can become state actors because of the nature of the activity they are engaged in, without involvement by

80. *See* Virginia v. Rives, 100 U.S. 313, 318 (1879) ("It is doubtless true that a State may act through different agencies—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the [Fourteenth] [A]mendment extend to all action of the State . . . whether it be action by one of these agencies or by another."); *see also, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179 (1972) ("State action . . . may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial action.").

81. Burton v. Wilmington Parking Auth., 365 U.S. 715, 716, 726 (1961); *see also* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295, 298 (2001) (holding an ostensibly private association to be a state actor because of the "pervasive entwinement of public institutions and public officials in its composition and workings"); Evans v. Newton, 382 U.S. 296, 299 (1966) ("Conduct that is formally 'private' may become so entwined with governmental policies . . . as to become subject to the constitutional limitations placed upon state action.").

82. *See Rendell-Baker*, 457 U.S. at 841 ("Acts of . . . private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."). By contrast, government *employees* are generally state actors. West v. Atkins, 487 U.S. 42, 49 (1988).

83. *See Rendell-Baker*, 457 U.S. at 840–41 (explaining that "private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government" do not constitute as state actors).

84. *See, e.g.*, Am. Mfrs. Mut. Ins. v. Sullivan, 526 U.S. 40, 52 (1999) ("[T]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State . . . ." (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974)).

85. *See, e.g.*, *Jackson*, 419 U.S. at 350, 358 (1974) (holding that a utility company "subject to extensive state regulation" did not constitute a state actor).

government officials.[86] In this "public function"[87] branch of the doctrine, case law does establish a governing test. An activity is a public function only if it has been "*traditionally*" "*exclusively*" performed by the state.[88] This test is extremely hard to meet. As the Court has put it, "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'"[89]

This short state action primer should indicate why a city's privatized, contract-police force would seemingly *not* be a state actor under current doctrine. Its status as a government contractor would fail to suffice. Even if it received most of its revenue from the state and was regulated to some degree, there would be no state action under current "entwinement" doctrine. And according to the best article written on the topic, "no aspect of policing, neither patrol nor detection, has ever been 'exclusively' performed by the government, and all have at one point or another been left largely to private initiative."[90]

That statement may be a slight exaggeration,[91] but most police activities—patrolling the streets, investigating crimes, intervening physically in crimes, even making arrests—have undoubtedly been done by private citizens in the Anglo-American tradition for centuries.[92] Citizens' arrests

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86. *See, e.g.*, *id.* at 352; *see also* G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 344–46 (1997) (discussing situations in which a private entity engages in activity "so predominantly, even uniquely, governmental in nature that the private actor's action may be fairly attributable to government").

87. *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 302–03 (2001) (discussing application of the "public function test").

88. *See id.* at 302 ("[T]he performance of . . . a public function did not permit a finding of state action . . . unless the function performed was exclusively and traditionally public . . . ."); *Rendell-Baker*, 457 U.S. at 842 (1982) ("[T]he question is whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'" (quoting *Jackson*, 419 U.S. at 353)); *Jackson*, 419 U.S. at 352 ("[S]tate action [is] present in the exercise by a private entity of powers traditionally exclusively reserved to the State.").

89. Flagg Bros. v. Brooks, 436 U.S. 149, 158 (1978). To give a simple illustration: the Blooming Grove Volunteer Ambulance Corps, created by contract with the city of Blooming Grove, New York, to provide emergency ambulance and medical services to that community, is not a state actor because (1) the contractor relationship fails to suffice under entanglement doctrine, and (2) "ambulance services in this country historically were provided by an array of non-state actors, including hospitals, private ambulance services, and, in what seems to be somewhat of a conflict of interest, funeral homes." Grogan v. Blooming Grove Volunteer Ambulance Corps, 768 F.3d 259, 262, 265 (2d Cir. 2014).

90. Sklansky, *supra* note 6, at 1259.

91. Sklansky acknowledges that private police cannot always legally perform all the functions of public law enforcement—for example, searching private homes for evidence of illegal activity. *See id.* at 1183 (observing that tort and criminal doctrines limit the actions of private police).

92. *See id.* at 1193–221 (providing a historical survey of public and private policing in Europe and the United States); Stephen Rushin, *The Regulation of Private Police*, 115 W. VA. L. REV. 159, 176 (2012) (surveying the growing number of state statutes that "formally recognize and protect a private police officer's ability to engage in coercive behavior" such as "arrest, search, surveillance and interrogation").

remain permissible in some form in every state today,[93] and they are not deemed state action when they occur.[94] Private police officers have often been found not to be state actors under public function doctrine, including in cases where the private officer stopped, searched, and detained suspected criminals.[95] Thus, policing has by no means been an "exclusively" governmental affair, and a city that privatized its police would arguably become a Fourth Amendment-free zone.[96]

The case of military contractors is more complicated, although even here arguments can be made under current doctrine that no state action exists. Private military contractors are, after all, contractors (and therefore arguably not state actors under "entwinement" doctrine), while the longtime existence of mercenary forces and private militias[97] might suggest that soldiering is not a public function either. Hence the uncertainty surrounding this question too.[98]

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93. *See* Rushin, *supra* note 92, at 177 ("Over the last twenty-five years, states have increasingly moved to codify the common law citizen's arrest doctrine. In 1976, thirty-two states had codified some . . . right to citizen's arrest. By 2011, all fifty states had . . . ." (footnotes omitted)).

94. *See, e.g.*, United States v. Lima, 424 A.2d 113, 120 (D.C. 1980) ("The fact that a private person makes a citizen's arrest does not automatically transform [him] into an agent of the state. His conduct is not actionable for any deprivation . . . of rights, privileges or immunities secured by the Constitution.").

95. *See, e.g.*, United States v. Bowers, 739 F.2d 1050, 1056 (6th Cir. 1984) (holding that a private detective interviewing a suspect was not required to give *Miranda* warnings); White v. Scrivner Corp., 594 F.2d 140, 143 (5th Cir. 1979) (holding that store employees who detained and searched a suspected shoplifter were not performing a public function because "[w]hile these actions are usually performed by police officers, private citizens do occasionally engage in them"); United States v. Casteel, 476 F.2d 152, 154 (10th Cir. 1973) (holding that private citizens interviewing a suspect were not required to give *Miranda* warnings). *But see* Griffin v. Maryland, 378 U.S. 130, 135 (1964) (finding an ostensibly private police officer to be a state actor but noting entanglement with state authority—the private officer was a deputized county sheriff who identified himself as such during the events in question); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 99–101 (2004) (discussing *Griffin*).

96. *See* Sklansky, *supra* note 6, at 1183 ("Criminal procedure law—the vast set of interrelated constitutional doctrines that regulate . . . police officers throughout the United States—has almost nothing to say about . . . private security guards. . . . Private searches fall outside the coverage of the Fourth Amendment, and evidence they uncover is almost always admissible . . . .").

97. *See generally* SEAN MCFATE, THE MODERN MERCENARY: PRIVATE ARMIES AND WHAT THEY MEAN FOR WORLD ORDER (2014) (discussing private war making past and present).

98. *See supra* note 4; Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 188 (2005) (arguing that "under even the narrow construction of the state action doctrine found in U.S. constitutional law, . . . the activities at Abu Ghraib would probably be actionable" but that "[i]f the prison were managed entirely by private contractors, showing a nexus to the state would be more difficult"); Craig S. Jordan, *Who Will Guard the Guards? The Accountability of Private Military Contractors in Areas of Armed Conflict*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 309, 316 (2009) (arguing that "it is . . . unlikely that the U.S. would recognize a PMC as acting on behalf of the state" and that "[c]ourts have been reluctant to find PMCs liable under this doctrine"). *But see* Dobyns v. E-Systems, Inc., 667 F.2d 1219, 1225–26 (5th Cir. 1982) (holding a military surveillance contractor assisting in peacekeeping in the Middle East a state actor on the ground that "military surveillance" and "peacekeeping" were public functions).

I will return to the problem of privatization later. While there are deep uncertainties and inadequacies in current state action doctrine, there's at least one clear principle that the doctrine gets right, and this principle by itself is enough to demonstrate state action in the post-2011 Title IX trials conducted by private schools all over the country.

B. The Blum *Principle*

If a private citizen were compelled by governmental actors to search his neighbor's house for evidence of a crime, the search would have to qualify as state action. Otherwise, the police could easily evade the Fourth Amendment's restraints, and Congress could circumvent every constitutional right through the simple expedient of passing a statute requiring private individuals to engage in otherwise-unconstitutional acts.

For this reason, a coercion or compulsion principle is central to state action jurisprudence. This principle has long been recognized: as the Supreme Court puts it, a private party becomes a state actor if the government "has exercised coercive power" over him.[99]

The coercion principle is most commonly associated with *Blum v. Yaretsky*,[100] the 1982 case just quoted, but it dates back at least to the sit-in cases of the early 1960s. In *Petersen v. City of Greenville*,[101] the Court found state action in a racially segregated lunch counter because a city ordinance required such segregation.[102] "When the State has commanded a particular result, it has saved to itself the power to determine that result . . . and, in fact, has removed that decision from the sphere of private choice."[103] In a companion case, *Lombard v. Louisiana*,[104] the Court reached the same conclusion where the mayor of New Orleans had issued a public statement that, as interpreted by the Court, prohibited "desegregated service in restaurants."[105] This official statement, said the Court, had "at least as much coercive effect as an ordinance"[106] and therefore required the same state action conclusion.

As the Court would later affirm in *Blum*, mere governmental "approval of or acquiescence in the initiatives of a private party is not sufficient."[107] But where the challenged activity resulted from the state's "exercise[] [of] coercive power," state action exists.[108] Indeed, in *Blum* and later cases, the

99. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).
100. 457 U.S. 991 (1982).
101. 373 U.S. 244 (1963).
102. *Id.* at 250–51.
103. *Id.* at 248.
104. 373 U.S. 267 (1963).
105. *Id.* at 268, 273.
106. *Id.*
107. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).
108. *Id.*

Court has gone much further: even if not coerced, a private party's conduct is state action if government has "provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[109]

The *Blum* principle leaves little doubt about the existence of state action in the sexual assault investigations and adjudications conducted under the Dear Colleague letter's mandate. If "overt," "significant encouragement" means anything, it includes conditioning hundreds of millions of dollars in federal funds on an institution's compliance with governmental directives. But the Dear Colleague letter did not merely encourage. It almost certainly coerced.

To be sure, it's possible to argue that conditional-funding regimes never coerce because the funding recipient is always free to walk away from the funds. But it's well established that in unusual circumstances, a threat to strip funding can be coercive, operating as a "gun to the head."[110] And in the case most nearly on point, not only did a court find coercion—the federal government conceded it.

A decade ago, Congress threatened to defund universities if any of their departments denied on-campus access to recruiters from the U.S. military (which, at that time, excluded openly gay individuals).[111] In a suit challenging this regulation brought by professors at Yale Law School, the Department of Defense conceded that this defunding threat was coercive, and the court so ruled:

> DoD has conceded the fact of coercion. . . . There is no question of fact that the Faculty, acting as Yale Law School, voted to [permit on-campus access to military recruiters] because of the threatened cut-off of $300 million to other parts of Yale University. This court concludes, as a matter of law, that this conceded coercion is well past the point of pressure and is compulsion.[112]

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109. *Id.*; *see also, e.g.*, Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 615 (1989) (finding state action in private employers' breath and urine testing of employees where the federal government had enacted nonmandatory regulations "ma[king] plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions").

110. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604 (2012) (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.); *see also, e.g.*, Agency for Int'l Dev. v. All. for Open Soc'y Int'l, 133 S. Ct. 2321, 2328 (2013) (stating that funding conditions can be found unconstitutional "when the condition is actually coercive, in the sense of an offer that cannot be refused"); Planned Parenthood of Greater Ohio v. Hodges, 188 F. Supp. 3d 684, 690 (S.D. Ohio 2016) (same); Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh, 172 F. Supp. 2d 138, 152 (D.D.C. 2001) (stating that "acceptance of conditional funding" can be a "coerced decision"), *rev'd*, 295 F.3d 28 (D.C. Cir. 2002).

111. *See* Doug Lederman, *A Supreme Battle Takes Shape*, INSIDE HIGHER ED. (Sept. 22, 2005), https://www.insidehighered.com/news/2005/09/22/solomon [https://perma.cc/K759-228V].

112. Burt v. Rumsfeld, 354 F. Supp. 2d 156, 175 (D. Conn. 2005) (citation omitted), *rev'd on other grounds sub nom.* Burt v. Gates, 502 F.3d 183 (2d Cir. 2007). Note: the author of this Article

Although it involved funding to states, the Court's decision in *Sebelius*[113]—the health care case—is also instructive. Seven Justices in *Sebelius* held that the federal government's threat to strip states of Medicaid funding if they refused to participate in the new health care program "crossed the line distinguishing encouragement from coercion."[114] These Justices stressed, among other things, (1) that the defunding threat was based on a newly imposed condition, meaning that states had not agreed to it when they had initially accepted (and become reliant on) Medicaid funding;[115] (2) the threat applied broadly to preexisting funds unrelated to the newly imposed health-insurance scheme;[116] and, most importantly, (3) the sheer size of the funds under threat.[117] Federal Medicaid funds, noted the Justices, constituted over 10% of most states' total revenue and accounted for roughly 22% of overall state budgets.[118] Faced with so massive a loss in funding, states would have "no real choice" but to participate in the national health care program.[119]

All three of these factors apply to the Title IX context. First, the conditions imposed by the Dear Colleague letter were new, representing a dramatic shift from prior agency interpretations of Title IX,[120] and therefore

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was a party to and lawyer in *Burt*. The named plaintiff was the late Robert Burt, a devoted colleague and friend.

113. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

114. *Id.* at 2603 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.) ("[The States] object that Congress has 'crossed the line distinguishing encouragement from coercion' in the way it has structured the funding . . . . Given the nature of the threat and the programs at issue here, we must agree." (quoting New York v. United States, 505 U.S. 144, 175 (1992)); *id.* at 2662 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("In structuring the ACA, Congress unambiguously signaled its belief that every State would have no real choice but to go along with the Medicaid Expansion. If the anticoercion rule does not apply in this case, then there is no such rule.").

115. *Id.* at 2606 ("[T]hough Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or 'retroactive' conditions." (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 25 (1981)).

116. *Id.* at 2603 (opinion of Roberts, C.J.) ("Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States' existing Medicaid funds."); *id.* at 2606 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.) ("A State could hardly anticipate that Congress's reservation of the right to 'alter' or 'amend' the Medicaid program included the power to transform it so dramatically."); *id.* at 2666 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("Congress could have made just the *new* funding provided under the ACA contingent on acceptance of the terms of the Medicaid Expansion[,] . . . so that only new funding was conditioned on new eligibility extensions.").

117. *Id.* at 2605 (opinion of Roberts, C.J.) ("The threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."); *id.* at 2663 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("[T]he sheer size of this federal spending program in relation to state expenditures means that a State would be very hard pressed to compensate for the loss of federal funds by cutting other spending or raising additional revenue.").

118. *Id.* at 2604–05 (opinion of Roberts, C.J.); *id.* at 2663 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

119. *Id.* at 2608 (opinion of Roberts, C.J.); *id.* at 2662 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

120. *See supra* Section I(B).

not what schools had signed up for when initially accepting the funds at issue. Second, the defunding threat applied to all federal funding across the board, making the Title IX defunding threat look more like a coercive penalty than a policy choice about what the government wanted its money spent on. Finally, and most importantly, the threatened funding loss was massive, both in absolute terms and as a percentage of operating budgets—in some cases constituting 15–20% of school budgets.[121]

Because *Sebelius* involved funding to states, not private entities, the case is arguably distinguishable, but the three factors just discussed do not merely state a good argument for coercion under *Sebelius*. They state a good argument for coercion, period. Even if styled as mere "guidance," the Dear Colleague letter, together with the government's investigations of dozens of universities and repeated reaffirmation of its multi-hundred-million-dollar defunding threat, was clearly an attempt to force compliance. The letter was intended to compel, and it was very successful, causing compliance all over the country, even at schools where there was considerable internal opposition.[122] In a remarkable acknowledgment, Secretary of Education Betsy DeVos stated in September, 2017, that the Department of Education and its Office for Civil Rights had been using "intimidation and coercion" to "push[] schools to overreach."[123] It would take an extraordinary feat of rationalization not to see coercion in the Dear Colleague letter and the government's enforcement efforts pursuant to it.

Thus *Blum* leaves scant room for doubt. Under *Blum*, coercion and even significant governmental encouragement create state action. At minimum,

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121. Yale's federal funding exceeded $500 million in fiscal year 2015, accounting for roughly 16% of operating expenses. YALE UNIV., FINANCIAL REPORT 2014–2015, at 16, 20 (2015), https://your.yale.edu/sites/default/files/2014-2015_annual_financial_report_0.pdf [https://perma.cc/952Y-6LDW]. Harvard's $578 million accounted for roughly 13% of operating expenses. HARVARD UNIV., FINANCIAL REPORT: FISCAL YEAR 2015, at 7 (2015), http://finance.harvard.edu/files/fad/files/_fy15harvard_finreport_.pdf [https://perma.cc/HF2B-4Y8A]. Tufts's $138 million in federal funding accounted for 17%. TUFTS UNIV., ANNUAL FINANCIAL REPORT OF TUFTS UNIVERSITY: 2015, at 15 (2015), http://finance.tufts.edu/budgetacc/files/2015AnnualFinancialReport.pdf [https://perma.cc/3VJL-F275]. Northwestern's $408.5 million accounted for roughly 20%. NORTHWESTERN UNIV., 2015 FINANCIAL REPORT, at 12, 35 (2015), http://www.northwestern.edu/financial-operations/annual-financial-reports/2015-Financial-Report.pdf [https://perma.cc/FWB7-4JBZ].

122. As mentioned earlier, OCR's investigation of Tufts provides an illustration. *See supra* notes 66–68 and accompanying text. Tufts University President Anthony Monaco, after initially refusing to comply with OCR directives and denying that his school was in violation of Title IX, quickly agreed to change the school's policies when OCR warned that it would "move to terminate Tufts' federal funding if the university did not comply, a result so catastrophic that it virtually required Tufts to reach some understanding with the government." Bombardieri, *supra* note 67; *see also, e.g.*, Opinion, Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014) (publishing statement by twenty-eight Harvard Law School professors protesting Harvard University's adoption of new policies as a result of the Dear Colleague letter). Schools may also be reacting to the potentially highly damaging reputational consequences of OCR's finding them in violation of Title IX—another form of governmental pressure.

123. *See* DeVos, *supra* note 15.

the Dear Colleague letter strongly encouraged, and for many schools all over the country, it coerced. Far from being Rule 11 sanctionable, the state action argument here is close to unassailable.[124]

Which almost puts us in position to turn to the due process merits—to the question, that is, of whether the procedures used at private colleges' Title IX sexual assault hearings violate due process. But not quite. *Blum* leaves open two crucial questions that have to be answered before proceeding to the merits.

C. *What the* Blum *Principle Leaves Unanswered*

First, a puzzle has always lain buried under the *Blum* principle—a problem that, although seemingly obvious, courts almost never confront. *Blum* seems to prove far too much.

Blum's "significant encouragement" test would, for example, seem to make state actors out of every governmental contractor and every recipient of conditional public spending. Anyone who enters a contract with the government is given substantial, overt monetary encouragement to do what the contract requires; anyone who receives conditional benefits is given substantial encouragement to take the acts that generate the benefits. Why aren't they all state actors under *Blum*?

Blum's encouragement test seems, therefore, difficult to take at face value. Perhaps, then, *Blum* should be narrowed to coercion—which, in practice, some lower courts appear to have done by referring to *Blum*'s "state coercion test,"[125] a phrase that seems to drop out "encouragement." But the same puzzle reappears with equal force with respect to coercion.

Government coerces whenever it applies law to us. On April 15, most adults are legally compelled to file tax returns. Are we state actors when we

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124. Not one of the courts finding no state action in private school Title IX hearings, *see supra* note 70, genuinely came to grips with *Blum*. Only two referred to the coercion principle at all, and they did so cursorily. First, in *Tsuruta v. Augustana University*, the court acknowledged that "'extensive regulation' that compels or coerces a private school to act in a given way could constitute state action." No. 4:15-CV-04150-KES, 2015 WL 5838602, at *2 (D.S.D. Oct. 7, 2015) (quoting Rendell-Baker v. Kohn, 457 U.S. 830, 841 (1982)). However, the *Tsuruta* court dismissed the coercion concern, stating only that the plaintiff "has disclosed no cases where a court has found that a private school's compliance with Title IX's complaint-resolution regulations make that entity a state actor." *Id.* Second, in *Doe v. Washington & Lee University*, the court said that "[w]hile it is plausible that [the university] was under pressure to convict students accused of sexual assault in order to demonstrate that the school was in compliance with the OCR's guidance, for Fifth Amendment protections to apply, '[t]he government must have compelled'" the private actor's conduct. No. 6:14-CV-00052, 2015 WL 4647996, at *9 (W.D. Va. Aug. 5, 2015) (alteration in original) (quoting Andrews v. Fed. Home Loan Bank of Atlanta, 998 F.2d 214, 218 (4th Cir. 1993)). The court then went on, with little explanation, to find that the OCR's "guidance" did not amount to compulsion—perhaps meaning that the school was not compelled to *convict*, which is not the issue (the issue being whether the school was compelled to *adjudicate*). *Id.*

125. *E.g.*, Klunder v. Brown Univ., 778 F.3d 24, 30 (1st Cir. 2015); *see also* Paige v. Coyner, 614 F.3d 273, 278 (6th Cir. 2010) (referring to the "state-compulsion test laid out . . . in *Blum*").

file those returns? Are we state actors when we stop at a red light? When we refrain from stealing?

The coercion principle implies that private individuals become state actors whenever they obey the law. It would seem to follow that criminals are the only truly private actors left in the country—a logical possibility, but a very odd conclusion. When invoked, the coercion principle is typically treated as self-evident.[126] And it is undoubtedly both correct and indispensable. The puzzle is how to square the correctness of the *Blum* principle with the fact of more-or-less ubiquitous governmental coercion at every moment of our waking lives.

Second, assuming this riddle can be answered, when private schools adjudicate Title IX sexual assault claims, does the *Blum* principle imply that schools are state actors only when they obey the *specific procedural rules mandated by the Dear Colleague Letter*, or does it imply that *the entirety of their Title IX adjudicatory process* is state action? I'll refer to this as the "level-of-generality" problem.

To illustrate, recall the inquisitorial *Brandeis* case described earlier.[127] With respect to some particulars of its Title IX process—for example, its standard of proof—Brandeis was complying with express governmental directives or warnings.[128] But many other pieces of Brandeis's inquisitorial procedure were filled in by the school at its own discretion. Even then, however, Brandeis was still engaged in the more general course of action (adjudicating student-on-student sexual assault claims) that the federal government had compelled it to take.[129] The question is whether due process applies only to the specifically mandated procedural details or instead to all the procedures Brandeis used to discharge the compelled action. The *Blum* principle on its face arguably does not decide this level-of-generality question.

The level-of-generality question returns us to the privatization "black hole" with which this Article began. Every privatization case will raise it. Say that a city disbands its police force and instead contracts with a private security firm to police its streets. Assume that the contract obliges the firm to enforce the law and mandates one or two details, but leaves everything else to the firm's discretion.

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126. *See, e.g.*, *Andrews*, 998 F.2d at 217 (referring to the coercion cases as standing for an "obvious proposition that when the government orders specific conduct, it must be held accountable for that conduct").

127. Doe v. Brandeis Univ., 177 F. Supp. 3d 561 (D. Mass. 2016).

128. *See supra* Section I(B).

129. *See Brandeis*, 177 F. Supp. 3d at 572 (noting that the adoption of new procedures by Brandeis and other universities "has been substantially spurred by the Office for Civil Rights of the Department of Education, which issued a 'Dear Colleague' letter in 2011 demanding that universities do so or face a loss of federal funding").

Why might a city craft its policing contract in this open-ended fashion? Because doing so would, precisely, help the private security firm evade constitutional restraints. Gillian Metzger noticed this paradox in state action doctrine years ago: "Private actors given broader discretion in their exercise of [delegated] power are less likely to be subject to constitutional constraints than those who operate under close government supervision and whose potential for abusive action is thus more curtailed."[130] In just this way, the Department of Education and OCR, while compelling schools to adjudicate sexual assault cases, left schools with a large amount of unsupervised discretion in doing so—which might be said, under existing doctrine, to point against a state action finding.

Now suppose that the city's newly privatized security firm chooses to initiate suspicionless stop-and-frisks—a clear Fourth Amendment violation if conducted by state actors. The same level-of-generality question would be presented: should constitutional restraints apply only to the particular mandates imposed by the government, or rather to the entirety of the private firm's acts of policing? Solving the problem of privatization in constitutional law depends on answering this question.

Two issues thus remain. First, how do we preserve *Blum* without turning everyone into state actors most of the time, and second, which campus sexual assault trial procedures are properly subject under *Blum* to due process analysis—only those specifically mandated by the Dear Colleague letter, or all the procedures used by a given school, even those not specifically compelled by the government, when the school was coerced to conduct such trials by the government?

It turns out that these questions are closely related. Answering them will require that we recognize a mistake state action doctrine has been making for a long time. Once we see where current doctrine goes wrong, we will be able to answer these difficulties, tackle the vast problem that privatization poses for constitutional law, and, finally, address the due process merits of today's Title IX sexual assault trials.

III. Where State Action Doctrine Goes Wrong and How To Make It Right

Current state action doctrine begins with the wrong question. Here's the question state action case law tells judges to answer: *Is the actor who took the challenged action a "state actor"?* Because "the party charged" with a constitutional violation "must be a person who may fairly be said to be a state actor,"[131] the "threshold issue" in every state action case is whether the defendant "is a state actor."[132]

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130. Metzger, *supra* note 7, at 1425.

131. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

132. Communities for Equity v. Mich. High Sch. Athletic Ass'n, 459 F.3d 676, 691–92 (6th Cir. 2006); *see, e.g.*, MBH Commodity Advisors v. Commodity Futures Trading Comm'n, 250 F.3d

This simple question seems unavoidable, given that constitutional rights apply only against state actors. And it's a perfectly sensible question to ask in most cases. It will deliver the right result when defendants are uncontroversially state actors (legislatures, officials, and so on) and when defendants are uncontroversially private parties acting without state involvement. But it's the wrong question to ask in difficult cases. Specifically, it's the wrong question for every case in which the government has induced private parties to engage in conduct that would be unconstitutional if state actors engaged in that conduct directly.

A criminal law analogy is useful. Some crimes can be committed only by public officials, which is a kind of state actor requirement. Assume New York prohibits public officials from soliciting bribes. If *A*, a New York public official, induces *B*, a private citizen, unknowingly to solicit a bribe on *A*'s behalf from *C*—where *A* and *C* understand what's happening, but *B* has no idea—*A* is guilty of soliciting a bribe even though *B* is innocent.[133] In criminal law, this kind of case is well known; it's called "perpetration by means."[134] Public official *A* perpetrates the crime by having the innocent *B*, who statutorily can't commit it, solicit the bribe for him.

Judges would have no difficulty with such a case under standard doctrines of criminal law. But if they reasoned the way state action doctrine reasons, they *would* have difficulty.

Suppose the judge says to himself, "For this crime to have taken place, the person soliciting the bribe must have been a public official; thus, the threshold question is whether *B* was a public official." The judge might then correctly observe that *B*, a private citizen, was not a public official. Suddenly it begins to look as if no one has committed the crime. *B* solicited money, but he wasn't a public official (and didn't even know he was soliciting a bribe),

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1052, 1065 n.7 (7th Cir. 2001) ("[The] defendant must be a state actor in order to be subject to the Constitution's due process requirements." (citing R.J. O'Brien & Assoc. v. Pipkin, 64 F.3d 257, 262 (7th Cir. 1995))); Price v. Int'l Union, 927 F.2d 88, 91 n.3 (2d Cir. 1991) ("[S]tate action requires: that . . . the party charged with the deprivation must be a state actor."); Jackson v. Urow, No. 86-3968, 1986 U.S. App. LEXIS 25988, at *2 (4th Cir. June 10, 1986) ("The person charged with the wrongful deprivation must be a state actor.").

133. MODEL PENAL CODE § 2.06(2)(a) (AM. LAW INST., Proposed Official Draft 1962) ("A person is legally accountable for the conduct of another person when . . . acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct . . . ."); *see also, e.g.*, People v. Brody, 83 N.E.2d 676, 678–79 (N.Y. 1949) (upholding defendant's conviction of receiving unauthorized fees as a deputy commissioner even though the fees had been received by a private intermediary and reasoning that the "crime of taking unauthorized fees (like the crime of taking bribes . . .) can, obviously, be committed through an intermediary or agent").

134. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 639 (2000) ("Virtually all legal systems . . . recognize the institution of perpetration-by-means."); *see, e.g.*, United States v. Kelner, 534 F.2d 1020, 1022 (2d Cir. 1976) ("It is a general principle of causation in criminal law that an individual (with the necessary intent) may be held liable if he is a cause in fact of the criminal violation, even though the result which the law condemns is achieved through the actions of innocent intermediaries.").

so he isn't guilty; *A* was a public official, but he didn't solicit, so he isn't guilty either.

The point is this: a violation requiring action by a public official can be committed by and through a private actor, not because the private actor has "become a public official," but simply because the public official has induced the private citizen to commit the violation. In constitutional terms: if state actors are constitutionally prohibited from invading a certain right, and state actor *A* deliberately induces private citizen *B* to invade that very right, then *A* has violated the Constitution—period. *The question of whether* B *is himself a state actor never properly comes into it.*[135]

Simple though it is, this reorientation of the threshold question points to the solution of all the difficulties identified at the end of the last section.

First, it completely answers the riddle of *Blum*'s seeming to prove too much. Yes, if a private individual is coerced by government to search someone else's house, the search has to comply with the Fourth Amendment. But *that's not because the private individual has become a state actor.* It's a case of perpetration by means. Yes, if a government contract required an employer to racially discriminate in hiring, the discrimination would be unconstitutional. The reason is not to be found, however, in excessive governmental "entwinement" (there would be no more entwinement than in countless governmental-contractor cases), nor in public function doctrine (no public function would be at issue). The reason is not that the contractor has magically transubstantiated into a state actor at all. The true reason is the *Blum* principle as just restated: government cannot purposely induce a private actor to take action that would violate constitutional rights if the government took the action itself. Thus *Blum* is correct, but correctly understood, it does *not* imply that we all turn into state actors whenever we stop at red lights, enter into government contracts, file our tax returns, and so on.

At the same time, we can see why *Blum* was also correct in extending the coercion principle to cover cases of "significant encouragement." To repeat the principle just stated:

> (1) Inducement principle. *Where state actors would violate constitutional rights by taking a particular action, they cannot purposely induce a private actor to take that same action.*[136]

Coercion is only one kind of inducement; significant encouragement is another. That's the lesson of the bribery analogy. Public official *A* is guilty

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135. In criminal cases, difficult proximate-causation issues can arise when the instrumentalized party is not a wholly innocent agent, but is instead a knowing participant or "semi-innocent." Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 387 (1985). These complications are not relevant to constitutional law.

136. To be clear, this principle refers to inducing one party to violate another party's constitutional *rights*; it does not apply when government merely induces parties to take actions that the government lacks the *power* to compel. Congress may pay states to enact a drinking age; it may offer tax benefits to induce action it has no power to compel.

of soliciting a bribe provided that he intentionally induced private citizen *B* to solicit the bribe on his behalf; it makes no difference whether *A* coerced *B* into this action, offered him money to do it, offered him a position in government to do it, or offered him any other significant inducement. The same logic applies to state actors in constitutional law.

Second, we can now pry open the whole problem of privatization in a new way, which will in turn answer the level-of-generality problem.

Return to the case of a privatized state police department. As we've seen, current state action doctrine, which looks to the concepts of entwinement and public function to solve privatization cases, generates a disturbing answer. Because policing has not traditionally been an exclusive state preserve, and because a state could contract with a private security firm and deliberately choose not to supervise that firm closely, a privatized police force would apparently be a nonstate actor, hence free to violate the Fourth Amendment at will. To escape that result, the reflexive response of many critics has been to call for elimination of public function doctrine's exclusivity requirement, so that many more governmental functions become public functions.[137] A better strategy is to recognize that public function doctrine too has been asking the wrong question.

Consider these two police forces:

- Google hires a private security firm called Blackwater to police the Googleplex, the company's multi-acre corporate headquarters in Mountain View, California; Blackwater employees patrol, prevent trespass, enforce the criminal law, and make arrests.
- California replaces all state and local police by entering into a contract with Blackwater; under this contract, Blackwater employees, unsupervised by the state, perform functions all over California identical to those of Google's officers at the Googleplex.

Public function doctrine tells us that these two cases are to be analyzed identically. In other words, public function doctrine asks once again whether the private parties at issue are "state actors," and Blackwater is either a state actor in both cases or neither. But we don't have to look at the problem this way.

In case two, Blackwater *has* to be subject to the Fourth Amendment, or else the Fourth Amendment will have become a nullity in California. The same isn't true of Google's security force. The Fourth Amendment is not a dead letter in California just because it does not apply to purely private

137. *See* Sklansky, *supra* note 6, at 1259 ("Were the Supreme Court to retract that limitation [the exclusivity requirement], the difficulty would largely disappear."). Sklansky goes on to discuss the problems that would follow if the exclusivity requirement were dropped. *Id.* at 1259–60.

security officers hired to patrol private property. Public function doctrine can't see this difference.

Public function doctrine, in current form, asks whether there is a special set of activities that *even private parties* can't engage in without constitutional restraints. But suppose we asked instead the perpetration-by-means question: is there a special set of activities that *government* can't engage in without constitutional restraints, even if it does so *through the use of private parties*?

The answer is yes, and *law enforcement* is the paradigmatic example of such an activity.

Why? For a simple reason. A host of rights in the Bill of Rights—in particular, in the Fourth through Eighth Amendments—are paradigmatically addressed to law enforcement. In other words, the core, foundational applications of these rights concern the investigation, prosecution, adjudication, and punishment of law-violating activity (both criminal and civil). If the government could evade these rights by privatizing law enforcement, much of the Fourth through Eighth Amendments would be rendered nugatory.

For example, it is axiomatic Fourth Amendment doctrine that "general warrants" are unconstitutional.[138] General warrants authorized discretionary searches and seizures of large numbers of persons and places not specified in advance by a magistrate, in order to enforce civil or criminal laws, and they were the Fourth Amendment's paradigm case—the primary abuse the amendment was enacted to prohibit.[139] But if governments could privatize their police forces without the Fourth Amendment attaching thereto, the privatized police could engage in generalized, unspecified searches and seizures with constitutional impunity. Similarly, if governments could replace their criminal and civil courts with private-adjudication contractors not bound by the Constitution, the core process rights of the Sixth and Seventh Amendments—for example, trial by jury—would be lost.

The reasoning here is simple but inexorable. It follows from the existence of constitutional paradigm cases.[140] Certain governmental powers or functions are the paradigmatic objects of constitutional rights. Allowing government to privatize those powers, cut loose from constitutional safeguards, would permit the government to evade and erase those

138. *See, e.g.*, Payton v. New York, 445 U.S. 573, 583 (1980); Stanford v. Texas, 379 U.S. 476, 480 (1965).

139. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 1–31 (1997) (discussing the centrality of the ban on general warrants to the enactment and historical understanding of the Fourth Amendment).

140. *See generally* Jed Rubenfeld, *The Paradigm-Case Method*, 115 YALE L.J. 1977 (2006) (showing that paradigmatic "Application Understandings," that is, the core historical applications of a given constitutional prohibition, anchor and shape the development of the doctrine governing that prohibition).

constitutional rights. That result cannot be tolerated. Allowing privatization of law enforcement, without attaching constitutional restraints thereto, would erase core constitutional rights; therefore, the Constitution must continue to apply when the government induces private parties to do law enforcement on its behalf.

This is *not* to say that law enforcement is an exclusively "public function" or an "inherently governmental function." Private actors can take, and have always taken, law enforcement into their own hands. Rather, law enforcement is an *inherently constitutional function for the government*, meaning that state actors *cannot circumvent the constitutional rights that attach to it by inducing private parties to do the job on their behalf.*

What other powers, beyond law enforcement, belong in this category? This Article is not the place for a full-fledged theory dealing with that question, but the general outlines of an answer may be as follows.

When first enacted, the Constitution established a new national government vested with two powers: that of war, and that of law.

"War powers" is a familiar enough term. The "law power" is less familiar, but not esoteric. By that term, I'm simply referring to making the law, executing it, and adjudicating it—the functions that were the primary objects of Articles I to III of the Constitution. Making law consists primarily of enacting rules governing individuals' conduct that apply without their individualized consent. Executing the law includes policing compliance, prosecuting violators, and punishing violations. Adjudication refers both to authoritative fact-finding (to determine whether a law has been broken) and to authoritatively interpreting the law. Making law can also be referred to as "legislating" or "regulating." Executing the law and adjudicating it, taken together, can be referred to as "law enforcement."

The war and law powers share certain features in common. Both involve force. Both can be used to dispense death. Both can be used to coercively take away liberty and property. Both enable tyranny in any government vested with them.

Which is precisely what made a Bill of Rights necessary. All the guarantees laid out in the Bill of Rights are directed, paradigmatically, at the law or war powers. If this is so, then war making also falls into the special class of inherently constitutional activities. And if this is so, then—to answer the question posed at the beginning of this article—private military contractors would be bound to uphold constitutional rights.[141]

141. Other powers too may carry constitutional restraints when privatized. If, for example, the state has a constitutional *duty* to do X, constitutional restraints may be required if the state seeks to have X done by private actors.

This highly general law-and-war principle, however, is much broader than the present article requires. For present purposes, the following, much narrower principle suffices:

> (2) Law enforcement principle. *When government requires or induces a private party to engage in law enforcement, all relevant constitutional restraints apply.*[142]

Does this law enforcement principle swallow up everything that government does, making it impossible for governments to privatize anything without constitutional rights attaching thereto?

No. Governments do a great deal beyond law enforcement—indeed, beyond the law and war powers altogether. If government privatizes the construction of buildings, for example, constitutional restraints need not attach. Governments can privatize their trains and train stations, their airports, their fire departments, their utilities, their garbage collection, their community colleges, and their power plants—all without imposing constitutional requirements on the private parties that take over these functions. Government could privatize the welfare state.

But policing is different, because it's law enforcement. A state can contract with private security firms to police its streets and enforce its laws, but the Constitution will still apply. Privatized prisons fall under the same rule; the Eighth Amendment directly targets criminal punishment, and punishing law breakers is central to the business of law enforcement. (This analysis provides a far better explanation of why courts have found private

142. This principle refers only to cases in which government uses private parties for its own ends—i.e., when it delegates powers to private parties but continues to direct their objectives—not cases in which government purports to withdraw altogether, as for example by disbanding its police completely and "letting the market" take over. Such cases would require a separate analysis. In this path of inquiry lies the true importance of landmark state action cases like *Marsh v. Alabama*, 326 U.S. 501 (1946), and *Shelley v. Kraemer*, 334 U.S. 1 (1948), which current doctrine can no longer even explain.

prisons to be state actors than current public function doctrine can.)[143] Privatized tax collection is also law enforcement.[144]

What about private arbitration—is it bound by constitutional due process? Not if it's genuinely private, freely chosen by private parties. But if the federal government retained a private arbitral body and compelled its use, that body *would* have to abide by due process.[145]

The most critical feature of the law enforcement principle is that it answers the level-of-generality problem raised earlier. When law enforcement powers are privatized—whether by statute, under a contract, or through a defunding threat—constitutional restraints apply to *all* the actions taken by the private parties in discharging their delegated functions, not merely to those actions specifically mandated.

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143. The "extensive history" of private imprisonment in America is well-known. JAMES AUSTIN & GARRY COVENTRY, BUREAU OF JUSTICE ASSISTANCE, EMERGING ISSUES ON PRIVATIZED PRISONS 9 (2001) ("Private enterprise in the United States has an extensive history of involvement in the provision of correctional services."); *see* WILLIAM B. SECREST, BEHIND SAN QUENTIN'S WALLS: THE HISTORY OF CALIFORNIA'S LEGENDARY PRISON AND ITS INMATES 1851–1900, at 9–10 (2015):

> In early 1851, [General Mariano Guadalupe] Vallejo presented a plan to the state legislature to establish and maintain a state prison. . . . Vallejo and his associate, [James Madison] Estill, would build the prison, staff it, clothe and feed all the convicts, and offer rewards to be in effect for a ten-year period for any prisoner who escaped. . . . All that was asked in return was that Vallejo and Estill could utilize the convict labor for their own profit.

Nevertheless, courts have repeatedly held that privatized prisons are state actors under public function doctrine—a result they have reached only by ignoring or torturing the exclusivity requirement. *See, e.g.*, Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003) ("Clearly, confinement of wrongdoers—though sometimes delegated to private entities—is a fundamentally governmental function."); Skelton v. Pri-Cor, Inc., 963 F.2d 100, 102 (6th Cir. 1991) (treating a private prison corporation as having acted under color of law without mentioning the exclusivity requirement). On the analysis proposed here, courts would not need to hold, falsely, that privatized prisons are "state actors" performing an "exclusively" governmental function; the principle is simpler—government cannot privatize its law enforcement power without passing on the applicable constitutional restraints.

144. *See, e.g.*, Cohen v. World Omni Fin. Corp., 457 Fed. Appx. 822, 830 (11th Cir. 2012) (holding that a private company "was a state actor" in collecting taxes under statutory mandate, regardless of public function analysis).

145. On just this ground Judge Posner found the National Railroad Adjustment Board to be a state actor. *See, e.g.*, Elmore v. Chi. & Ill. Midland Ry., 782 F.2d 94, 96 (7th Cir. 1986) ("The National Railroad Adjustment Board, however, while private in fact, is . . . the tribunal that Congress has established to resolve certain disputes in the railroad industry. Its decisions therefore are acts of government, and must not deprive anyone of life, liberty, or property without due process of law."). Stock exchange organizations that enforce federal securities laws against broker–dealers offer another analogy. There is a circuit split concerning whether due process applies to such proceedings. Jerrod M. Lukacs, Note, *Much Ado About Nothing: How the Securities SRO State Actor Split Has Been Misinterpreted and What It Means for Due Process at FINRA*, 47 GA. L. REV. 923, 926 (2013). Assuming these organizations are compelled by the federal government to enforce the law, state action should be found and due process held applicable, according to the arguments presented in this Article.

To see why, we need only consider once again a privatized police force that decides on its own to engage in house searches without probable cause or a warrant—or a privatized prison that decides in its own discretion to torture recalcitrant inmates. Under the law enforcement principle, these actions are categorically unconstitutional; that the state had not specifically ordered them would be no defense. When government privatizes its law enforcement powers, constitutional rights must attach to the delegated powers *in their entirety*, not merely to the specific actions dictated by the state. The reason, to repeat, is straightforward: otherwise, core rights established by the Fourth through Eighth Amendments could easily be evaded and essentially erased.

The law enforcement principle is an anti-evasion principle. It's a matter of preserving the Bill of Rights against circumvention. I will not say more here defending it. Instead I will assume its premises and return now to private colleges' Title IX sexual assault hearings.

IV. Do Today's Campus Sexual Assault Hearings Violate Due Process?

A. Which Procedures Are Subject to Due Process Analysis?

Which procedures in campus sexual assault hearings must satisfy constitutional due process requirements—only those specifically mandated by the government, or all the procedures used by a school when it complies with a governmentally imposed duty to prosecute and adjudicate? We are now in a position to answer this question. In the last section, we identified two core principles:

(1) Inducement principle. *Governments cannot purposely induce private parties to take actions that would violate constitutional rights if state actors took those actions themselves.*

(2) Law enforcement principle. *If government requires or induces a private party to engage in law enforcement, all relevant constitutional restraints apply.*

Under principle (1), those procedural rules specifically mandated by the Dear Colleague letter for Title IX hearings must plainly satisfy due process—for example, the standard of proof. Principle (2), however, reaches further. As we've just seen, under principle (2), if it applies, private schools' Title IX hearings pursuant to procedures adopted as a result of the Dear Colleague letter would have to satisfy due process in their entirety.

Does principle (2) apply here? Did the Dear Colleague letter require schools to engage in law enforcement?

The answer is clearly yes. The Dear Colleague letter required schools to investigate, charge, adjudicate, and punish law-breaking conduct—the very definition of law enforcement.

It's important to reemphasize the change effected by the Dear Colleague letter on just this point. As noted earlier, prior to 2011, by OCR's own express acknowledgment, a school "was under no obligation to conduct an independent investigation" in cases involving "a possible violation of the penal law, the determination of which is the exclusive province of the police and the office of the district attorney."[146] The Dear Colleague letter reversed this position. Under the letter, in every case where schools have reason to know of a "possible" incident of "sexual violence," they must investigate that offense, charge the alleged perpetrator if sufficient evidence is found, adjudicate the charge, and impose significant punishment, potentially including expulsion, on a student found guilty.[147] In short, schools used to be able to leave law enforcement to state law enforcement officers, if they chose; under the Dear Colleague letter, they had to do it themselves.

The language of the Title IX bureaucracy may be calculated to avoid this appearance: for example, students are usually said to be found *responsible* rather than *guilty*; the word *charge* is rarely used; the word *crime* is almost never used.[148] But there can be no doubt that, pursuant to the Dear Colleague letter, campus Title IX hearings all over the country were (and still are) discharging core law enforcement functions that previously could be left to the police.

Some may feel that this conclusion denies or undermines Title IX's status as a civil rights statute. Campus sexual assault hearings are not about law enforcement, some might say; they're about educational equality.

The dichotomy is a false one. The question is not either-or. Under the Dear Colleague letter, Title IX remained of course an equality statute, but OCR was pursuing Title IX's equality objectives by compelling schools to do law enforcement on the federal government's behalf.

It is true that universities do not, in their Title IX hearings, expressly decide whether state law has been violated, but only whether school disciplinary codes have been violated. And on occasion, students are found guilty on the basis of conduct that would not violate local criminal (or even tort) law. A case like *Brandeis*, which involved kissing a sleeping boyfriend, might be an illustration. If schools are merely enforcing their own regulations, and if those regulations cover conduct that doesn't violate local criminal or tort law, doesn't that show that Title IX hearings are *not* enforcing the law?

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146. *See supra* note 36.

147. *See supra* notes 40, 47 and accompanying text.

148. *See, e.g.*, Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 595 (D. Mass. 2016) (observing use of the term "responsible" in the Brandeis handbook); Doe v. Brown Univ., 166 F. Supp. 3d 177, 193 (D.R.I. 2016) (observing use of the terms "responsible" and "violation" in Brown's code of conduct); Tsuruta v. Augustana Univ., No. 4:15-CV-04150-KES, 2015 WL 5838602, at *6 (D.S.D. Oct. 7, 2015) (referring to proof of a "violation" as required before a "resolution proceeding" may be initiated).

On the contrary, it confirms and compounds the problem: the Dear Colleague letter had universities enforcing federal law in just the same way Congress characteristically has administrative agencies enforce federal law.

Congress frequently sets out a general statutory prohibition (for example, employers must not subject employees to unsafe working conditions),[149] instructing an administrative agency first to enact regulations defining that prohibition, and then to investigate, charge, adjudicate, and punish violations thereof.[150] When agencies follow these directives, they are plainly enforcing the law, however broadly or narrowly they choose to define the prohibition Congress has established for them.

In exactly the same way, the Dear Colleague letter told schools they had to enact regulations proscribing "sexual assault" or "sexual violence"—terms that undoubtedly cover core acts of criminal and tortious assault and that are in turn further defined by the Department of Education to include all unconsented-to sexual activity.[151] Schools were then told to investigate, adjudicate, and punish every alleged instance of sexual violence, so defined. This is the very model of *regulatory* or *administrative* law enforcement: schools are positioned here, in relation to the Department of Education, exactly as administrative agencies are positioned in relation to Congress.

Just as OSHA is doing law enforcement on Congress's behalf when its workplace safety regulations go beyond local criminal or tort law, so too are schools doing law enforcement on OCR's behalf when their sexual assault regulations go beyond local criminal or tort law. The Dear Colleague letter, not metaphorically but literally, turned schools all over the country into federal regulatory field agents.[152]

Does this mean that every employer in the country, directed by federal statute to police its employees' compliance with federal laws, is a "state actor"? Must every Title VII workplace harassment hearing necessarily provide constitutional due process? No.

The distinction between mere law compliance and law enforcement is critical here. All laws require compliance; few impose on private parties duties of law enforcement. Speed limit laws require you to obey the speed

149. *E.g.*, 29 U.S.C. § 654(a)(1) (2012) ("Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . . .").

150. *See, e.g.*, *id.* § 655 (authorizing and establishing procedure for promulgation, modification, and revocation of occupational safety and health regulations); *id.* § 657 (authorizing inspections, investigations, and record-keeping); *id.* § 659 (outlining enforcement procedure).

151. *See supra* note 52.

152. Moreover, several states have passed statutes requiring schools to enact "affirmative consent" definitions of sexual assault. *See, e.g.*, CAL. EDUC. CODE § 67386(a)(1); *see generally 50 States of Consent*, AFFIRMATIVE CONSENT, http://affirmativeconsent.com/affirmative-consent-laws-state-by-state [https://perma.cc/4P32-GRZ5] (maintaining a list of state affirmative consent laws). In such states, schools are doubly engaged in government-mandated law enforcement in their sexual assault hearings.

limit, but they don't require you to enforce the speed limit against anyone else. (That's the job of the police—of law enforcement.) Compliance means discharging one's *own* obligations under a law; enforcement means policing, adjudicating, and punishing *others'* violations.[153]

The Dear Colleague letter turned schools into law enforcers in just this sense. The letter not only required schools to ensure that *they themselves* complied with Title IX—ensuring, that is, that their officers, supervisors, and other agents did not discriminate. More than this, it required schools to police, adjudicate, and punish sexual assaults committed by *third parties*, namely their students. Students are not a university's agents.[154] By contrast, employees *are* their employer's agents.[155] Hence, while Title VII demands law compliance from employers, the Dear Colleague letter had universities engaged in paradigmatic law *enforcement*.

Thus, in every Title IX sexual assault hearing conducted as a result of the Dear Colleague letter, due process applies. Not only must the specific procedural mandates of the Dear Colleague letter satisfy due process. The entire adjudicatory process must do so as well.

A judge that so held today, although contradicting several district courts, would not be without precedent. In 1969, New York passed a statute requiring every private college in that state to enact "'rules and regulations for the maintenance of public order on college campuses,'" including providing for "'suspension, expulsion or other appropriate disciplinary action' for student violators."[156] In 1970, twenty-four students were expelled from a private college on Staten Island under rules the school had enacted pursuant to that statute.[157] The students brought a due process claim.[158] The district judge dismissed for lack of state action, but the Second Circuit reversed.[159]

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153. The same distinction—between law compliance and law enforcement—underlies *Printz v. United States*, which holds that while Congress may require states to comply with laws of general applicability, it may not require states to "implement," "enact or administer a federal regulatory program." 521 U.S. 898, 925, 933 (1997) (citing New York v. United States, 505 U.S. 144, 188 (1992)).

154. *See* Miles v. Washington, No. CIV-08-166-JHP, 2009 WL 259722, at *4 (E.D. Okla. Feb. 2, 2009) ("The students are not agents of the school and their actions cannot be considered the actions of the school."); Bruneau v. S. Kortright Cent. Sch. Dist., 935 F. Supp. 162, 171 n.7 (N.D.N.Y. 1996) ("[S]tudents are not agents of the school."); Hanson v. Kynast, 494 N.E.2d 1091, 1095 (Ohio 1986) ("[A] student is not an agent of a university . . . .").

155. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (AM. LAW INST. 2006) ("The elements of common-law agency are present in the relationship[] between employer and employee . . . .").

156. Coleman v. Wagner Coll., 429 F.2d 1120, 1122 (2d Cir. 1970) (quoting N.Y. EDUC. LAW § 6450 (McKinney 2016) (repealed 2004)).

157. *Id.* at 1121–22.

158. *Id.* at 1123.

159. *Id.* at 1123, 1125.

A two-judge majority held that, although the statute on its face only required schools to have a disciplinary code—saying nothing, in other words, about what the codes should prohibit—further inquiry into the statute's intent and application was warranted:

> [S]pecifically, section 6450 may [have been] intended or applied as a command to the colleges of the state to adopt a new, more severe attitude toward campus disruption and to impose harsh sanctions on unruly students. The Governor's Memorandum approving section 6450 referred to an "intolerable situation on the Cornell University Campus" and spoke of "the urgent need for adequate plans for student-university relations." . . . *If these considerations have merit and section 6450 was intended to coerce colleges to adopt disciplinary codes embodying a "hard-line" attitude toward student protesters, it would appear that New York has indeed "undertaken to set policy for the control of demonstrations in all private universities" and should be held responsible for the implementation of this policy.*[160]

Reactions at other New York schools, said the majority, would be relevant on remand. "A reasonable and widespread belief among college administrators," held the court, "that section 6450 required them to adopt a particular stance toward campus demonstrators would seem to justify a conclusion that the state intended for them to pursue that course of action. And this intent, if present, would provide a basis for a finding of state action."[161]

The third judge was Henry Friendly, who, concurring, said that state action was already established and that no further inquiry was necessary:

> [D]o not rules of private colleges framed in response to a state mandate have a significantly different symbolic appearance than rules formulated in the absence of such a statute? . . . [O]bjections to the very existence of a detailed code would be met by the answer that one was state-compelled. When a state has gone so far in directing private action that citizens may reasonably believe this to have been taken at the state's instance, state action may legitimately be found even though the state left the private actors almost complete freedom of choice.[162]

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160. *Id.* at 1124–25 (emphasis added) (citations omitted).

161. *Id.* at 1125.

162. *Id.* at 1126–27 (Friendly, J., concurring). In 1988, the Second Circuit returned to the same statute and found no state action in a private college's disciplinary proceedings, on the grounds that the statute contained nothing about the content of the required disciplinary codes, that "the state's role under the [statute] has been merely to keep on file rules submitted by colleges and universities," that the state "has never sought to compel schools to enforce these rules and has never even inquired about such enforcement," and that there was no "evidence whatsoever that any private college administrators anywhere in the State of New York believe, reasonably or not, that the [statute] requires that particular sanctions be imposed . . . ." Albert v. Carovano, 851 F.2d 561, 568, 570 (2d Cir. 1988) (en banc). What OCR has done is obviously distinguishable.

The Dear Colleague letter presents a striking parallel, except that the federal government went much further than the New York legislature did. The federal government unquestionably "set policy"—an explicit, detailed sexual assault policy—for all private universities; it unquestionably demanded that schools adopt "a 'hard-line' attitude"; it dictated important procedural rules that schools had to incorporate into their disciplinary codes; and it unquestionably warned schools to "impose harsh sanctions" on violators, at the peril of losing their federal funding. Under the Second Circuit's reasoning, the federal government was therefore "responsible for the implementation of this policy."[163]

B. The Chief Due Process Requirements for Title IX Sexual Assault Hearings

Outside of criminal law, where strict and well-known procedural rules govern, due process requirements are said to be decided by a "balancing test" under *Mathews v. Eldridge*.[164] As everyone knows, however, "balancing tests" can generate virtually any outcome a decision maker wants.[165] The result is that little can be said with certainty in this area, and everything will ultimately depend on the instincts, attitudes, and ideologies of the particular judges who make the final determinations.[166] All the same, there are some procedural rules that serve as bedrock in our system. Accordingly, the following sections will identify those bedrock rules and, with respect to other matters, will highlight the most prominent issues, rather than trying definitively to resolve them.

1. Notice and Hearing.—The most fundamental, minimal requirements of due process are notice and a hearing.[167] The Supreme Court has insisted

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163. *Id.*

164. 424 U.S. 319, 334–35 (1976); *see, e.g.*, Turner v. Rogers, 564 U.S. 431, 444–48 (2011) (applying the *Mathews* factors to a civil contempt proceeding).

165. *See* Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 645 (1988):

> If we take balancing seriously, as a legitimate means of deciding cases, we not only invite the possibility that different judges may treat the same case differently, we abandon the grounds upon which to consider this situation problematic. The internal logic of balancing is not offended by this state of affairs; different judges mean different world views, and different world views are acceptable.

166. *See* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1278 (1975) (describing the procedural balancing test as "uncertain and subjective").

167. *See Mathews*, 424 U.S. at 348 ("The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" (alteration in original) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring))); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("The fundamental requisite of due process of law is the opportunity to be heard." (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914))).

on these requirements even in public high school disciplinary proceedings.[168] In 1998, a federal appellate court held that "procedural due process" on college campuses (in a state school) required "adequate notice, definite charge, and a hearing . . . with all necessary protective measures."[169] Thus, inquisitorial processes like those described in *Doe v. Brandeis*—where, as summarized earlier, the accused had no right to be informed of the charges against him, no right to confront the evidence against him, and no hearing in its usual sense—are plainly unconstitutional.

It defies belief that courts would permit a governmental agency to have students judged guilty of sexual assault, to have a permanent notation thereof placed in their academic records, and to impose other punishment therefor, without at a minimum informing the accused of the allegations against him and providing a hearing at which he could confront and rebut the evidence against him. But that's exactly what the Department of Education was doing through the Dear Colleague letter. The only difference is that DOE achieved this result by inducing private schools like Brandeis to take the unconstitutional actions on its behalf.

Kafka-esque failures of notice, sometimes accompanied by significant threats to free speech, are disturbingly common in the Title IX process. Professor Laura Kipnis of Northwestern University has written of being charged with a Title IX violation after publishing an essay in the *Chronicle of Higher Education*.[170] Her university hired a team of lawyers to investigate

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168. Goss v. Lopez, 419 U.S. 565, 579 (1975) ("At the very minimum, . . . students facing suspension . . . must be given *some* kind of notice and afforded *some* kind of hearing."). Due process applies only when "property" or "liberty" interests are threatened, but the law is clear under *Goss*—and has been clear for decades—that university disciplinary proceedings threaten such interests, at least where the student faces suspension or expulsion. *See, e.g.*, Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 633 (6th Cir. 2005) ("[T]he Due Process Clause is implicated by higher education disciplinary decisions."); Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975) (applying *Goss* to a school disciplinary hearing); Doe v. Ohio State Univ., 136 F. Supp. 3d 854, 865 (S.D. Ohio 2016) ("Disciplinary processes [at universities] implicate due process because they have the potential to deprive a student of either 'the liberty interest in reputation' or 'the property interest in education benefits temporarily denied.'" (quoting *Goss*, 419 U.S. at 576)). *But cf.* Krainski v. Nevada *ex rel.* Bd. of Regents, 616 F.3d 963, 971 (9th Cir. 2010) (holding that it was not "clearly established" that students *not* "suspended or expelled" had a right to due process in disciplinary hearings).

169. Woodis v. Westark Cmty. Coll., 160 F.3d 435, 440 (8th Cir. 1998) (quoting Jones v. Snead, 431 F.2d 1115, 1117 (8th Cir. 1970)); *see also, e.g.*, Hennessy v. City of Melrose, 194 F.3d 237, 250 (1st Cir. 1999) ("A hearing—or the offer of one—usually is necessary when a school takes serious disciplinary action against a student." (emphasis omitted)); Gorman v. Univ. of R.I., 837 F.2d 7, 13 (1st Cir. 1988) ("Indeed, in student discipline cases, since [*Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961)], the federal courts have uniformly held that fair process requires notice and an opportunity to be heard before the expulsion or significant suspension of a student from a public school."); Jenkins v. La. State Bd. of Educ., 506 F.2d 992, 1003 (5th Cir. 1975) ("There is no question but that a student charged with misconduct has a right to an impartial tribunal.").

170. Laura Kipnis, *My Title IX Inquisition*, CHRON. HIGHER EDUC. (May 29, 2015), http://chronicle.com/article/My-Title-IX-Inquisition/230489/ [https://perma.cc/U2RJ-QPY6].

the charges against her.[171] These lawyers, when they contacted Professor Kipnis, refused to provide her with the complaint and initially refused to tell her what she had been accused of.[172] Similarly, in *Brandeis*, the accused party had to guess at the accusations against him through the questions put to him by the investigator.[173]

Yale's "informal complaint" process allows a Title IX officer to investigate complaints without telling the accused student what he has been accused of doing or who has accused him.[174] At San Diego State University, administrators sent out a campus-wide email warning of an alleged sexual assault and naming the accused student,[175] but again, the school refused to tell the accused student not only who had accused him, but what he had been accused of.[176] Unsatisfied by the student's responses to the unspecified allegations, the school ordered him to leave campus; only later, having found out the identity of his accuser, was the student able to submit evidence that led to his exoneration.[177] There should be little doubt: these procedures are unconstitutional.

2. If a Hearing Is Held.—Assuming a school does hold a hearing, what are its minimal due process conditions?

Let's first consider cross-examination: as noted earlier, OCR specifically warned schools not to permit cross-examination of the complainant.[178] Instead, typically, following OCR recommendations, schools

171. Jonathan H. Adler, *Northwestern's Kipnis Cleared in Title IX Investigation*, WASH. POST: VOLOKH CONSPIRACY (June 1, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/01/northwesterns-kipnis-cleared-in-title-ix-investigation/ [https://perma.cc/ZZ9F-ZJKL].

172. *See* Erik Wemple, *Northwestern University Professor Laura Kipnis Details Title IX Investigation over Essay*, WASH. POST (May 29, 2015), https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/05/29/northwestern-university-professor-laura-kipnis-details-title-ix-investigation-over-essay/ [https://perma.cc/D6CU-XK8L] ("Kipnis wasn't allowed to have an attorney with her for her meeting with investigators; she wasn't apprised of her charges before the meeting; she had to fight with the investigators over recording the session.").

173. Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 583 (D. Mass. 2016) ("[I]t was not until February 2014, when John had his first interview with the Special Examiner, that he began to learn of the factual allegations behind the charges. Even then, John was forced to speculate based on the particular questions the Special Examiner asked him about certain incidents." (citation omitted)).

174. YALE UNIV., OFFICE OF THE PROVOST, UWC PROCEDURES 3 (2015), provost.yale.edu/sites/default/files/files/UWC%20Procedures.pdf [https://perma.cc/9TTD-JQDP].

175. Charles M. Sevilla, *Campus Sexual Assault Allegations, Adjudications, and Title IX*, 39 CHAMPION 16, 17 (2015) ("As soon as SDSU received notice of the complaining witness's sexual assault allegation, it sent an email blast across the campus warning of the threat he posed—naming him in the more than 20,000 emails.").

176. *Id.*

177. *Id.*

178. *See supra* Section I(B); QUESTIONS AND ANSWERS ON TITLE IX, *supra* note 53, at 31 ("strongly discourag[ing] a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence").

allow the accused to submit questions to a hearing panelist, who "screens" the questions and decides whether or in what words to pose them.[179]

Moreover, cross-examination is frequently prevented even as to other witnesses. At many schools, a Title IX investigator reports to the decision makers either in writing or orally about interviews he has conducted.[180] There is no requirement that these investigators record their interviews—indeed, as in Professor Kipnis's case, they may not even permit a recording to be made[181]—so there will be no independent way to verify that the investigator's report of what the witnesses said is accurate and complete. In such cases, the investigator presents hearsay summaries of statements allegedly made by other individuals, whom the accused student is never given an opportunity to confront or cross-examine directly.

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179. *See id.* ("A school may choose, instead, to allow the parties to submit questions to a trained third party (e.g., the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case."). Yale's policy allows "each party . . . to submit questions for the panel to ask the other party or witness. The panel, at its sole discretion, may choose which, if any, questions to ask." YALE UNIV., OFFICE OF THE PROVOST, *supra* note 174, at 6; *see also, e.g.*, UNIV. OF VA., APPENDIX A: PROCEDURES FOR REPORTS AGAINST STUDENTS 17, https://eocr.virginia.edu/appendixa [https://perma.cc/9LP4-C4LL] ("The parties may not directly question each another [sic] or any witness, although they may proffer questions for the Review Panel, which may choose, in its discretion, to pose appropriate and relevant questions to the Investigator, the parties and/or any witnesses."); UNIV. OF KAN., STUDENT NON-ACADEMIC CONDUCT PROCEDURES 9 (2015), http://policy.ku.edu/sites/policy.ku.edu/files/Non%20Academic%20Misconduct%20Procedures_Revised%208.21.15.pdf [https://perma.cc/2BEZ-C7RG] ("Only the Chair and Panel members are given absolute authority to directly question parties and witnesses. At the discretion of the Chair, parties may directly question witnesses and each other, but the Chair is empowered to have questions directed to the Chair, disallow or reframe any questions.").

180. *See, e.g.*, HARVARD UNIV., APPENDIX A3: OVERVIEW OF FAS PROCEDURES ON SEXUAL AND GENDER-BASED HARASSMENT BY STUDENTS 2, http://www.fas.harvard.edu/files/fas/files/appendix_a3_overview_of_fas_procedures_students.pdf [https://perma.cc/7HCL-K52S]:

> Once the [Investigator's] report has been given to the Complainant, the Respondent, and the Title IX Coordinator, the report is forwarded to the School's Administrative Board for consideration of discipline. The Administrative Board must accept as final the ODR report's findings of fact and its conclusions about policy violations; the Board's only role is to determine the appropriate discipline to administer in response to the violation.

Id.; UNIV. OF CAL., STUDENT ADJUDICATION MODEL FOR SEXUAL VIOLENCE & SEXUAL HARASSMENT CASES 10 (2016), https://students.ucsd.edu/_files/student-conduct/ucsd-sexual-violence-sexual-harassment-adjudication-implementing-procedures1-4-16.pdf [https://perma.cc/YMK7-M3XU] ("The Title IX investigator will be present at the appeal hearing. The Appeal Body may question the investigator . . . . The investigation report . . . will be entered as evidence at the appeal hearing.").

181. Kipnis, *supra* note 170:

> They told me, cordially, that they wanted to set up a meeting during which they would inform me of the charges and pose questions. . . . We finally agreed to schedule a Skype session in which they would inform me of the charges and I would not answer questions. . . . I said I wanted to record the session; they refused but said I could take notes.

At least one judge—in a Title IX case involving a state school—has found that both these limitations on cross-examination violated due process, but that opinion was reversed on appeal,[182] and the appellate court's ruling squares with existing case law. Prior to the recent Title IX controversies, several federal courts had held that due process does *not* require cross-examination in school disciplinary proceedings—or at least that the accused has no "right to unlimited cross-examination."[183] A school disciplinary hearing is not a criminal trial and should not be turned into one, especially given that litigation-style cross-examination can be extremely painful for victims of sexual assault.

A troubling consideration, however, is that campus sexual assaults frequently lack physical evidence or corroborating eye witnesses.[184] Indeed, this "absence of corroborating evidence" has served as the basis for arguments in favor of the preponderance of the evidence standard (discussed further below), on the theory that higher evidentiary standards "make it inevitable that date rapists will be frequently acquitted."[185] But if the evidence in a campus sexual assault trial consists solely or primarily of the complainant's statement, and especially if the burden of proof is lowered for that reason, cross-examination would be more critical than it might be in other disciplinary proceedings. In such a case, some opportunity to directly question the complainant, and challenge his or her statements, would seem essential to due process.

The ultimate question is what sort of cross-examination rights judges would insist on for a student if the Department of Education itself had conducted the hearing and, say, found the student guilty of sexual assault and therefore expelled him from his university. What an agency cannot constitutionally do itself, it cannot make private parties do.

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182. A California trial court found that the procedure employed by the University of California at San Diego was "unfair" because it did not allow the accused to cross-examine the complainant. Doe v. Regents of the Univ. of Cal., 210 Cal. Rptr. 3d 479, 494 (2016). Reversing, the appellate court observed that "there is no California or federal authority requiring an accused be permitted, in a disciplinary hearing, to directly question the complainant." *Id.* at 504.

183. Gorman v. Univ. of R.I., 837 F.2d 7, 16 (1st Cir. 1988) ("As for the right to cross-examination, suffice it to state that the right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases."); *see, e.g.*, Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987) ("Where basic fairness is preserved, we have not required the cross-examination of witnesses and a full adversary proceeding."); Winnick v. Manning, 460 F.2d 545, 549 (2d Cir. 1972) ("The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings.").

184. Lavinia M. Weizel, Note, *The Process That is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1649 (2012).

185. *See, e.g.*, Katherine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 691 (1999).

The same analysis applies to the other components of Title IX hearings, which vary from school to school. Some block lawyers from participating;[186] others permit it.[187] Almost no schools provide a lawyer to a student who can't afford one.[188] At some schools, accused students may call witnesses, while at others, that prerogative is vested in the hearing panel.[189] Due process analysis will demand that courts look at each case on its own facts, but the question should always be whether the procedures would satisfy due process were a federal agency conducting the hearing itself.

If courts are looking for a list of procedures to satisfy due process, they might do well to start with a case decided almost fifty years ago, when two state college students in Missouri had been suspended for allegedly participating in riots.[190] The court ordered the college to grant the students a new hearing with the following procedures:

(1) a written statement of the charges to be furnished each plaintiff at least 10 days prior to the date of the hearing;

(2) the hearing shall be conducted before the President of the college;

(3) plaintiffs shall be permitted to inspect in advance of such hearing any affidavits or exhibits which the college intends to submit at the hearing;

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186. *See, e.g.*, *Conduct Process Settings*, U. NOTRE DAME, http://dulac.nd.edu/community-standards/process/settings/#hearing [https://perma.cc/J6JP-8G46] ("The student may be accompanied, but not represented, by a University Support Person at the Hearing. A University Support Person may be any University of Notre Dame student, faculty or staff member, with the exception of parents and attorneys. . . . The student may not proceed through an attorney."); *see also* Allie Grasgreen, *Students Lawyer Up*, INSIDE HIGHER ED (Aug. 26, 2013), https://www.insidehighered.com/news/2013/08/26/north-carolina-becomes-first-state-guarantee-students-option-lawyer-disciplinary [https://perma.cc/4WVW-8SZ3] ("Previously, institutions in the 17-campus UNC System allowed lawyers to attend hearings only when a student was also being tried in criminal court, and only to advise. (Most universities operate this way, or do not permit lawyers at all.)").

187. *E.g.*, UNIV. OF KAN., STUDENT NON-ACADEMIC CONDUCT PROCEDURES 8 (2015), http://policy.ku.edu/sites/policy.ku.edu/files/Non%20Academic%20Misconduct%20Procedures_Revised%208.21.15.pdf [https://perma.cc/Y69M-YFUW] ("The complainant and the respondent shall submit to the Vice Provost for Student Affairs, or designee, . . . the name of their advisor(s) and if s/he is an attorney . . . .").

188. On the contrary, the current debate is whether students will be allowed to be represented by attorneys that the *students* pay for. *See* Grasgreen, *supra* note 180 ("The legislation, signed into law on Friday, guarantees any student at a public institution in the state the right to legal representation, *at the student's expense*, during campus judiciary proceedings." (emphasis added)); Tovia Smith, *For Students Accused of Campus Rape, Legal Victories Win Back Rights*, NPR (Oct. 15, 2015), http://www.npr.org/2015/10/15/446083439/for-students-accused-ofcampus-rape-legal-victories-win-back-rights [https://perma.cc/NB6W-KR5R] (discussing the bill for the Safe Campus Act, which would require that institutions "permit each party to the proceeding to be represented, *at the sole expense of the party*, by an attorney or other advocate for the duration of the proceeding . . . ." H.R. 3403, 114th Con. § 164(a)(4) (2015) (emphasis added)).

189. *See, e.g.*, YALE UNIV., OFFICE OF THE PROVOST, *supra* note 174, at 6 ("At its sole discretion, the panel may request the testimony of additional witnesses.").

190. Esteban v. Cent. Mo. State Coll., 277 F. Supp. 649, 650–51 (W.D. Mo. 1967).

(4) plaintiffs shall be permitted to have counsel present with them at the hearing to advise them;

(5) plaintiffs shall be afforded the right to present their version as to the charges and to make such showing by way of affidavits, exhibits, and witnesses as they desire;

(6) plaintiffs shall be permitted to hear the evidence presented against them, and plaintiffs (not their attorney) may question at the hearing any witness who gives evidence against them;

(7) the President shall determine the facts of each case solely on the evidence presented at the hearing therein and shall state in writing his finding as to whether or not the student charged is guilty of the conduct charged and the disposition to be made, if any, by way of disciplinary action;

(8) either side may, at its own expense, make a record of the events at the hearing.[191]

These procedures obviously need updating. Instead of the university president, cases should be tried before impartial decisionmakers. Instead of access to "affidavits" or "exhibits," the accused should be given prehearing access to the investigator's report. Cross-examination of the complainant should be done by someone representing the accused, not by the accused himself. Both sides should be entitled to call witnesses. And modern conceptions of due process might require that the school provide an attorney to students who can't afford one.

3. Competence and Impartiality.—There are, however, still deeper and more structural problems in campus Title IX rape adjudications: in particular, problems of basic competence and partiality. Sexual assault is not like plagiarism, a matter well within academic expertise. Not to put too fine a point on it, but faculty, administrators, and students often have little idea what they're doing when called on to judge rape allegations, which can lead to errors in both directions.

In one Title IX case, a faculty member reportedly had to ask the complainant to explain anal sex.[192] At many schools, fellow students—who may well know the parties or at any rate know people who know them—sit

191. *Id.* at 651–52.

192. Vanessa Grigoriadis, *Meet the College Women Who Are Starting a Revolution Against Campus Sexual Assault*, N.Y. MAG. (Sept. 21, 2014), http://nymag.com/thecut/2014/09/emma-sulkowicz-campus-sexual-assault-activism.html [https://perma.cc/L9JK-H7KE] (quoting a sexual assault claimant as saying that judges "kept asking me to explain the position I was in . . . . At one point, I was like, 'Should I just draw you a picture?' So I drew a stick drawing," and stating that "one of the three judges even asked whether [the accused] used lubricant, commenting, 'I don't know how it's possible to have anal sex without lubrication first'").

as judges.[193] In one case, a college bookstore manager served as a judge.[194] "Our disciplinary and grievance procedures," as the American Council on Education—which represents 1,700 higher education institutions—has put it, "were designed to provide appropriate resolution of institutional standards for student conduct, especially with respect to academic matters. They were never meant for misdemeanors, let alone felonies."[195]

The truth is that academic institutions are self-interested parties in their own campus rape cases. Their self-interest can bias them in some cases against victims, in others against the accused. Cases currently pending may reveal egregious instances where sexual assailants have been falsely exonerated or insufficiently punished because of their connection to important school sports teams.[196] But as pressure has mounted from the opposite direction, schools today can have powerful incentives—legal and reputational—to find guilt.[197]

Courts have acknowledged this possibility, while rejecting it as a basis for holding that a school violated Title IX or the Constitution. "It may well be," stated one district court recently, "that a desire to avoid Title IX liability

193. *See, e.g.*, Office of the Provost, *Title IX FAQs*, YALE U. (Feb. 3, 2014), http://provost.yale.edu/title-ix/faq [https://perma.cc/7WE7-3EHA] ("Undergraduate, graduate, and professional students are appointed as members of the UWC and sit on formal hearing panels reviewing student complaints."); Sara Ganim & Nelli Black, *An Imperfect Process: How Campuses Deal with Sexual Assault*, CNN (Dec. 21, 2015), http://www.cnn.com/2015/11/22/us/campus-sexual-assault-tribunals/ [https://perma.cc/9JZY-9N7W] ("From campus to campus, the process varies. Some have students on the panels, some don't.").

194. *See* Walt Bogdanich, *Reporting Rape, and Wishing She Hadn't*, N.Y. TIMES (July 12, 2014), http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html [https://perma.cc/3C2Q-E9GY] ("The [panel] chairwoman, Sandra E. Bissell, vice president of human resources, was joined by Brien Ashdown, an assistant professor of psychology, and Lucille Smart, director of the campus bookstore, who the school said had expressed an interest in serving.").

195. Letter from Molly C. Broad, President, American Council on Educ., to Senators Tom Harkin and Lamar Alexander, Comm. on Health, Educ., Labor, and Pensions 2 (June 25, 2014), http://www.acenet.edu/news-room/Documents/Letter-Senate-HELP-Sexual-Assault-Hearing.pdf [https://perma.cc/8R89-E8BB].

196. *See, e.g.*, Nick Martin, *Lawsuit Alleges Baylor Officials Ignored Multiple Claims of Sexual Assault*, WASH. POST (Mar. 31, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/03/31/lawsuit-alleges-baylor-officials-ignored-multiple-claims-of-sexual-assault/ [https://perma.cc/7S2X-DPCZ] (describing lawsuit allegations that school officials ignored multiple sexual assault reports against then-football player Tevin Elliot, who is now serving a twenty-year sentence for rape); Anita Wadhwani & Matt Slovin, *Two More Women Join University of Tennessee Sexual Assault Lawsuit*, TENNESSEAN (Feb. 2, 2016), http://www.tennessean.com/story/sports/college/ut/2016/02/24/women-join-ut-sexual-assault-suit/80860462/ [https://perma.cc/L74K-WATB] (summarizing allegations including that a football player was allowed to reenroll "even after an internal investigation found that he had assaulted one of the new plaintiffs").

197. *See* Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 71, 74–75 (describing OCR pressure on colleges to reinvestigate cases where students have been previously found not guilty); Sara Lipka, *The 'Fearmonger'*, CHRON. HIGHER EDUC. (Nov. 20, 2011), http://chronicle.com/article/TheFearmonger/129833 [https://perma.cc/R9HK-8RC9] (describing "panic" over the threat of federal investigation).

to the alleged victims of sexual assault or an effort to persuade the DOE and others that it takes sexual assault complaints seriously caused Columbia to 'maladminister' Plaintiff's disciplinary hearing, as he alleges," but "that is not discrimination against Plaintiff because of sex."[198] Nor could a due process claim be stated, according to the court, because "constitutional claims may be brought only against 'state actors.'"[199]

Some Title IX advocates argue that these biases are good for the process. "If there were only pressure one way," according to Michelle Anderson, "you'd have a problem. But you have pressure on both sides," and that "will lead to more equitable and fair outcomes."[200] It's disturbing and disheartening for a law professor to make this kind of argument. Two conflicts of interest do not equal impartiality. A more likely result is that in some schools, or in some cases, one bias will dominate, and in others the other—undermining everyone's prospects for a fair adjudication.

One piece of the partiality problem may be the government-mandated creation at every school of a Title IX office vested with training, prosecutorial, investigatory, and adjudicatory authority.[201] Title IX bureaucracies are a growth industry in the academy today,[202] and the "training" they offer is sometimes less than fully objective. At Stanford, training materials given to student jurors advised them of certain "indicators" on the part of an accused man that he is an "abuser," which included "feel[ing] victimized" by the accusation and "act[ing] persuasive and logical."[203] At Ohio State, the Title IX office's training materials for hearing judges included:

> statements like a "[v]ictim centered approach can lead to safer campus communities"; "[s]ex offenders are overwhelmingly white males"; "[i]n a large study of college men, 8.8% admitted rape or attempted rape"; "[s]ex offenders are experts in rationalizing their behavior"; and

198. Doe v. Columbia Univ., 101 F. Supp. 3d 356, 371 n.7 (S.D.N.Y. 2015).

199. *Id.* at 368 n.5.

200. Michelle Anderson, Dean, CUNY Sch. of Law, Transcript of Debate on Courts, Not Campuses, Should Decide Sexual Assault Cases, INTELLIGENCE SQUARED U.S. 28 (Sept. 17, 2015), http://www.intelligencesquaredus.org/debates/courts-not-campuses-should-decide-sexual-assault-cases [https://perma.cc/GEN7-4VWG].

201. DEAR COLLEAGUE LETTER, *supra* note 33, at 7; *see* Elizabeth Bartholet et al., *supra* note 118, (expressing concern about vesting investigatory, prosecutorial, and adjudicatory authority in "a Title IX compliance office rather than an entity that could be considered structurally impartial").

202. Gersen & Suk, *supra* note 37, at 904 ("Schools must employ Title IX coordinators to oversee their compliance . . . . At some schools this is a single person, but at many schools this entails an entire office, staff, and structure dedicated to implementing federal directives regarding regulation of sexual conduct.").

203. Mike Armstrong & Daniel Barton, Opinion, *A Thumb on the Scale of Justice*, STAN. DAILY (Apr. 29, 2011), http://www.stanforddaily.com/2011/04/29/op-ed-a-thumb-on-the-scale-of-justice/ [https://perma.cc/965X-AYYJ].

> "22-57% of college men report perpetrating a form of sexually aggressive behavior."[204]

In a recent case involving Washington and Lee University, the plaintiff, found guilty of sexual intercourse without consent, asserted that:

> [the complainant had] attended a presentation put on by W & L's Title IX Officer, Lauren Kozak ("Ms. Kozak"). During Ms. Kozak's presentation, she introduced an article, *Is it Possible That There Is Something In Between Consensual Sex And Rape . . . And That It Happens To Almost Every Girl Out There?* . . . to make her point that "regret equals rape," and went on to state her belief that this point was a new idea everyone, herself included, is starting to agree with.[205]

An "impartial tribunal" is of course fundamental to due process,[206] but Washington and Lee is a private university, and so as usual, the court found that due process did not apply. "Had Plaintiff been enrolled at a public university," said the court, "he would have been entitled to due process and the proceedings against him might have unfolded quite differently."[207]

4. Burden of Proof.—Finally, there is the government-mandated standard of proof. Of the Dear Colleague letter's many procedural directives, its imposition of the preponderance of the evidence standard drew the most attention.[208]

There are three well-recognized standards of proof in the American legal system: "preponderance of the evidence," which is just another way of saying "more likely than not"; "clear and convincing evidence"; and criminal law's "beyond a reasonable doubt."[209] Some schools previously used the "clear and convincing evidence" standard in their disciplinary hearings—and still do, for nonsexual offenses.[210] Critics of the Dear Colleague letter argue that the

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204. Doe v. Ohio State Univ., No. 2:15-cv-2830, 2016 U.S. Dist. LEXIS 21064, at *8–9 (S.D. Ohio Feb. 22, 2016).

205. Doe v. Wash. & Lee Univ., No. 6:14-cv-00052, 2015 WL 4647996, at *3 (W.D. Va. Aug. 5, 2015).

206. *E.g.*, Jenkins v. La. State Bd. of Educ., 506 F.2d 992, 1003 (5th Cir. 1975) ("There is no question but that a student charged with misconduct has a right to an impartial tribunal.").

207. *Wash. & Lee*, 2015 WL 4647996, at *8.

208. *See, e.g.*, Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 145 (2013) ("Much of the media attention directed at the Dear Colleague Letter has focused on the preponderance of the evidence standard . . . ."); Valerie Bauerlein, *In Campus Rape Tribunals, Some Men See Injustice*, WALL ST. J. (Apr. 10, 2015), http://www.wsj.com/articles/in-campus-rape-tribunals-some-men-see-injustice-1428684187 [https://perma.cc/V4SZ-TNHJ] (discussing the preponderance of evidence standard at length and garnering over 700 comments and over 1,100 Facebook shares).

209. *See* Chmielewski, *supra* note 208, at 150 (discussing the standards of proof in the American legal system).

210. *See, e.g.*, *UWS Chapter 17: Student Nonacademic Disciplinary Procedures*, U. WIS. WHITEWATER § 17.12(4)(f) (2009), https://www.uww.edu/student-handbook/system-17intro [https://perma.cc/AQ2U-YBAU] (stating the evidentiary standard of clear and convincing for some

preponderance standard affords insufficient protection for students accused of sexual assault.[211]

But as the letter's supporters have pointed out, "more likely than not" is the most common and widely accepted burden of proof in the American legal system, used in the overwhelming majority of civil suits.[212] Outside of criminal law, the Supreme Court has found it unconstitutional only very occasionally, when an individual was threatened with extraordinary sanctions—for example, civil commitment, termination of parental rights, or deportation.[213] The preponderance standard is even used at criminal sentencing hearings.[214] Thus the notion that the preponderance standard might be unconstitutional in Title IX hearings faces steep obstacles.

The issue is not, however, quite open-and-shut.

The Court has frequently stated that "fundamental fairness" may require an "intermediate standard of proof" where the threatened penalty is grievous and involves "'stigma,'"[215] and lower courts have often applied this precept to "quasi-criminal" proceedings. "'[C]lear and convincing' evidence is required," a state supreme court has put it, "in various quasi-criminal proceedings or where the proceedings threaten the individual involved with . . . a stigma."[216] Clear and convincing evidence has been held required

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offenses but preponderance of the evidence for all sexual offenses); *XI. (B.) Procedures for Disciplinary Cases*, HARV. LAW SCH. (2016), http://hls.harvard.edu/dept/academics/handbook/rules-relating-to-law-school-studies/xii-administrative-board/b-procedures-for-disciplinary-cases-except-for-cases-covered-under-the-law-schools-interim-sexual-harassment-policies-and-procedures-see-appendix-viii/ [https://perma.cc/36V4-59T7] (establishing "clear and convincing evidence" as the standard for all disciplinary sanctions with the exception of sexual offenses).

211. *See, e.g.*, Statement, Comm. on Women in the Acad. Profession, Am. Ass'n Univ. Professors, Campus Sexual Assault: Suggested Policies and Procedures 371 (2012), https://www.aaup.org/file/Sexual_Assault_Policies.pdf [https://perma.cc/ED8T-SDLJ] ("The AAUP advocates the continued use of 'clear and convincing evidence' in . . . discipline cases as a necessary safeguard of due process and shared governance.").

212. Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 281, 290–91 (2016), http://www.yalelawjournal.org/forum/for-the-title-ix-civil-rights-movement-congratulations-and-cautions [https://perma.cc/N2DA-WH58] ("In reality the preponderance standard is used in the vast majority of cases, not only in internal disciplinary proceedings but also in other administrative or civil court proceedings and under other civil rights statutes that protect equality." (footnotes omitted)).

213. *See* Herman v. Huddleston, 459 U.S. 375, 389 (1983) (citing cases).

214. *See, e.g.*, United States v. Gerick, 568 F. App'x 405, 409 (6th Cir. 2014). *But cf.* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (requiring proof beyond a reasonable doubt for facts increasing potential maximum sentence).

215. Santosky v. Kramer, 455 U.S. 745, 756–57 (1982) (citing cases).

216. Riley Hill Gen. Contractor v. Tandy Corp., 737 P.2d 595, 602 (Or. 1987). In Chenega Mgmt. v. United States, 96 Fed. Cl. 556 (2010), the court observed that:

> The United States Court of Appeals for the Federal Circuit has held that a "quasi-criminal" claim requires the application of the clear and convincing standard. Recently, the United States Court of Federal Claims also has held that "clear and convincing" evidence is required to prove a violation of FAR 3.101–1, i.e., "[g]overnment business shall be conducted in a manner above reproach . . . with complete impartiality and with preferential treatment for none."

for violations of a city ordinance prohibiting conduct of a "criminal nature" but punishable only by a fine,[217] as well as for attorney disciplinary proceedings, at least where "bad faith" is at issue and the attorney faces suspension.[218] Title IX hearings would also seem to be quasi-criminal in nature.

The fact that Title IX hearings involve sex offenses may itself be important. In 2015, the Massachusetts Supreme Court held that the state's Sex Offender Registry Board (SORB) violated due process when it used the preponderance standard to adjudge the plaintiff a "level two sex offender," posing a "moderate risk" of re-offense.[219] Said the court:

> Although a preponderance standard is generally applied in civil cases, the clear and convincing standard is applied when "particularly important individual interests or rights are at stake." . . .
>
> . . . Balancing the *Mathews* factors, we conclude that sex offender risk classifications must be established by clear and convincing evidence in order to satisfy due process.
>
> . . . "Classification and registration entail possible harm to a sex offender's earning capacity, damage to his reputation, and, 'most important, . . . the statutory branding of him as a public danger.'" Internet dissemination . . . magnifies these consequences. Although the State has a strong interest in protecting the public from recidivistic sex offenders, allowing SORB to make classification determinations with a lesser degree of confidence does not advance that interest.[220]

The *SORB* case is hardly controlling in the Title IX context, but it can't be entirely ignored. Both SORB and Title IX hearings are noncriminal proceedings; both determine whether an individual is a sex offender; and both create a documentary record of a person's sex offender status, made available to others. Many individuals found guilty of sexual assault in Title IX hearings have also had their names disseminated over the media or Internet, subjecting

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Id. at 582 n.31 (alterations in original) (citations omitted).

217. City of Milwaukee v. Wilson, 291 N.W.2d 452, 459 (Wisc. 1980).

218. "In attorney suspension and disbarment cases, the finding of bad faith must be supported by clear and convincing proof." White v. Reg'l Adjustment Bureau, Inc., 632 F. App'x 234, 236 n.1 (5th Cir. 2016) (quoting Crowe v. Smith, 261 F.3d 558, 563 (5th Cir. 2001)). *But see, e.g.*, Jones v. Conn. Med. Examining Bd., 72 A.3d 1034, 1041 (Conn. 2013) (upholding the preponderance standard in physician license revocation proceeding); *see also* Steadman v. Sec. & Exch. Comm'n, 450 U.S. 91, 96–97 n.15 (1981) (upholding on statutory grounds the preponderance standard in SEC broker registration revocation proceedings, although noting that petitioner had not argued a constitutional violation).

219. Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 41 N.E.3d 1058, 1060–61 (Mass. 2015).

220. *Id.* at 1068–72 (citations omitted).

them to vilification and adverse consequences.[221] Indeed, from a certain point of view, the great accomplishment of the Dear Colleague letter was, under the aegis of an antidiscrimination statute, to turn every school in the country into a Sex Offender Registry Board.

Massachusetts SORB classifications, however, impinge on rights more severely than do sexual assault determinations under Title IX. For example, "level two sex offenders" must comply with self-reporting requirements whenever they move.[222] Failure to do so can lead to incarceration,[223] and offenders' names can be officially, publicly disseminated.[224]

But the potential consequences of a Title IX conviction of sexual assault are undoubtedly grievous and in some cases life-damaging. Students not only face expulsion and calumny; the expulsion and its reasons may be noted on their academic record, making it very difficult for them to complete their education because other schools won't admit them. The case for a higher standard of proof in the Title IX context probably comes down to the combination of these potentially life-damaging sanctions with the uncomfortable fact (mentioned earlier) that in campus sexual assault cases, there is frequently no evidence of the offense other than the complainant's statement.[225] Because such cases often come down to a "'he said/she said' conflict," critics have questioned using a proof standard that "requires a finding of responsibility even if the factfinder is almost 50% sure that the accused student is not guilty."[226]

Supporters of the Dear Colleague letter sometimes respond that a higher standard of proof would perpetuate the invidious calumny that rape victims are lying. According to Nancy Chi Cantalupo, applying a clear and

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221. *See, e.g.*, Richard Pérez-Peña, *At Yale, the Collapse of a Rhodes Scholar Candidacy*, N.Y. TIMES (Jan. 26, 2012), http://www.nytimes.com/2012/01/27/sports/ncaafootball/at-yale-the-collapse-of-a-rhodes-scholar-candidacy.html [https://perma.cc/U8P8-7L5C] (revealing the identity of a Yale student investigated for sexual assault while maintaining the confidentiality of the story's sources: "This account of the accusation against Witt . . . is based on interviews with a half-dozen people with knowledge of all or part of the story; they all spoke on the condition of anonymity because they were discussing matters that the institutions treat as confidential."); Cathy Young, *Columbia Student: I Didn't Rape Her*, DAILY BEAST (Feb. 13, 2015), http://www.thedailybeast.com/columbia-student-i-didnt-rape-her [https://perma.cc/Z9VB-RAAX] (describing social media attacks on a student acquitted of sexual assault at Columbia and stating that a "Tumblr post that began to circulate last September said, 'The name of Emma Sulkowicz's rapist is Jean-Paul Nungesser. Don't let him have any feeling of anonymity or security. Rapists don't get the luxury of feeling comfortable.'"); *supra* Section I.A (describing an alleged episode of this kind at Brandeis).

222. *Doe, SORB No. 380316*, 41 N.E.3d at 1065.

223. *Id.* at 1065–66 ("If a judge determines that incarceration is a more appropriate penalty for a noncompliant offender than a fine, the judge now must impose a mandatory minimum sentence of at least six months.").

224. *Id.* at 1066.

225. Weizel, *supra* note 178, at 1649.

226. Open Letter from Members of the Penn. Law Sch. Faculty, Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities 2 (Feb. 18, 2015), http://media.philly.com/documents/OpenLetter.pdf [https://perma.cc/J4JS-9NZY].

convincing proof standard to sexual assault cases would imply a "societal belief that victims lie," and "in the context of sexual violence, a systemic assumption that victims lie is a kind of gender-stereotyping that is widely recognized as a violation of equality rights . . . ."[227]

It's hard to know how to respond to this kind of argumentation. Undoubtedly rape victims have historically been[228]—and often still are—outrageously disbelieved and doubted.[229] But not all sexual assault claims are true; the question is what to do about that fact, and on that score Cantalupo's argument doesn't seem helpful. Indeed it seems badly mistaken.

First, higher standards of proof cannot be equated with systemic assumptions about accusers' veracity. For example, proof beyond a reasonable doubt isn't required in criminal law because of a "societal belief" that most witnesses or prosecutors are lying. It's required because some accusations are wrong, and the Constitution demands an extremely high degree of confidence when individuals face the special punishments and stigmatization associated with criminal liability. Similarly, a school like Yale, which requires clear and convincing evidence in cheating cases, does not do so because of a "systemic assumption" that the accusers, whoever they may be, are lying.

More fundamentally, it's difficult to understand how a school that used the clear and convincing evidence standard in *all* its disciplinary proceedings could possibly be said to be implying anything invidious about sexual assault complainants. Prior to the Dear Colleague letter, no school I know of singled out sexual assault cases for a higher proof standard than it applied in other cases. The schools previously using the clear and convincing standard for sexual assault cases did so for *all* serious disciplinary charges. The claim that such schools were implying anything special about sexual assault complainants seems based more on ideology than logic.

Perhaps the presumption of innocence itself is the issue here. Many Title IX activists feel that it is imperative not to question the validity of sexual assault claims,[230] suggesting a kind of reverse presumption—that all sexual

227. Cantalupo, *supra* note 212, at 289.

228. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1094 (1986); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1028–29 (1991).

229. Christopher Ingraham, *How a Vicious Cycle of Skepticism Keeps Cops from Treating Rape Seriously*, WASH. POST: WONKBLOG (Nov. 13, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/11/13/how-a-vicious-cycle-of-skepticism-keeps-cops-from-treating-rape-seriously/ [https://perma.cc/6MAE-CCYA].

230. *See, e.g.*, *Supporting a Survivor: The Basics*, KNOW YOUR IX, https://www.knowyourix.org/for-friends-and-fami/supporting-survivor-basics/ [https://perma.cc/M84L-MWQR] ("DO NOT: Question the validity of the victim's claims. . . . Having someone question whether or not a person was actually violated, assaulted, or raped is a huge insult that can shake a survivor to his or her core.").

assault claimants are, or must be assumed to be, victims. This way of thinking is sometimes explicitly embraced:

> In this book we will be using the term *victim* to refer to people who claim to have been sexually assaulted. Even if the alleged perpetrator was not found guilty, that does not mean that the person assaulted does not still feel like a victim. In fact, the victim may suffer from a more severe case of rape trauma . . . if she thinks that no one believes her.[231]

Note that over the course of these sentences, the person who "claim[s] to have been sexually assaulted" becomes, simply, "the person assaulted." If it's assumed that all rape complainants are rape victims, any proof standard will seem too high. The presumption of innocence will itself seem grotesque. "I'm really tired of people suggesting that you're somehow un-American if you don't respect the presumption of innocence," said adjunct law professor Wendy Murphy in 2006, as the Duke lacrosse sexual assault case was unfolding, "because you know what that sounds like to a victim? Presumption you're a liar."[232]

The reality and the problem is that some sexual assault claims are false. Unfortunately, it's impossible to know how many. An often-repeated claim asserts that only two percent of rape allegations are false,[233] but the figure seems to be one of those self-perpetuating statistics with no evidence behind it.[234] A 1994 study found that the true figure was closer to forty percent,[235] but that study is extremely controversial and subject to numerous criticisms.[236] Recently, it has become common to assert that a 2%–8% false-reporting rate is the "accepted" figure,[237] but again acceptance seems to mean only that the figure is repeatedly stated; the analysis putatively supporting it appears to be highly misleading.[238]

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231. CAROL BOHMER & ANDREA PARROT, SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION 5 (1993).

232. STUART TAYLOR JR. & KC JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE 166 (2007).

233. *See, e.g.*, DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 125 (1997); Torrey, *supra* note 227, at 193.

234. *See* RAPE INVESTIGATION HANDBOOK 237–40 (John O. Savino & Brent T. Turvey eds., 2011) (discussing studies contradicting the 2% figure).

235. Eugene J. Kanin, *False Rape Allegations*, 23 ARCHIVES OF SEXUAL BEHAV. 81, 84 (1994).

236. *See, e.g.*, Philip N.S. Rumney, *False Allegations of Rape*, 65 CAMBRIDGE L.J. 128, 139 (2006).

237. *E.g.*, Donna Zuckerberg, *He Said, She Said: The Mythical History of the False Rape Allegation*, JEZEBEL (July 30, 2015), http://jezebel.com/he-said-she-said-the-mythical-history-of-the-false-ra-1720945752 [https://perma.cc/DB2Z-WF42] ("The most commonly accepted statistic is that 2–8 percent of rape allegations are false.").

238. *See* Francis Walker, *How to Lie and Mislead with Rape Statistics: Part 2*, DATA GONE ODD (Jan. 27, 2015), http://www.datagoneodd.com/blog/2015/01/27/how-to-lie-and-mislead-with-rape-statistics-part-2 [https://perma.cc/N3M4-4TQH] (arguing that the 2%–8% figure is highly misleading).

A source that may be worth attending to on this point is the NCHERM Group, a vigorous supporter of the Dear Colleague letter reforms, an advocate of affirmative consent measures, and a leading firm in the provision of assistance to Title IX officers, including supplying investigators to schools.[239] In 2014, the partners of that group published an open letter warning "the public and the media" that "campus [sexual assault] complaints are not as clear-cut as the survivors at Know Your IX would have everyone believe" and that students are being found guilty when the evidence doesn't support it.[240] To illustrate, the open letter provided synopses of several cases the firm had been recently asked to investigate, including:

> A female student . . . had spread rumors by social media that she had been raped by a male student. When the rumors got back to the male student, he approached her about it, and she offered him a lengthy apology, and then put it in writing. We had to investigate nevertheless [because the Dear Colleague letter requires an investigation whenever school officials learn of a rape allegation], and she told us that they'd had a drunken hook-up that she consented to. She was fine with what happened. We asked her why she called it a rape then, and she said, "you know, because we were drunk. It wasn't rape, it was just rapey rape." We asked her if she was aware of what spreading such an accusation might do to the young man's reputation, and her response was "everyone knows it wasn't really a rape, we just call it that when we're drunk or high."
>
> . . . .
>
> A female student was caught by her boyfriend while cheating on him with another male student. She then filed a complaint that she had been assaulted by the male student with whom she had been caught cheating. The campus investigated, and the accused student produced a text message thread from the morning after the alleged assault. It read:
>
> Him: How do I compare with your boyfriend?
>
> Her: You were great
>
> Him: So you got off?
>
> Her: Yes, especially when I was on top

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239. *Welcome to The NCHERM Group, LLC*, NCHERM GROUP, LLC, https://www.ncherm.org [https://perma.cc/SCS2-MW9F]; Nancy Hogshead-Makar & Brett A. Sokolow, *Setting a Realistic Standard of Proof in Sexual-Misconduct Cases*, CHRON. HIGHER EDUC. (Oct. 15, 2012), http://chronicle.com/article/Setting-a-Realistic-Standard/135084 [https://perma.cc/E5LL-VMA6].

240. Open Letter from Brett A. Sokolow, President and CEO, NCHERM Grp., to Higher Education About Sexual Violence 5 (May 27, 2014), https://www.ncherm.org/wordpress/wp-content/uploads/2012/01/An-Open-Letter-from-The-NCHERM-Group.pdf [https://perma.cc/RD6U-PXFV] [hereinafter "NCHERM Open Letter"]; *see also* Gersen & Suk, *supra* note 36, at 934–35 (discussing the NCHERM Open Letter).

> Him: We should do it again, soon
>
> Her: Hehe
>
> . . . .
>
> A male student performed demeaning, degrading and abusive sexual acts on a female non-student. They engaged in BDSM, and he ignored her protests throughout the entire sexual episode, despite her screaming in obvious pain and trying to get away from him. She filed a grievance with the campus, and we soon discovered instant messages in which she consented just before the incident to exactly these acts, and agreed to forgo the use of a "safe word" common in BDSM relationships.[241]

These incidents are not offered as representative, and of course there are vastly more cases of actual sexual assault. In fact, it's conceivable that in each of the above cases there *was* an assault. The point and the worry, rather, is that, according to NCHERM, accused students are being found guilty in similar cases *notwithstanding* the lack of evidence, due to perceived governmental pressure: "We could go on and on with a litany of these complicated and conflicting cases. We hate that some of them provoke tired old victim-blaming tropes," but "[w]e hate even more that in a lot of these cases, the campus *is holding the male accountable in spite of the evidence—or the lack thereof—because they think they are supposed to, and that doing so is what OCR wants*."[242] If true, a higher standard of proof would ameliorate this problem.

The most forthright defense of the preponderance standard is also the simplest: that its benefits outweigh its costs. A "more likely than not" standard makes true claims of sexual assault easier to prove; that's a good thing. Unfortunately, it does the same with false claims. There's no getting around either of these facts. Under the "balancing test" prescribed by *Mathews*,[243] this price could be deemed perfectly defensible (after all, even false findings of guilt can serve valuable deterrence goals). An extreme version of this view was stated by an Oberlin student: "So many women get their lives totally ruined by being assaulted and not saying anything. So if one guy gets his life ruined, maybe it balances out."[244]

This position cannot be rejected out of hand. No metric exists for weighing the costs to innocent individuals falsely found guilty against the benefits of increased protection (assuming such increased protection resulted) for actual and potential sexual assault victims. There is no a priori

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241. NCHERM Open Letter, *supra* note 240, at 4–5.

242. *Id.* at 5 (emphasis added).

243. Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

244. Nara Schoenberg & Sam Roe, *Rape: the Making of an Epidemic*, BLADE, Oct. 10, 1993, at A9, https://news.google.com/newspapers?nid=1350&dat=19931010&id=w2NPAAAAIBAJ&sjid=XgMEAAAAIBAJ&pg=3761,2515343&hl=en [https://perma.cc/2DVE-QGX3].

basis for claiming that the former outweigh the latter. But running roughshod over the rights of people accused of crimes, or of conduct tantamount to crimes, seems once again more indicative of ideology than logic; it is hard to square with the fundamental commitments of American constitutionalism.

Moreover, those who engage in this kind of balancing should take into account a cost that's frequently overlooked: damage to the credibility of actual rape victims. Unreliable, closed-door campus sexual assault trials—conducted under a low standard of proof, using unrecognizably broad definitions of sexual assault, judged by incompetent personnel answerable to administrations that have obvious conflicts of interest—may well be reinforcing, not helping to overcome, skepticism about rape claims. As Catharine MacKinnon said years ago, "It is not in women's interest to have men convicted of rape who did not do it . . . . Lives are destroyed both by wrongful convictions and the lack of rightful ones, as the law and the credibility of women—that rare commodity—are also undermined."[245]

With a little ingenuity, and a little less ideology on both sides, new solutions might be found to deal with this problem. For example, upon meeting a lower standard of proof—whether a preponderance or something even lower than that, like "substantial evidence"—a student claiming sexual assault could be entitled to certain protective measures as well as medical, psychological, and legal assistance. At the same time, clear and convincing evidence could be held necessary before the accused could be seriously sanctioned—for example, suspended, expelled, or designated a sex offender on his educational record.[246]

Few judicial decisions have reached the question of the standard of proof required by due process in (public) university disciplinary hearings. One of the federal courts that did reach it—long before the current

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245. CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 131 (2005).

246. As an analogy, consider that, in many states, courts can issue domestic violence protective orders based on a preponderance standard, and in some, such orders may issue upon meeting a lower, "reasonable grounds" standard. AM. BAR ASSOC., COMM'N ON DOMESTIC & SEXUAL VIOLENCE, SEXUAL ASSAULT CIVIL PROTECTION ORDERS (CPOS) BY STATE (2015), https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Charts/SA%20CPO%20Final%202015.authcheckdam.pdf [https://perma.cc/JPJ8-XHH6]. Some schools already have policies allowing administrators to implement protective measures with no official standard of evidence at all. In Yale's "informal" complaint process, for example, there is no required standard of proof, and the Title IX Coordinator is empowered to provide "accommodations and interim measures that are responsive to the party's needs as appropriate and reasonably available." YALE UNIV., OFFICE OF THE PROVOST, *supra* note 174, at 4 (2015), provost.yale.edu/sites/default/files/files/UWC%20Procedures.pdf [https://perma.cc/9TTD-JQDP]. Such accommodations include:

> providing an escort for the complainant; ensuring that the parties have no contact with one another; providing counseling or medical services; providing academic support, such as tutoring; and arranging for the complainant to re-take a course or withdraw from a class without a penalty, including ensuring that any changes do not adversely affect the complainant's academic record.

Id. at 10 n.8.

controversies—suggested that due process might require clear and convincing evidence at least where the student faces possible expulsion and where the charge involves conduct constituting a criminal offense.[247]

The ultimate question is whether the Constitution would permit the government to adjudicate a sexual assault claim, order the expulsion of a student as a sex offender, and have a notation to that effect placed in his academic record, on a preponderance of the evidence. If so, there is no constitutional problem. If not, then the Department of Education cannot achieve that result by making schools do it on the government's behalf.

Conclusion

Constitutional law today is woefully unable to deal with privatization—or even sometimes to see it. But the principles that would solve this problem turn out to be simple. What government cannot itself do without violating constitutional rights, it cannot induce private individuals to do. And whenever the federal government privatizes its law enforcement powers, constitutional restraints apply in full. They apply, that is, not only to specifically mandated acts, but to the private parties' discharge of these powers in their entirety.

This means that many of the post-2011 Title IX sexual assault trials that took place, and still are taking place, all over the country were and are unconstitutional. Some will be outraged by this conclusion. We have reached a point where merely arguing for fair process can trigger charges of sexism, rape apology, and so on.

As it considers new regulations to replace the Dear Colleague letter, the Department of Education should bear two points in mind. First, if the Department continues to require schools to try sexual assault cases, it should not only ensure that public schools comply with due process; it should ensure that private schools do so as well, because their trials will be equally subject to the Constitution's due process constraints. Second, the entire business of shadow courts trying rape cases on college campuses, severed from the institutions of law enforcement, may be too deeply flawed to remedy. If a murder allegedly took place on a college campus, most of us would strenuously object were the school to keep the matter secret, never informing law enforcement, and instead convening a secretive trial of its own in which faculty, school administrators, and students sat as judges and juries. We should have the same reaction when the alleged crime is rape.

Future historians will wonder how we went through this looking glass. They will ask what combination of activism and appeasement, of real victimization and false victim-mongering, could have led to this new hysteria in which a morning kiss becomes an act of "sexual violence," its perpetrator

247. Smyth v. Lubbers, 398 F. Supp. 777, 797 (W.D. Mich. 1975).

to be marked with a scarlet letter, and all this done under the trappings of law, but where the proceedings take place in such secrecy that the accused isn't even to know what he is accused of. They will wonder how so many in positions of respect and authority, who knew or should have known what was happening, not only at Brandeis but around the country, willingly participated or did not speak.

That history remains to be written.

* * *

Beyond the Bully Pulpit: Presidential Speech in the Courts

Katherine Shaw*

Abstract

The President's words play a unique role in American public life. No other figure speaks with the reach, range, or authority of the President. The President speaks to the entire population, about the full range of domestic and international issues we collectively confront, and on behalf of the country to the rest of the world. Speech is also a key tool of presidential governance: For at least a century, Presidents have used the bully pulpit to augment their existing constitutional and statutory authorities.

But what sort of impact, if any, should presidential speech have in court, if that speech is plausibly related to the subject matter of a pending case? Curiously, neither judges nor scholars have grappled with that question in any sustained way, though citations to presidential speech appear with some frequency in judicial opinions. Some of the time, these citations are no more than passing references. Other times, presidential statements play a significant role in judicial assessments of the meaning, lawfulness, or constitutionality of either legislation or executive action.

This Article is the first systematic examination of presidential speech in the courts. Drawing on a number of cases in both the Supreme Court and the lower federal courts, I first identify the primary modes of judicial reliance on presidential speech. I next ask what light the law of evidence, principles of deference, and internal executive branch dynamics can shed on judicial treatment of presidential speech. I then turn to the normative, arguing that for a number of institutional reasons, it is for the most part inappropriate for a court

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to give legal effect to presidential statements whose goals are political storytelling, civic interpretation, persuasion, and mobilization—not the articulation of considered legal positions. That general principle, however, is not absolute. Rather, in a subset of cases, a degree of judicial reliance on presidential speech is entirely appropriate. That subset includes cases in which presidential speech reflects a clear manifestation of intent to enter the legal arena, cases touching on foreign relations or national security, and cases in which government purpose constitutes an element of a legal test. In light of the rhetorical strategies of President Donald Trump, the question of the impact of presidential statements in the courts is quickly becoming a critical one.

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Introduction

Presidential speech, "part theater and part political declaration,"[1] is both a central feature of the contemporary presidency and a key tool of presidential governance. The President's words are often designed to reach multiple audiences: Congress and the public; members of the federal bureaucracy and regulated industries; allies and adversaries. They may aim to inspire or to mobilize, to comfort or to condemn.[2]

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1. PEGGY NOONAN, WHAT I SAW AT THE REVOLUTION: A POLITICAL LIFE IN THE REAGAN ERA 68 (1990).

2. In Mary Stuckey's words, "The President has become the nation's chief storyteller, its interpreter-in-chief. He tells us stories about ourselves, and in so doing he tells us what sort of people we are, how we are constituted as a community. We take from him not only our policies but our national self-identity." MARY E. STUCKEY, THE PRESIDENT AS INTERPRETER-IN-CHIEF 1 (1991)

But what sort of impact, if any, should presidential speech have in *court,* if that speech is plausibly related to the subject matter of a pending case? Curiously, neither judges nor scholars have grappled with that question in any sustained way, though citations to presidential speech appear with some frequency in judicial opinions. Some of these citations are no more than passing references; at other times, presidential statements play a significant role in judicial assessments of the meaning, lawfulness, or constitutionality of either legislation or executive action.

Public law scholars *have* considered the role of presidential rhetoric (as well as actual presidential involvement) in the formal legislative process, when it comes to both proposing and shaping legislation;[3] such discussions typically approach presidential speech as a subset of legislative history, with its relevance subsumed within larger debates about the propriety of reliance on legislative history.[4] And a rich body of administrative law literature questions the President's ability to control the actions of executive branch agencies and officials, including through both direction and rhetorical appropriation of agency action.[5] But, although presidential speech often appears in these debates, no sustained attention has yet been paid to the role of presidential statements, as a distinct category, in judicial fora.

With or without scholarly attention, however, courts do incorporate presidential speech into their decisional processes, in sometimes surprising ways. A number of recent examples from the lower courts, which I'll introduce briefly here and revisit in depth in Part III, help illustrate the scope of the phenomenon. In the first, a challenge to the Obama Administration's

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(footnote omitted); *see also* CAROL GELDERMAN, ALL THE PRESIDENTS' WORDS: THE BULLY PULPIT AND THE CREATION OF THE VIRTUAL PRESIDENCY 9 (1997) ("Speeches are the core of the modern presidency."); MICHAEL WALDMAN, MY FELLOW AMERICANS xi (2003) ("[E]specially in the past century, Presidents have led with their words—using what Theodore Roosevelt called the 'bully pulpit' to inspire, rally, and unite the country.").

3. *E.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2125 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)). For a social science perspective that also investigates the role of rhetoric, see José D. Villalobos et al., *Politics or Policy? How Rhetoric Matters to Presidential Leadership of Congress*, 42 PRESIDENTIAL STUD. Q. 549, 550, 554–57 (2012). *See generally* Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1 (2002) (analyzing the State of the Union and Recommendation Clauses of Article II and arguing that they envision a significant role for the President within the legislative process).

4. *See* WILLIAM N. ESKRIDGE JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 851 (5th ed. 2014) (noting, in the case of presidential signing statements, but with logic that is not by its terms limited to that context, that "for the same reasons that interpreters are usually interested in the views of the congressional sponsors, they might be interested in the views of the President"); *see also* Christopher S. Yoo, *Presidential Signing Statements: A New Perspective*, 164 U. PA. L. REV. 1801, 1804 (2016) (proposing an "equal dignity principle" counseling "that both presidential and congressional legislative history be treated the same").

5. *See infra* notes 84–92 and accompanying text.

executive action on immigration, a Texas district court repeatedly invoked presidential statements when reaching the conclusion that the challenged program likely represented a substantive rule change for which notice-and-comment rulemaking had been required.[6] Presidential statements played a similar role in a constitutional challenge to the military's "Don't Ask Don't Tell" (DADT) policy;[7] in that case, the district court relied on a single presidential speech as support for the conclusion that, contra the representations made by the Departments of Justice and Defense, DADT did not advance national security interests.[8] A district court in a third example rebuffed a Guantanamo detainee's attempts to rely on the contents of a presidential speech to establish changed conditions that rendered his continued detention unlawful.[9] A fourth case rejected a constitutional challenge to a targeted killing, with the district court pointing to presidential speech as evidence of the continuing threat posed by the target of the strike.[10] Finally, multiple decisions on President Trump's "travel ban" executive orders have featured extensive reliance on presidential statements (as well as statements by candidate Trump and staffers and associates) as evidence that the orders were motivated by a discriminatory purpose.[11]

Each of these examples is striking in the impact of presidential speech on a court's analysis of the legal status of some government conduct. Together, these examples illustrate the range of uses to which presidential

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6. Texas v. United States, 86 F. Supp. 3d 591, 668 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016). For example, the court stated:

> What is perhaps most perplexing about the Defendants' claim that DAPA is merely "guidance" is the President's own labeling of the program. In formally announcing DAPA to the nation for the first time, President Obama stated, "I just took an action to change the law." He then made a "deal" with potential candidates of DAPA: "if you have children who are American citizens . . . if you've taken responsibility, you've registered, undergone a background check, you're paying taxes, you've been here for five years, you've got roots in the community—*you're not going to be deported. . . . If you meet the criteria, you can come out of the shadows . . . .*"

Id.; *see infra* notes 172–77 and accompanying text.

7. 10 U.S.C. § 654, *repealed by* Don't Ask Don't Tell Repeal Act of 2010, § 2(f)(1)(A), 124 Stat. 3515.

8. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 919 (C.D. Cal. 2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011); *see infra* notes 246–50 and accompanying text.

9. Al Warafi v. Obama, No. 09-2368 (RCL), 2015 WL 4600420, at *1 (D.D.C. July 30, 2015), *vacated as moot*, No. 15-5266 (D.C. Cir. Mar. 4, 2016).

10. Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 58–59 (D.D.C. 2014). At issue in the case were actually two strikes: the one that killed Al-Aulaqi and also resulted in the death of another American, Samir Khan; and a second strike, which killed Al-Aulaqi's teenage son Abudlrahman. *Id.* Because the relevant executive branch statements focus on Anwar Al-Aulaqi, that is also my focus in the text. *See infra* notes 235–45 and accompanying text. *See generally* SCOTT SHANE, OBJECTIVE TROY: A TERRORIST, A PRESIDENT, AND THE RISE OF THE DRONE 299–300 (2015) (describing the lawsuit).

11. *See infra* notes 187–203 and accompanying text.

speech is put in the courts, as well as the magnitude of its potential impact. And in each case in which presidential statements are invoked, their treatment appears largely ad hoc, undertheorized, and badly in need of guiding principles. This Article aims to propose some such principles—both for courts presented with presidential speech, and for executive branch lawyers advising on the potential consequences of presidential statements.

Some presidential speech is legally operative, of course: the granting of a pardon, for example, or the issuance of a veto.[12] And much more is purely expressive.[13] But there exists a vast expanse between those two poles, and what courts do with presidential utterances in that middle space can shed new light on the relationship between the President and administrative agencies, and on debates in administrative law, the separation of powers, and constitutional law more broadly.

As I argue in what follows, binding Presidents to their claims and representations has an undeniable appeal. But for the most part it is a category error for a court to give legal effect to presidential statements whose goals are political storytelling, civic interpretation, persuasion, and mobilization—not the articulation of considered legal positions. The general principle of non-reliance, however, should give way under several circumstances: first, where the President clearly manifests an intent to enter the legal arena; second, where presidential speech touches on matters of foreign affairs; and third, where presidential speech supplies relevant evidence of government purpose, *and* government purpose is a component of an established legal test.

This Article proceeds as follows. Part I provides background and context: It first walks through the most important work by social scientists—primarily political scientists and communications scholars—on what is known in those fields as "the rhetorical presidency." It then provides an account, drawn from memoirs as well as scholarship, of the institutional context in which presidential speeches are crafted. Part I therefore remains tightly focused on the *speech* aspect of this project. Part II shifts the focus to the other side of the equation—the type of action on which presidential speech may be deemed to have some bearing. So it first addresses agency action, describing key administrative law debates regarding the relationship between the President and the administrative state. It then discusses direct

12. For discussions of the President's pardon power, see William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977); Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802 (2015). *Cf. generally* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975) (describing a category of speech which is not merely descriptive or communicative, but operative (i.e., "performative")).

13. *See* GEORGE C. EDWARDS III, THE PUBLIC PRESIDENCY: THE PURSUIT OF POPULAR SUPPORT 1 (1983) ("[T]he President is rarely in a position to command others to comply with his wishes. Instead, he must rely on persuasion.").

presidential action in the form of executive orders and other similar tools. Finally, it considers the role of the President in the legislative process.

With the stage thus set, Part III identifies the forms of presidential speech that appear in judicial opinions, across a range of cases and subject matter areas. It also asks what light principles of deference and evidentiary principles can shed on judicial treatment of presidential speech. Part IV then examines the intersection of internal executive branch dynamics and judicial treatment of presidential speech. Finally, Part V turns more fully to the normative, offering a series of recommendations, sensitive to institutional dynamics, to guide judicial use of presidential speech in the courts. In brief, Part V argues that only presidential speech that manifests some intent to enter the legal arena should give rise to judicial reliance, and that under most circumstances, presidential statements should yield to other, more carefully considered and crafted executive branch statements where there is tension between the two. But those general principles are subject to exceptions: where presidential speech touches on matters of foreign affairs, or where government purpose is a component of a legal test and presidential statements may supply relevant evidence of that purpose.

Several caveats are in order before proceeding further. First, this Article does not directly weigh in on judicial treatment of modes of direct presidential action like executive orders, presidential memoranda, presidential proclamations, and the like. Though I do consider such sources both insofar as presidential speech might bear on judicial treatment of them, and to draw out their relationship to presidential speech as a distinct category, my primary interest is in statements that fall short of the degree of formality attached to those categories of statements; accordingly, I focus on speeches alone.[14] One important unifying feature is the *spokenness* of such addresses (though all are subsequently recorded).[15] Some political scientists demarcate

14. This means that my focus is not on Twitter, which as of late 2017 appears to be President Donald Trump's preferred mode of communication. The implications of the Twitter presidency are surely important to scholarship on the presidency, and much of this discussion is applicable to presidential statements made via Twitter. But Twitter is not my primary focus here.

15. Although executive orders and presidential proclamations appear by law in the Federal Register, 44 U.S.C. § 1505(a)(1) (2012), as a general matter presidential speeches do not. Rather, speeches of the President are collected in two places: first, the Daily Compilation of Presidential Documents (which in 2009 replaced the Weekly Compilation of Presidential Documents), a collection consisting of "presidential statements, messages, remarks, and other materials released by the White House Press Secretary," *U.S. Government Documents: The President of the United States*, PRINCETON U. LIBR., https://libguides.princeton.edu/usgovdocs/president [https://perma.cc/7KDG-9PSE]; *see Daily Compilation of Presidential Documents*, NAT'L ARCHIVES, https://www.archives.gov/federal-register/publications/presidential-compilation.html [https://perma.cc/Y3DX-M2SX]; and, second, the "Public Papers of the President," a twice-yearly publication dating back to 1957. *Public Papers of the President*, NAT'L ARCHIVES, http://www.archives.gov/federal-register/publications/presidential-papers.html#about [https://perma.cc/L24L-RWHQ]; *see also* Samuel McCormick & Mary Stuckey, *Presidential Disfluency:*

this category as spoken popular presidential communication (SPPC).[16] Here, the fact that such rhetoric is spoken provides a way to distinguish it from other rhetorical content that emanates from the White House.[17] The spokenness may also be independently relevant, since speaking often has an improvisational quality that renders it unique among types of presidential discourse.[18]

Second, courts often invoke speech not just by Presidents but also by other senior executive branch officials. Although this Article is primarily concerned with speech by the President, from time to time I also refer to statements by officials other than the President, particularly in the handful of Supreme Court cases I discuss.

Third, I do not consider presidential speech as it might bear on a President's personal liability—for example, in a pending case accusing then-candidate Trump of inciting violence at a campaign rally.[19]

Literacy, Legibility, and Vocal Political Aesthetics in the Rhetorical Presidency, 13 REV. COMM. 3, 19 n.19 (2013) (noting that speeches and "other kinds of public addresses" are available in the Weekly Compilation and the Public Papers). The Public Papers' website suggests that the collection reflects remarks as delivered, and where discrepancies appear between written documents and recordings of remarks as delivered, the spoken word controls. *Public Papers of the President*, NAT'L ARCHIVES, http://www.archives.gov/federal-register/publications/presidential-papers.html#about [https://perma.cc/L24L-RWHQ]. In addition, the Presidency Project at the University of California, Santa Barbara, is in the process of making all presidential speeches free and available to the public. *See* AM. PRESIDENCY PROJECT, www.presidency.ucsb.edu/index/php [https://perma.cc/2YBT-NES9].

16. Anne C. Pluta, *Reassessing the Assumptions Behind the Evolution of Popular Presidential Communication*, 45 PRESIDENTIAL STUD. Q. 70, 70 (2015); *cf.* Kevin Coe & Rico Neumann, *The Major Addresses of Modern Presidents: Parameters of a Data Set*, 41 PRESIDENTIAL STUD. Q. 727, 728, 731 (2011) (critiquing underdeveloped inclusion criteria in much of the scholarship on presidential communication and offering "a detailed conception of major presidential addresses" as "a president's spoken communication that is addressed to the American people, broadcast to the nation, and controlled by the president" (emphasis omitted)).

17. Such content includes tweets, blog posts, letters to congressional committees, etc.

18. *Cf.* Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435, 1442 (1997) (emphasizing the Constitution's "writtenness"); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 773 (1988) ("[T]he written Constitution lies at the core of the American 'civil religion.'" (quoting Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 234 (1980) (quoting Sanford Levinson, *The Constitution in American Civil Religion*, 1979 SUP. CT. REV. 123))).

19. Nwanguma v. Trump, No. 3:16-cv-247-DJH, 2017 WL 1234152 (W.D. Ky. Mar. 31, 2017). It does bear noting that in contrast to the explicit constitutional protection legislators enjoy for statements made in their official capacity as legislators, the Constitution confers no such privilege on Presidents. *See* U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, they shall not be questioned in any other Place."). For discussions of the legislative privilege, see generally JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 87–110 (2007); Michael L. Shenkman, *Talking About Speech or Debate: Revisiting Legislative Immunity*, 32 YALE L. & POL'Y REV. 351, 352 (2014).

Finally, I have deliberately avoided limiting my consideration of presidential statements to speech that is expressly about law. Presidential speech, perhaps uniquely in our political landscape, can straddle the worlds of law, politics, and policy, and any attempt to limit this project to speech that makes expressly legal claims would both circumscribe the scope of the analysis and present hopeless problems of line drawing. At base, I hope this discussion—of speech that resists easy categorization as law or not-law, treated by courts in ways that are similarly impervious to easy or clear definition—contributes to the body of work on the complex relationship between the worlds of law and politics.[20]

I. Background

Rhetoric is a central feature of the presidency.[21] Many of the grants of authority (as well as duties) in Article II's spare provisions have explicitly rhetorical dimensions. The power to request the opinion in writing of any executive officer[22] is fundamentally rhetorical in nature, as is the obligation to provide information to Congress, and to recommend to its consideration "such Measures as [the President] shall judge necessary and expedient."[23] The President, alone among constitutional actors, is constitutionally required to recite a *particular* oath before entering into the office;[24] by constitutional command, his own words call the office into being. And every presidency begins with an inaugural address. The first time Americans encounter their President *as* President is in the context of speechmaking.[25]

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20. *See, e.g.*, Aziz Z. Huq, *Binding the Executive (By Law or By Politics)*, 79 U. CHI. L. REV. 777 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010)) (rejecting a sharp distinction between legal and political checks on the Executive); H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 U. CHI. L. REV. 365, 385 (1998) (reviewing DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 (1997)) ("[P]olicy and principle, politics and law, are not rigid, mutually exclusive categories.").

21. Indeed, although he focused more on bargaining than direct popular appeals, political scientist Richard Neustadt famously identified rhetoric as a key source of presidential power. RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS 10–11 (1960) ("Presidential power is the power to persuade.").

22. U.S. CONST. art. II, § 2, cl. 1.

23. *Id.* art. II, § 3; *cf.* Vasan Kesavan & Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 17–22 (2002) (discussing a "publicity principle" in some of the provisions relating to the President).

24. U.S. CONST. art. II, § 1, cl. 8. The Constitution provides that other state and federal officials shall "be bound by Oath or Affirmation, to support this Constitution," but only the presidential oath is actually set forth in the Constitution. *Id.* art. VI, cl. 3. *See generally* Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299 (2016) (discussing the relationship between oaths and constitutional duty).

25. BRADLEY H. PATTERSON, THE WHITE HOUSE STAFF: INSIDE THE WEST WING AND BEYOND 162 (2000) ("Every presidency starts with a speech—the inaugural address . . . ."); *see also* Arthur Schlesinger Jr., *Introduction* to THE CHIEF EXECUTIVE: INAUGURAL ADDRESSES OF

Although speechmaking has always been an important presidential exercise, both the form and substance of presidential speech have evolved considerably over time. This Part first surveys the key literature on what political scientists describe as the "rhetorical presidency." It then turns to an institutionally grounded examination of the circumstances in which presidential speeches take shape.

A. Presidential Speech: A Brief Historical Account

Much of the literature on the rhetorical dimensions of the presidency begins from the influential account of political scientist Jeffrey Tulis. Tulis traces the emergence of what he terms "the rhetorical [P]residency" to the Administrations of Theodore Roosevelt and Woodrow Wilson,[26] both of whom played major roles in reshaping the institution from one that abjured the use of popular rhetoric to one in which popular or mass rhetoric was understood as a "principal tool of presidential governance."[27] On Tulis's telling, the transformation has been so complete that today it is "taken for granted that Presidents have a *duty* constantly to defend themselves publicly, to promote policy initiatives nationwide, and to inspirit the population."[28]

According to Tulis, the founding-era vision of presidential rhetoric was characterized by four core themes: concerns about the dangers of demagoguery;[29] the founders' considered choice to create a primarily representative, rather than direct, democracy;[30] the paramount importance of an independent Executive, whose authority derives directly from the Constitution;[31] and a separation-of-powers vision in which the President's role was both marked by "energy and 'steady administration of law,'" and in which the need for compromise in light of the overlapping and conflicting authority of Congress and the President served as a disincentive to rhetorical appeals.[32] These broad principles resulted in "[t]wo general prescriptions for

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THE PRESIDENTS OF THE UNITED STATES iv (1965) ("[E]very President, as he takes the oath, has his opportunity to confide to his countrymen his philosophy of government, his conception of the Presidency, and his vision of the future.").

26. JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY 4 (1987); *see also* James W. Ceaser, Glen E. Thurow, Jeffrey Tulis & Joseph M. Bessette, *The Rise of the Rhetorical Presidency*, 11 PRESIDENTIAL STUD. Q. 158, 159 (1981) (arguing that "mass rhetoric," once rarely employed by Presidents, has become a principal governing tool).

27. TULIS, *supra* note 26, at 4.

28. *Id.*

29. *Id.* at 27–33; *see also* Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CONST. L. 422, 435 (2000) ("At the time of the founding, demagoguery was seen as a central threat to the stability of democratic regimes, and popular rhetoric was associated with the power to sway the masses behind a charismatic leader who would break the fetters of constitutional office.").

30. TULIS, *supra* note 26, at 33–39.

31. *Id.* at 39–40.

32. *Id.* at 43.

presidential speech":[33] first, that "policy rhetoric . . . would be *written*, and addressed principally to *Congress*";[34] and second, that presidential speech that was directed to the people at large, like proclamations and inaugural addresses, would "emphasize[] popular instruction in constitutional principle and the articulation of the general tenor and direction of presidential policy, while tending to avoid discussion of the merits of particular policy proposals."[35]

Tulis argues that these general themes informed the rhetorical strategies of every nineteenth-century President but Andrew Johnson, who alone "did not adhere to the forms and doctrine of the nineteenth-century constitutional order."[36] On Tulis's account, the exception proves the rule, because Johnson was impeached based in part on the style and content of his speeches.[37]

Although both Abraham Lincoln and Andrew Johnson used speechmaking to advocate policy positions more than their predecessors had, it was not until the presidencies of Theodore Roosevelt, William Howard Taft, and most significantly Woodrow Wilson that presidential speechmaking acquired its modern character. Beginning with Theodore Roosevelt, "twentieth century [P]residents have been increasingly willing to use their office to rally public support behind their policy positions,"[38] and Wilson essentially established the practice that has continued to this day.[39]

Throughout his account, Tulis focuses on two distinct aspects of presidential speech: audience and content. In terms of audience, he traces the transition from Congress to the general public—courts as such do not enter the picture. In terms of content, he describes a shift from general articulations

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33. *Id.* at 46.

34. *Id.*

35. *Id.* at 47.

36. *Id.* at 61. Tulis does acknowledge some informal, popular appeals by other nineteenth-century Presidents but finds them "dwarfed" in number and import by the activities of twentieth-century Presidents. *Id.* at 63. He also notes a significant increase in presidential speeches in the period following the Civil War but nonetheless finds the break represented by President Woodrow Wilson far more significant than the Civil War/Reconstruction break. *Id.* at 65.

37. The tenth article of impeachment against Johnson charged that he "did . . . make and deliver . . . certain intemperate, inflammatory, and scandalous harangues . . . [which] are peculiarly indecent and unbecoming in the Chief Magistrate of the United States . . . ." *Id.* at 90–91; *see id.* at 61 (noting that Johnson was "formally and constitutionally challenged for his behavior on the stump"); *see also* Whittington, *supra* note 29, at 436–37 (describing Johnson's "effort to go over the heads of the 'people's representatives' by appeal directly to the people themselves," which congressional Republicans viewed as "an invitation to anarchy and tyranny"). *See generally* TULIS, *supra* note 26, at 87–90 (describing Johnson's rhetoric).

38. Keith E. Whittington, *The Rhetorical Presidency, Presidential Authority, and President Clinton*, 26 PERSP. ON POL. SCI. 199, 199 (1997).

39. TULIS, *supra* note 26, at 118; *see also* GELDERMAN, *supra* note 2, at 3 ("[O]nly after Woodrow Wilson took office in 1913 did the bully-pulpit presidency take hold.").

of constitutional principles to persuasive exercises designed to articulate and defend particular policy proposals.[40]

To be sure, others have both built on and challenged Tulis's theory. Samuel Kernell suggests that the change Tulis identifies is mostly traceable to developments in partisanship and the media environment,[41] rather than a particular Wilsonian vision of the presidency that reshaped the office in its image. Doris Kearns Goodwin identifies Teddy Roosevelt, rather than Wilson, as primarily responsible for the transformation.[42] Keith Whittington cautions that "[t]he rhetorical presidency offers one mechanism for characterizing presidential practice and the sources of presidential authority. . . . [It] is simply one approach to understanding how and why presidents conduct their office and how presidents relate to the larger constitutional structure."[43] And a recent literature suggests that increasing polarization has undermined the power of presidential rhetoric, so that Presidents today speak primarily to those whose support they already command.[44] Still, despite these critics, Tulis's continues to be the definitive

40. *See also* Vanessa B. Beasley, *The Rhetorical Presidency Meets the Unitary Executive: Implications for Presidential Rhetoric on Public Policy*, 13 RHETORIC & PUB. AFF. 7, 25 (2010) (discussing Tulis's account). There is, however, one subject-matter area in which his historical account does not strictly hold: in the context of war, direct popular appeals were common well before the completion of the transformation Tulis describes. *See* TULIS, *supra* note 26, at 6 (observing that prior to the twentieth century, "attempts to move the nation by moral suasion in the absence of war were almost unknown"); *see also* Oren Gross & Fionnuala Ni Aolain, *The Rhetoric of War: Words, Conflict, & Categorization Post-9/11*, 24 CORNELL J.L. & PUB. POL'Y 241, 246 (2014) ("[T]he old rhetorical model itself recognized an important exception to the general antipathy towards presidential public oratory. Even prior to the twentieth century, in matters pertaining to the conduct of war, Presidents have delivered popular speeches aimed directly at the general public.").

41. SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP 2, 11–12 (3d ed. 1997) (describing the "strategy whereby a president promotes himself and his policies in Washington by appealing to the American public for support" as traceable to a combination of "advances in transportation and communications" and rises in partisanship and divided government).

42. *See* DORIS KEARNS GOODWIN, THE BULLY PULPIT xi (2013) ("The essence of Roosevelt's leadership . . . lay in his enterprising use of the 'bully pulpit,' a phrase he himself coined to describe the national platform the presidency provides to shape public sentiment and mobilize action.").

43. Whittington, *supra* note 38, at 205. For a related discussion that slightly predates Tulis, see EDWARDS, *supra* note 13. And Tulis has had other detractors. Anne Pluta, for example, has recently cast doubt on some of the foundations of Tulis's empirical claims, particularly on the frequency of spoken speech. *See* Pluta, *supra* note 16, at 88 ("[T]here was a significant amount of nineteenth-century presidential rhetoric; there was a fundamental relationship between the President and the people from the inception of the institution; there is no significant increase in SPPC coinciding with Wilson's presidency; and no contemporary evidence exists of [a] constitutional norm against presidents addressing the public.").

44. GEORGE C. EDWARDS III, ON DEAF EARS: THE LIMITS OF THE BULLY PULPIT 213 (2003); FRANCES E. LEE, BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE 164 (2009); Ezra Klein, *The Unpersuaded*, NEW YORKER (Mar. 9, 2012), https://www.newyorker.com/magazine/2012/03/19/the-unpersuaded-2 [https://perma.cc/Z3TN-CS67].

political science account of the role of rhetoric in the relationship between the presidency and the public.

B. Presidential Speeches: An Institutional and Procedural Overview

The presidency is an inherently dynamic institution,[45] and the institutional context out of which presidential speeches emerge is no exception. But all Presidents have given speeches, and most Presidents have relied to some degree on the assistance of others in preparing those speeches.[46] And, since at least the Administration of FDR, the President has been just one player in a larger White House operation responsible for producing the President's words.[47]

Existing memoirs about presidential speechwriting in the modern White House[48] make clear how time-pressed and chaotic the process of crafting presidential speeches can be. As Reagan speechwriter Peggy Noonan tells it, much of the time speeches were subject to a thorough process of circulation, input, and clearance, with major speeches "sent out to all of the pertinent federal agencies and all the important members of the White House staff and

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45. STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE 20 (1997) ("[T]he presidency is a governing institution inherently hostile to inherited governing arrangements." (emphasis omitted)); *see also* STEPHEN HESS, ORGANIZING THE PRESIDENCY 3 (1976) ("A president decides . . . to give competing assignments and overlapping jurisdictions or to rely on aides with specific and tightly defined responsibilities. He selects between formal lines of command and informal arrangements. He chooses between the advice of specialists and generalists.").

46. Alexander Hamilton, for example, famously drafted George Washington's farewell address. RON CHERNOW, ALEXANDER HAMILTON 505 (2004); *see also* TED SORENSEN, COUNSELOR: A LIFE AT THE EDGE OF HISTORY 130 (2008) ("JFK never pretended . . . that he had time to draft personally every word of every speech he was required to make . . . ."); JAMES C. HUMES, CONFESSIONS OF A WHITE HOUSE GHOSTWRITER 5 (1997) (observing that presidential speechwriters date back to George Washington).

47. *See* Gelderman, *supra* note 2, at 9 ("Surrogate speechwriting came fully into its own under Franklin Roosevelt."); *see also* KARLYN KOHRS CAMPBELL & KATHLEEN HALL JAMIESON, PRESIDENTS CREATING THE PRESIDENCY: DEEDS DONE IN WORDS 17 (2008) (recounting the speechwriting services of which Lincoln, FDR, Wilson, and JFK took advantage); Kurt Ritter & Martin J. Medhurst, *Introduction* to PRESIDENTIAL SPEECHWRITING: FROM THE NEW DEAL TO THE REAGAN REVOLUTION AND BEYOND 5 (2003) (rejecting the "myth" that FDR was the first President to regularly use speechwriters; "Insofar as we know, the first president to hire a full-time speechwriter in the White House was Warren G. Harding.").

48. The "modern White House" is probably most traceable to the reforms implemented in the wake of the "Brownlow Report." *See* PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT iii–iv (1937) (proposing expansion in the size, responsibilities, and authority of the White House staff in response to "the growth of the work of the Government matching the growth of the Nation over more than a generation"); *see also* Matthew J. Dickinson, *The Executive Office of the President: The Paradox of Politicization*, *in* THE EXECUTIVE BRANCH 135, 139–142 (Joel D. Aberbach & Mark A. Peterson eds., 2005) (acknowledging that, despite its later deviation from Roosevelt's apolitical vision of career civil servants, the Executive Office of the President created in response to the Brownlow Report "is justly celebrated as a landmark in the evolution of the modern presidency").

the pertinent White House offices."[49] But even with such processes in place, "the final battle would be fought on the plane, in the limousine, on the couch in the Oval Office. The speech was never really frozen until the President had said it . . . ."[50] And Michael Waldman, former head speechwriter for President Clinton, tells a number of stories of last-minute changes,[51] discarded drafts mistakenly delivered as final speeches,[52] and a significant improvisational component to presidential speechmaking, at least as practiced by President Bill Clinton.[53] Clinton speechwriter David Kesnet echoes this, suggesting that something like 25% of President Clinton's delivery was extemporaneous.[54]

Notwithstanding the frequent informality and time pressures that attend their crafting, presidential speeches can be an important site of policy development. As one unidentified former White House Chief of Staff explained:

> I used to think before I went to the White House, . . . that you made policy decisions and then you wrote a speech to describe the policy. . . . Oftentimes it doesn't work that way. Oftentimes, the fact of scheduling the speech drives policy . . . . It's the fact of having scheduled a time, a locale where he's going to talk about a certain issue that forces the policymakers in the [A]dministration, including the President himself, to make decisions.[55]

These drivers and constraints mean that policy announcements can be made, perhaps even inadvertently, in insufficiently considered or cleared speeches.[56] In addition, time pressure and relatively fluid processes mean that sophisticated bureaucratic players may use presidential speeches to bypass

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49. NOONAN, *supra* note 1, at 75; *see also* MATT LATIMER, SPEECHLESS: TALES OF A WHITE HOUSE SURVIVOR 182 (2009) (describing the process of "sen[ding speeches] out for comment throughout the White House staffing system").

50. NOONAN, *supra* note 1, at 78.

51. *See, e.g.*, MICHAEL WALDMAN, POTUS SPEAKS 139 (2000) (describing changes made to President Clinton's 1996 nomination acceptance speech while in the presidential motorcade en route to the convention center).

52. *Id.* at 60–62.

53. *Id.* at 44 (describing President Clinton's improvisation of significant portions of the 1993 State of the Union Address); *see also id.* at 94 (same for the 1995 State of the Union Address); GEORGE STEPHANOPOULOS, ALL TOO HUMAN: A POLITICAL EDUCATION 201–03 (1999) (describing a teleprompter error that left the President improvising the first seven minutes of his 1994 State of the Union address).

54. Patterson, *supra* note 25, at 167.

55. WHITE HOUSE TRANSITION PROJECT, WHITE HOUSE OFFICE OF COMMUNICATIONS 30 (2008) (quoting a background interview), http://whitehousetransitionproject.org/wp-content/uploads/2016/03/WHTP-2009-33-Communications.pdf [https://perma.cc/THH9-MJHP].

56. *See* LATIMER, *supra* note 49, at 185 (describing once having "created a presidential policy" by proposing an international day of prayer in the President's National Day of Prayer remarks).

complex policy-development processes and lay down policy markers that the rest of the executive branch is then largely bound to implement.[57]

Internal White House dynamics can have a significant impact on the final output of the speechwriting process. Some social scientists have attempted to measure the impact of such dynamics. A recent contribution uses archival materials to chart the evolution of a 1992 speech by President George H.W. Bush announcing an intent to veto a tax bill.[58] Reviewing various iterations of the speech and staff memos, the authors conclude that the documents reveal that "two key sources of power within the White House—speechwriters and policy advisors—vie for control over the words of the President."[59] Reviewing drafts of both the formal "Statement of Administration Policy" or SAP (about which more below) and President Bush's speech announcing his intent to veto the bill, the authors tally advisor inputs both qualitatively and quantitatively, ultimately concluding that presidential speechwriters have a significant edge over policy advisors on the final product.[60]

This particular 1992 speech may have involved more rigor and formality than many presidential speeches. That is because where a presidential speech involves pending legislation and will simultaneously serve as a SAP, a formal review process conducted by the Office of Management and Budget (OMB) precedes finalization of the message.[61] This clearance process involves coordination within OMB, as well as "the agency or agencies principally concerned, and other [Executive Office of the President (EOP)] units."[62]

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57. Noonan tells a story of a Nixon speechwriter who "wrote a speech for Nixon that acknowledged for the first time that the United States would indeed be pulling out of Vietnam eventually." The speechwriter "managed to keep a copy of the script away from Henry Kissinger. When Kissinger finally saw it he yelled to [the speechwriter], 'how dare you end a war without staffing it out!'" (i.e., circulating for comments and feedback). NOONAN, *supra* note 1, at 92; *see also* SORENSEN, *supra* note 46, at 133 (describing a dynamic—though not applicable in the Kennedy White House, in Sorensen's telling—of "fierce turf battles in the White House over phrases intended to commit the president to one or another side of an internal ideological struggle").

58. Justin S. Vaughn & José D. Villalobos, *Conceptualizing and Measuring White House Staff Influence on Presidential Rhetoric*, 36 PRESIDENTIAL STUD. Q. 681, 682 (2006).

59. *Id.* at 682.

60. *Id.* at 686. Peggy Noonan makes virtually the same point when she tells this story: "[A State Department official] used to come into speechwriting and refer to himself and his colleagues as 'we substantive types' and to the speechwriters as 'you wordsmiths.' He was saying, We do policy and you dance around with the words. We would smile back. Our smiles said, 'The dancer is the dance.'" NOONAN, *supra* note 1, at 72.

61. *See, e.g.*, Vaughn & Villalobos, *supra* note 58, at 683 ("The [E]xecutive [B]ranch formally processes veto threats through the Office of Management and Budget (OMB) in the form of Statements of Administration Policy (SAP), which serve as formal notice to appropriate committee and subcommittee chairs that the president intends to veto particular pieces of legislation if Congress passes them.").

62. According to the description in the OMB archives, "OMB prepares SAPs for major bills scheduled for House or Senate floor action . . . . SAPs are prepared in coordination with other parts of OMB, the agency or agencies principally concerned, and other EOP units. Following its

Ordinary speeches may be subject to an analogous process run by the White House Staff Secretary or the speechwriting office, but White House practice on this has varied.[63]

In addition, State of the Union addresses, which are both constitutionally grounded[64] and serve as major political events,[65] often involve more rigorous processes than ordinary presidential speeches.[66] But even the contents of State of the Union addresses may not always be carefully developed,[67] or may be subject to last-minute changes, extemporaneous additions or changes, or both.[68]

As a general matter, then—with the potential exception of SAPs and perhaps State of the Union addresses—presidential speechwriting is characterized by a degree of fluidity and informality.

This actually stands in contrast to other White House processes. Although not subject to process requirements comparable to actual

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clearance, a SAP is sent to Congress by OMB's Legislative Affairs Office." *The Mission and Structure of the Office of Management and Budget*, OBAMA WHITE HOUSE, https://obamawhitehouse.archives.gov/omb/organization_mission [https://perma.cc/378K-XBKA]; *see also* Bernard H. Martin, *Office of Management and Budget*, *in* GETTING IT DONE: A GUIDE FOR GOVERNMENT EXECUTIVES 69, 70 (Mark A. Abramson et al. eds., 2013) (referring to OMB as "a central clearance mechanism" within the EOP); SAMUEL KERNELL, PRESIDENTIAL VETO THREATS IN STATEMENTS OF ADMINISTRATION POLICY: 1985–2004, INTRODUCTION 1–2 (CQ Press CD-ROM, rel. Mar. 31, 2005) (explaining that while "Presidents have long communicated their preferences on pending legislation to Congress," the formal SAP sent out by OMB dates to the mid-1970s and also noting that most SAPs actually originate in an agency, rather than the White House, "which explains why a first person statement from the president rarely appears in these memos").

63. *Compare* BRADLEY H. PATTERSON, TO SERVE THE PRESIDENT: CONTINUITY AND INNOVATION IN THE WHITE HOUSE STAFF 221 (2008) ("All of President Bush's speeches . . . go through the same centralized drafting, staff scrutiny, and editing process as the State of the Union . . . ."), *with* KATHRYN DUNN TENPAS & KAREN HULT, WHITE HOUSE TRANSITION PROJECT, THE OFFICE OF THE STAFF SECRETARY 13 (2017), http://www.whitehousetransitionproject.org/wp-content/uploads/2016/03/WHTP2017-23-Staff-Secretary.pdf [https://perma.cc/MZA4-FGKD] ("During the Obama [A]dministration, the Office of the Staff Secretary had less contact with speechwriting and did not conduct a . . . clearance process.").

64. U.S. CONST. art. II, § 3 ("He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . . ."). The in-person delivery, however, is not a constitutional imperative; Presidents Washington and Adams gave their addresses in person, but beginning with Thomas Jefferson, every President until Woodrow Wilson simply delivered the State of the Union in writing. GELDERMAN, *supra* note 2, at 6–8; WALDMAN, *supra* note 51, at 93.

65. WALDMAN, *supra* note 51, at 93 ("Watching [the State of the Union speech] is one of the few remaining civic rituals in America . . . ."); *see also* Keith E. Whittington, *The State of the Union Is a Presidential Pep Rally*, 28 YALE L. & POL'Y REV. INTER ALIA 37, 38 (2010) (discussing the "mass audience and high salience of the event").

66. WALDMAN, *supra* note 51, at 95 (describing a pre-State of the Union meeting with the full Cabinet as "a bit of a ritual").

67. *Id.*

68. *Id.* at 44, 94.

rulemaking,[69] a degree of rigor attends many White House policy development processes. As discussed, OMB coordinates a clearance process for SAPs; both OMB and its component, the Office of Information and Regulatory Affairs (OIRA), coordinate on other processes as well, including circulating congressional testimony for interagency and White House review.[70] And an especially regimented system of policy development and approval occurs in the foreign policy and national security spheres, where a statutory scheme set forth in the 1947 National Security Act,[71] together with a number of related presidential directives,[72] prescribe a high degree of formality and rigor.[73] This means that speechwriting on national security and foreign policy topics looks quite different from the picture sketched above.

By presidential directive, the National Security Council (NSC) is the "principal means for coordinating executive departments and agencies in the development and implementation of national security policy."[74] The NSC's decision-making process typically proceeds through three levels.[75] The first, a staff-level process known as an Inter-Agency Policy Committee or IPC,[76]

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69. *See* Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (2012); Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 100–01 (2003).

70. Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1846–47 (2013).

71. 50 U.S.C. § 401 (2012).

72. Presidential Policy Directive-1, Memorandum from the President on the Organization of the National Security Council System (Feb. 13, 2009) [hereinafter Presidential Policy Directive-1], https://fas.org/irp/offdocs/ppd/ppd-1.pdf [https://perma.cc/C3Z5-H86J]; National Security Presidential Directive-1, Memorandum from the President on the Organization of the National Security Council System (Feb. 13, 2001), https://fas.org/irp/offdocs/nspd/nspd-1.pdf [https://perma.cc/7M35-HGR4].

73. Sandra L. Hodgkinson, *Executive Power in a War Without End: Goldsmith, the Erosion of Executive Authority on Detention, and the End of the War on Terror*, 45 CASE W. RES. J. INT'L L. 65, 71–72 (2012) ("The National Security Act was originally designed to improve coordination among the various military services and the other arms of national security, such as the intelligence community, and continues to perform this function today, although it has broadened its scope to a relatively wide array of subjects.").

74. Presidential Policy Directive-1, *supra* note 72, at 2. Note, though, that there are in some ways two distinct NSCs—the NSC set forth in the National Security Act and further organized in related presidential directives, and the "modern NSC" system, in which "the [P]resident's own appointed NSC staff—led by the special assistant to the [P]resident for national security affairs"—manages the policy process. *See* AMY B. ZEGART, FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC 56 (1999).

75. Hodgkinson, *supra* note 73, at 72. For a thorough overview of the NSC policy-development process, see ALAN G. WHITTAKER ET AL., THE NATIONAL SECURITY POLICY PROCESS: THE NATIONAL SECURITY COUNCIL AND INTERAGENCY SYSTEM (2011), http://issat.dcaf.ch/download/17619/205945/icaf-nsc-policy-process-report-08-2011.pdf [https://perma.cc/294B-ATPG]. The NSC, which was divided into a National Security Staff and Homeland Security Council at the time of this report, is again a single entity. Exec. Order No. 13,657, 79 Fed. Reg. 8823 (Feb. 14, 2014).

76. *See* Presidential Policy Directive-1, *supra* note 72, at 4–5 (IPCs "shall be the main day-to-day fora for interagency coordination of national security policy").

is designed to "serve up key issues for resolution or approval at the second level."[77] That second level is the "Deputies Committee," composed of deputy-level officials (Deputy Secretaries, the Deputy Attorney General, etc.).[78] The third level is the "Principals Committee," composed of Cabinet or Cabinet-level officials designated by presidential directive.[79] The Principals Committee works "to ensure that, as much as possible, policy decisions brought to the President reflect a consensus within the departments and agencies."[80] Finally, issues are brought to the President for final decision.[81] This means that policy development on national security issues is typically subject to extended, serious, and careful consideration. National security and foreign policy speechmaking is very much a part of this process, so that "[w]hen the President makes foreign policy statements, meets with visiting heads of state, travels abroad, or holds press conferences dealing with national security his words usually have been carefully crafted and are the result of lengthy and detailed deliberations within the [A]dministration."[82] All of this means there may be reason to treat speeches that emerge from this process differently from other speeches.[83]

The discussion here suggests that there may be good reason for caution about excessive reliance on presidential speech—with a slightly different set of standards, for the institutional reasons detailed above, for speech in the national security and foreign affairs context.

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77. Hodgkinson, *supra* note 73, at 72.

78. Presidential Policy Directive-1, *supra* note 72, at 3–4.

79. *Id.* at 2–3.

80. WHITTAKER ET AL., *supra* note 75, at 31.

81. Samuel J. Rascoff, *Presidential Intelligence*, 129 HARV. L. REV. 633, 671 (2016). Some scholars have described this final stage of review as something of a rubber stamp, "legitimating decisions that were debated and decided elsewhere." ZEGART, *supra* note 74, at 76. A full discussion of the power dynamics of the NSC is far beyond the scope of this discussion, but wherever the true power resides, there is no question that the process is ordinarily a rigorous one.

82. WHITTAKER ET AL., *supra* note 75, at 6.

83. PATTERSON, *supra* note 25, at 164–65 (describing foreign affairs speeches as following a separate path from domestic policy speeches, and attributing the following observation to a Clinton White House staffer: "You say a blooper in a domestic speech . . . and your ratings sink five points, or the stock market goes down fifty. You say a blooper in a foreign affairs speech and you could start a war!"). But even in the more regimented national security sphere, it is possible, as Rebecca Ingber has argued, that speechmaking "can be employed strategically by officials within the government seeking to shape the decisionmaking process." Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L LAW 359, 397–98 (2013). Note, however, that Ingber's focus is on speechmaking by officials other than the President. *See also* Heather A. Larsen-Price, *The Right Tool for the Job: The Canalization of Presidential Policy Attention by Policy Instrument*, 40 POL'Y STUD. J. 147, 153 (2012) (portraying "presidential messages" as the tool for shaping policy in which "presidents have the greatest policy area flexibility").

II. Presidential Administration, Direct Presidential Action, and Presidential Speech in the Legislative Process

The preceding Part focused on one piece of this puzzle—presidential speeches themselves. But just as important is the *type of action* being tested—that is, the underlying conduct or directive at issue, and on which presidential speech may have some bearing. Accordingly, this Part first sketches the figure of the President in administrative law, focusing on some of the key inflection points in debates about the relationship between the President and the administrative state, and the intersection between those debates and judicial treatment of presidential speech. It next describes the primary modes of direct presidential action, also with an eye toward the role of presidential speech. Finally, it looks to the role of presidential speech in the legislative process.

A. The President in Administrative Law

One of the contexts in which presidential speech may be invoked is in the course of judicial review of some agency action.[84] It is, therefore, impossible to assess judicial treatment of presidential speech without engaging with several aspects of the relationship between the President and the administrative state. More specifically, the question of what effect courts should give presidential speech intersects with two distinct (though related) debates about the President in administrative law: first, the degree to which the President possesses directive authority vis-à-vis administrative agencies; and second, whether and how presidential involvement in agency decision-making should impact judicial deference to agency decisions, and relatedly, whether presidential interpretations are themselves entitled to any sort of deference.

The President, of course, is the head of the executive branch within which administrative agencies sit. But beyond that, the proper relationship between the President and those agencies—in particular, whether the President may *direct* those agencies in the exercise of their delegated authority, either some or all of the time—has long divided scholars. Peter Strauss succinctly describes two key camps in the title of his piece "*Overseer or 'the Decider'?*"[85] In brief, partisans of the position that the President is a

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84. Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 219 (1993) (arguing that the literature on presidential control has not been sufficiently attentive to "different types of agency decisionmaking" and proposing as a "rough cut" the categories of "adjudication, selection of regulatory strategies, value selection, and statutory interpretation").

85. Peter L. Strauss, *Overseer or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 696–97 (2007); *see also* Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2487–88 (2011) (describing the debate).

"decider" contend that when a statute delegates authority to an agency official, the President generally retains directive authority—that is, "the power to act directly under the statute or to bind the discretion of lower level officials"[86]—either presumptively or as a categorical matter.[87] Then-Professor Elena Kagan's influential *Presidential Administration*, which both identified and celebrated a shift toward presidential control and ownership of regulatory output, is perhaps most closely associated with this view.[88] (As I will return to later, one important additional aspect of her narrative is presidential appropriation of the output of regulatory processes.[89]) Subscribers to the "overseer" view argue that, absent statutory authority to the contrary, when Congress makes a delegation to an agency official, that delegated authority resides with the agency official alone.[90] According to these critics, Presidents may attempt to utilize other tools to impact agency output, but may not direct any particular course of action outright.

As a matter of practice, the line between the two may not always be clear, since, as Professor Strauss explains, "[t]he difference between

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86. Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006).

87. Here, the strength of this position varies, and even among adherents there are disagreements regarding whether this is the case as a matter of constitutional imperative or simply developed norms and the reality of contemporary governance. Important pieces include Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001) (arguing, "based in part . . . on policy considerations," in favor of unitary presidential control in areas delegated by statute to administrative agencies); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–3 (1994) (rejecting arguments from history in favor of the President's power to directly control all aspects of the executive branch, but sketching a "plausible structural argument on behalf of the hierarchical conception of the unitary executive" in light of "changed circumstances since the eighteenth century"); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 549–50 (1994) (arguing that the text and history of the Constitution independently establish the President's role as "a chief administrator constitutionally empowered to administer *all* federal laws").

88. Kagan, *supra* note 87, at 2320 (arguing that "most statutes granting discretion to [the Executive Branch]—but not independent—agency officials should be read as leaving ultimate decisionmaking authority in the hands of the President").

89. *See infra* notes 290–94 and accompanying text.

90. *See* Stack, *supra* note 86, at 267 (arguing that a statute "should be read to include the President as an implied recipient of authority" only when that statute "grants power to the President in name"); Strauss, *supra* note 85, at 704–05 ("[M]y own conclusion is that in ordinary administrative law contexts, where Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President's role—like that of the Congress and the courts—is that of overseer and not decider."); *see also* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 80–81 (4th ed. 1957) (positing that if the President enjoys unitary control over administrative agencies, Congress cannot "leave anything to the specially trained judgment of a subordinate executive official with any assurance that his discretion would not be perverted to political ends"). For rejections of the idea that a unitary Executive can solve the democratic-legitimacy problems posed by the rise of the administrative state, see Cynthia R. Farina, *The "Chief Executive" and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 185 (1997); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987–89 (1997).

oversight and decision can be subtle, particularly when the important transactions occur behind closed doors and among political compatriots who value loyalty and understand that the President who selected them is their democratically chosen leader."[91] But, he continues, "there is a difference between ordinary respect and political deference, on the one hand, and law-compelled obedience, on the other."[92]

This debate leads naturally to the second, which involves the impact of presidential involvement on judicial scrutiny of agency action. Kagan's *Presidential Administration* argues that although "courts . . . have ignored the President's role in administrative action in defining the scope of the *Chevron* doctrine,"[93] in fact "*Chevron*'s primary rationale suggests [an] approach . . . which would link deference in some way to presidential involvement."[94] In other words, presidential involvement, under *Chevron* as properly understood, should heighten the degree of deference courts grant to agencies. The piece makes a similar argument with respect to "hard look" review, suggesting that courts should "relax the rigors of hard look review when demonstrable evidence shows that the President has taken an active role in, and by so doing has accepted responsibility for, the administrative decision in question."[95]

A number of recent pieces grapple with the related issue of how political considerations—not synonymous with, though related to, presidential involvement—should impact judicial review of administrative action.

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91. Strauss, *supra* note 85, at 704; *see also* Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 645 (2010) ("[A]ny theoretical difference between influence and control, or between oversight and decision, will not be observed in practice.").

92. Strauss, *supra* note 85, at 704. A recent piece by Kathryn Watts both continues charting the trajectory identified in Kagan's *Presidential Administration* and focuses closely on the mechanisms by which outright direction or softer types of influence may be brought to bear. Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 700–04 (2016). And some social science literature examines the connection between presidential speech and administrative activity in particular subject matter areas. *See, e.g.*, Matthew Eshbaugh-Soha, *The Impact of Presidential Speech on the Bureaucracy*, 89 SOC. SCI. Q. 116, 127–28 (2008) (tracing linkage between presidential speeches and criminal complaints brought by DOJ's Civil Rights Division, and concluding that during the 1958–2002 period, positive "rhetorical attention paid to civil rights policy," as evidenced by frequency of invocation during presidential speeches, "increased the number of yearly criminal civil rights cases filed in U.S. District Court"); Andrew B. Whitford & Jeff Yates, *Policy Signals and Executive Governance: Presidential Rhetoric in the War on Drugs*, 65 J. POL. 995, 996 (2003) (finding that presidential rhetoric can alter the manner in and extent to which U.S. Attorneys implement drug policy).

93. Kagan, *supra* note 87, at 2375.

94. *Id.* at 2376. *But see* Peter M. Shane, Chevron *Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679, 701 (2014) (arguing that presidential involvement should not entitle agency interpretations to additional *Chevron* deference, with the possible exception of situations in which the President serves a constitutionally grounded coordinating function).

95. *Id.* at 2380.

Kathryn Watts has offered a proposal under which "what count as 'valid' reasons under arbitrary and capricious review" would include under some circumstances "political influences from the President, other executive officials, and members of Congress, so long as the political influences are openly and transparently disclosed."[96] A number of scholars have endorsed this or related proposals,[97] though others have sounded a cautionary note about this "political turn" in administrative law scholarship.[98]

Now for deference to the President himself. Although presidential statements can come in a variety of forms, Peter Strauss argues that, with respect to statutory interpretation, presidential interpretations are *not* entitled to *Chevron* deference, with rare exceptions, because the President is not an agency with the authority to interpret a statute.[99] Cass Sunstein has suggested that perhaps "the President himself is entitled to deference in his interpretations of law, even if he has not followed formal procedures,"[100] if he is acting pursuant to a delegation. And Kevin Stack argues that "the President's constructions of delegated authority should be eligible for *Chevron* deference, but only when they follow from statutes that expressly grant power to the President,"[101] and perhaps subject to a requirement of reason-giving.[102]

Taken together, these debates may well have implications for presidential speech. That is, if the President is properly understood to be empowered, either as a matter of constitutional imperative or prevailing

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96. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 (2009). Watts argues that such a move would bring arbitrary and capricious review "into harmony with other major doctrines, such as *Chevron* deference, which seem to embrace the newer political control model." *Id.* at 13 (footnote omitted).

97. *E.g.*, Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1130 (2010) (proposing a statutory requirement that significant rules "include at least a summary of the substance of executive supervision").

98. Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1880 (2012) (arguing that there are "real dangers" associated with "a move toward more politicized reason giving"); *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462–63 (2003) (critiquing administrative law scholars' concern with political accountability considerations).

99. Strauss, *supra* note 85, at 755 (critiquing the position that the President's views, "as [those of the agency], are entitled to *Chevron* deference"). Here Strauss appears mostly interested in the President's views as expressed in signing statements and similarly formal declarations—though presumably the concerns would be heightened in the context of potential deference to more informal presidential expressions.

100. Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2603–04 (2006) ("If Congress delegates authority to the President, then Congress presumably also entitles him to construe ambiguities as he sees fit, subject to the general requirement of reasonableness.").

101. Stack, *supra* note 86, at 267.

102. Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 959, 1013–20 (2007).

norms and practices, to direct agency action—and if the theoretical foundations of *Chevron* actually counsel in favor of deeper deference to agencies when the President is involved in agency decision making—it might seem to follow that presidential interpretations or views themselves would be *a fortiori* entitled to a degree of solicitude, even if not formal deference. On the other hand, if the President lacks the power to direct agency action, presidential remarks that bear on agency action would seem largely irrelevant, or at least lacking in any formal legal effect. And even *if* the President is understood as possessing directive authority, there is an argument that the President should be required to impose his interpretations on agency actors via internal executive branch channels, rather than by announcing his views separately in the hopes that courts will give them legal effect. As the Parts that follow show, presidential speechmaking can clash with agency representations and even actions, as well as representations made by DOJ in litigation, and nothing in the literature provides clear guidance as to how courts should resolve such disagreements when they arise.

B. Direct Presidential Action

Modern Presidents also exercise a degree of power largely independent of the apparatus of the administrative state, and direct presidential action both bears some resemblance to, and also may intersect with, presidential speech. Direct presidential action can take a number of forms: executive orders and presidential memoranda,[103] proclamations,[104] and executive agreements,[105] to list a few. Although "[t]he U.S. Constitution does not explicitly recognize any of these policy vehicles,"[106] they are now well-established tools within the President's arsenal. My interest in this category of action is twofold. First, a clear sense of the nature and scope of direct presidential action is necessary before we can assess the implications of any use of presidential speech in evaluating such action. But I am also interested in what these modes of presidential action have in common with presidential speech—since much of the time they take effect through documents that are communicative or expressive, but with more clearly established (though not uncontroversial) legal effect.

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103. KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 4–5 (2001).

104. HAROLD C. RELYEA, CONG. RESEARCH SERV., PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW 14 (2008), http://fas.org/sgp/crs/misc/98-611.pdf [https://perma.cc/6BJY-F33U].

105. Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1575 (2007).

106. WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 7 (2003).

The scope of the category of direct presidential action is subject to some debate. In his volume *Power Without Persuasion*, William Howell defines "direct presidential actions" as "the wide array of public policies that Presidents set without Congress."[107] Although he focuses the bulk of his analysis on executive orders, his definition is quite expansive, including non-public or classified documents like national security directives.[108] Howell argues that over the past half-century, "the trajectory of unilateral policy making has noticeably increased. While it was relatively rare, and for the most part inconsequential, during the eighteenth and nineteenth centuries, unilateral policy making has become an integral feature of the modern Presidency."[109] The Office of Legal Counsel has advised that executive orders and presidential directives have the same legal effect, and that, in general, there is "no basis for drawing a distinction as to the legal effectiveness of a presidential action based on the form or caption of the written document through which that action is conveyed."[110]

Of the existing modes of presidential action, the literature is most developed when it comes to executive orders. Though jurisdictional obstacles often preclude judicial review of executive orders,[111] and presidential orders are not subject to APA review, some challenges to executive orders do proceed to adjudication. Where they do, existing analyses find that courts are for the most part quite deferential to the Executive. Howell's analysis of the fate of executive orders in court finds that "[f]ully 83% of the time, the courts affirmed the President's executive order,"[112] and that "[o]nly when Congress explicitly forbids the President from taking certain actions, and public

107. *Id.* at xiv.

108. *Id.* (including within the category directives "that are filed away as confidential"); *see also id.* at 17–18 (discussing national security directives, most of which are classified).

109. *Id.* at 179. For similar observations of the rise of direct presidential actions, see PHILLIP COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION (2002); Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 34 (2002); Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 550 (2005).

110. Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order, 24 Op. O.L.C. 29, 29 (2000); *see also* VIVIAN S. CHU & TODD GARVEY, CONG. RESEARCH SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 2 (2014) (referring to any distinction between "executive orders, presidential memoranda, and proclamations" as "more a matter of form than of substance"); Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 155 (1999) ("Historically, presidents have had virtually a free hand in deciding what form their orders will take, what the content will be, and how (if at all) they will be entered into the public record.").

111. *See* Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1841 n.281 (2015) (referring to challenging executive orders in court as "notoriously difficult"); Erica Newland, Note, *Executive Orders in Court*, 124 YALE L.J. 2026, 2098–99 (2015) (summarizing the justiciability difficulties in challenging executive orders).

112. HOWELL, *supra* note 106, at 154.

attention is high, will judges overturn the Chief Executive."[113] A recent note updates that figure through 2013, finding that of a database of 152 Supreme Court and D.C. Circuit cases involving challenges to executive orders, the federal government prevailed over 70% of the time; when the case featured a "foreign relations component," the figure rose to over 90%.[114]

Presidential action can also occur across a range of subject matters, with sometimes significant impact. Executive orders have created the Executive Office of the President,[115] desegregated the armed forces,[116] attempted to seize private steel mills,[117] and authorized broad intelligence collection,[118] to name just a few consequential examples.

In addition to their range and generally successful track record in court, presidential orders can have an important communicative or expressive dimension. A recent example comes from the passage of the 2010 Affordable Care Act. After nearly a year of negotiations over the bill, the final obstacle to passage appeared to be concerns raised by a number of House members opposed to abortion—including some Democrats—about the prospect of federal funds being used for abortion services.[119] The impasse was eventually broken when President Obama agreed to issue an executive order that reaffirmed the substance of the Hyde Amendment,[120] which since 1976 has prohibited the use of federal funds for abortion,[121] and directed the Department of Health and Human Services (HHS) to set up a mechanism to ensure compliance with the statutory prohibition. The executive order is widely credited with having removed the final obstacle to passage of the bill,[122] and it was arguably its expressive content—announcing governmental opposition to federal funding of abortions—rather than its formal legal effect that was ultimately responsible. Another example from the Obama Administration is a 2010 Presidential Memorandum on hospital visitation.

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113. *Id.* at 179.

114. Newland, *supra* note 111, at 2091 fig.9, 2094.

115. Exec. Order No. 8,248, 4 Fed. Reg. 3857, 3864–65 (Sept. 8, 1939); MAYER, *supra* note 103, at 5.

116. Exec. Order No. 9,981, 13 Fed. Reg. 4311, 4313 (July 26, 1948).

117. Exec. Order No. 10,340, 17 Fed. Reg. 3139, 3141 (Apr. 10, 1952); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582–83 (1952).

118. Exec. Order No. 12,333, 46 Fed. Reg. 59,441, 59,950 (Dec. 4, 1981).

119. STAFF OF THE WASH. POST, LANDMARK: THE INSIDE STORY OF AMERICA'S NEW HEALTH CARE LAW AND WHAT IT MEANS FOR US ALL 277–81 (2010).

120. Exec. Order No. 13,535, 75 Fed. Reg. 15,599, 15,599 (Mar. 24, 2010).

121. Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976). Since 1976, the Hyde Amendment has been passed annually, typically as an appropriations rider. Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1731 (2016).

122. STAFF OF THE WASH. POST, *supra* note 119, at 281; John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 406 (2010) ("The ratification of this order was a political commitment to help the recent enactment of the Patient Protection and Affordable Care Act . . . .").

The Memorandum directed the Secretary of HHS to undertake a rulemaking that would require hospitals to allow patients to designate individuals to participate in their medical decisions.[123] Although both the language of the Memorandum and the final rule[124] swept broadly, the impetus for the undertaking was a widely reported incident in which a Florida hospital denied a woman access to the bedside of her dying partner, a woman with whom she shared four children.[125] Most striking for these purposes was the tone of the memorandum, which read more like a speech than a legal directive. It began,

> There are few moments in our lives that call for greater compassion and companionship than when a loved one is admitted to the hospital. In these hours of need and moments of pain and anxiety, all of us would hope to have a hand to hold, a shoulder on which to lean—a loved one to be there for us, as we would be there for them.[126]

The Memorandum continued in a similar vein for a few paragraphs before the appearance of the operative language directing the rulemaking. As the examples above illustrate, these modes of direct presidential action actually bear some resemblance to presidential speeches.

Of course, there is a degree of fiction in describing any of the foregoing as "direct" presidential action. The President does not, of course, typically draft executive orders or similar documents himself; depending on subject matter, that task may be performed by lawyers in the Office of Management and Budget, the White House Counsel's Office, or a component of DOJ or another agency.[127] But the President actually considers such documents and, importantly, affixes a signature.[128] This is similarly true of the modes of direct presidential action at issue in several of the lower-court cases discussed in

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123. Memorandum on Respecting Rights of Hospital Patients to Receive Visitors and to Designate Surrogate Decision Makers for Medical Emergencies, 2010 DAILY COMP. PRES. DOC. 2 (Apr. 15, 2010).

124. 75 Fed. Reg. 70,831 (Nov. 19, 2010) (codified at 42 C.F.R. §§ 482.13(h), 485.635(f) (2016)).

125. Sheryl Gay Stolberg, *Obama Widens Medical Rights for Gay Partners*, N.Y. TIMES (Apr. 15, 2010), http://www.nytimes.com/2010/04/16/us/politics/16webhosp.html?_r=0 [https://perma.cc/J8SV-ZTA6].

126. Memorandum on Respecting the Rights of Hospital Patients to Receive Visitors and to Designate Surrogate Decision Makers for Medical Emergencies, *supra* note 123, at 1.

127. *Cf.* Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 219 (1993) ("[P]artisans of the unitary executive often discuss presidential control as if *the President* is the one who exercises it. In general, of course, this is simply not true."). Professor Herz was focused here on agencies, but the point also holds for action that doesn't visibly emanate from an agency.

128. *But see* Whether Bills May be Presented by Congress and Returned by the President by Electronic Means, 35 Op. O.L.C., at 8–9 (2011), https://www.justice.gov/sites/default/files/olc/opinions/2011/05/31/bills-electronic-means_0.pdf [https://perma.cc/ZP2C-R2QC] (advising that the President must "sign" a bill when he approves its adoption, but that the Constitution permits the President's staff to affix his signature to legislation via autopen).

the next Part—presidential action in the national security sphere, in particular targeting (like the *Al-Aulaqi* case I discuss at length in the next Part) and detention at Guantanamo Bay. When it comes to both targeting and detention, the President does not, of course, personally take the ultimate actions subject to challenge.[129] But public reporting suggests, and executive branch statements confirm, that such actions involve actual presidential actions and determinations,[130] which distinguishes this conduct from most agency action.[131]

C. *Presidential Speech and the Legislative Process*

Finally for this Part, I briefly address presidential speech in the context of legislation. When it comes to legislative history—statements that are not themselves law, but are *about* law—the grooves of the debate are well worn. Some scholars advocate, and some judges pledge fealty to, a position of zero tolerance;[132] some embrace the potential relevance of all such materials;[133] and many, perhaps most, take sort of a middle ground, evidencing a willingness to give some weight under some circumstances to certain materials but not others.[134] Statements by executive branch officials, when

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129. *See* Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES (May 29, 2012), http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?mcubz=0 [https://perma.cc/NN2T-KM6Q] (describing DoD as actually "oversee[ing]" the strikes as a general matter); *see also id.* (with respect to targeted killing of Baitullah Mehsud, "Mr. Obama, through Mr. Brennan, told the C.I.A. to take the shot . . . .").

130. *Id.* (describing the President's practice of "personally overseeing the shadow war with Al Qaeda," including by personally "approving every new name on an expanding 'kill list'"); *see also* Press Release, Office of the Press Sec'y, Press Briefing by Senior Administration Officials on the Killing of Osama Bin Laden (May 2, 2011), http://www.whitehouse.gov/the-press-office/2011/05/02/press-briefing-senior-administration-officials-killing-osama-bin-laden [https://perma.cc/TY82-FSD5] ("[T]he President gave the final order to pursue the operation that he announced to the nation tonight . . . ."); Eric Holder, U.S. Att'y Gen., Speech at Northwestern School of Law (Mar. 5, 2012), http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html [https://perma.cc/E7WR-5W4J] (describing the Administration's targeting procedures). For an exploration of the legal implications of individually targeted military strikes, including the President's direct involvement therein, see Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521 (2013).

131. Authorizations by the executive branch of detention policies are somewhat harder to classify as either agency or direct presidential action. *See infra* notes 212–23 (discussing Al Warafi v. Obama, No. 09-2368 (RCL), 2015 WL 4600420 (D.D.C. July 30, 2015), *vacated as moot*, No. 15-5266 (D.C. Cir. Mar. 4, 2016)).

132. *See, e.g.*, ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 376–78 (2012).

133. ROBERT A. KATZMANN, JUDGING STATUTES 3–4 (2014).

134. *See generally* Nicholas Parillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266 (2013) (describing the positions).

they do appear in discussions of the interpretation of statutes, appear as simply a subset of the larger category of legislative history.[135]

Presidential *signing* statements—the "short documents that Presidents often issue when they sign a bill"[136]—have been the subject of extensive scholarly debate.[137] These instruments in some ways straddle the spheres of substantive law and legislative history. Though there is no question that they play an important part in influencing executive branch actors charged with law implementation,[138] scholars and judges take a range of positions on the extent to which signing statements should carry force in court.

But it may be worth looking beyond signing statements to consider more broadly presidential statements as a distinct source of authority when it comes to the interpretation of statutes.[139] The Constitution's Recommendations Clause imposes on the President the obligation to recommend legislation to Congress.[140] So, where draft legislation originates in the executive branch, there is an argument that statements by the President or other relevant executive branch officials should be deemed especially relevant to the interpretive task. The Supreme Court has recognized that the President "may initiate and influence legislative proposals"[141] and has cited

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135. *See, e.g.*, OTTO J. HETZEL ET AL., LEGISLATIVE LAW AND STATUTORY INTERPRETATION: CASES AND MATERIALS 589–90 (3d ed. 2001).

136. Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 308 (2006). For a brief historical account of presidential use of signing and veto statements, see WILLIAM ESKRIDGE ET AL., LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 848–52 (5th ed. 2014).

137. A nonexhaustive list includes Bradley & Posner, *supra* note 136; Neal Devins, *Signing Statements and Divided Government*, 16 WM. & MARY BILL RTS. J. 63 (2007); William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699 (1991); Daniel B. Rodriguez et al., *Executive Opportunism, Presidential Signing Statements, and the Separation of Powers*, 8 J. LEGAL ANALYSIS 95 (2016); Christopher S. Yoo, *Presidential Signing Statements: A New Perspective*, 164 U. PA. L. REV. 1801 (2016).

138. Neal Devins, *supra* note 137, at 69; M. Elizabeth Magill, *The First Word*, 16 WM. & MARY BILL RTS. J. 27, 28–30 (2007).

139. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2125 (2016) (reviewing KATZMANN, *supra* note 133):

> Lawyers, academics, and judges too often treat legislation as a one-body process ('the Congress') or a two-body process ('the House and Senate'). But formally and functionally, it is actually a three-body process: the House, the Senate, and the President. Any theory of statutory interpretation that seeks to account for the realities of the legislative process . . . must likewise take full account of the realities of the President's role in the legislative process.

140. U.S. CONST. art. II, § 3 ("[The President] shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient . . . ."). For a discussion of the duty imposed by the Recommendations Clause, see Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2081 (1989).

141. Clinton v. New York, 524 U.S. 417, 438 (1998); *see also* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1819 (1996) ("[T]he President has aptly been termed the 'legislator-in-chief.'"); Ganesh Sitamaran, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 103–04 (2015) ("Despite the conventional understanding of Congress as the primary source of

presidential statements in canonical statutory interpretation cases.[142] But neither courts nor scholars have provided well-developed descriptive or normative accounts of the role of presidential speech when it comes to the judicial task of interpreting statutes.[143]

III. Presidential Speech in the Courts

A. The Forms of Presidential Speech: A Taxonomy

This Part turns to presidential speech itself. For purposes of this project, the statements Presidents make[144] can be divided into several distinct categories: views on constitutional power or authority; views on statutory meaning or purpose; statements that might bear on the meaning or purpose of executive action; statements of conclusions with specified legal consequences; and statements of fact, either legislative or adjudicative. The subparts below describe judicial encounters—both in the Supreme Court and lower courts—with presidential speech in each of these categories.[145]

1. Constitutional Power or Authority.—First, presidential speech may directly address constitutional power or authority. The Supreme Court's opinion in the presidential-power case *Myers v. United States*[146] supplies perhaps the best example of judicial reliance on this sort of presidential speech. In its decision striking down a statute that required the President to obtain Senate approval before removing a postmaster, the *Myers* Court cited statements by no fewer than five Presidents; all were made in speeches, and

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legislation, often, the [E]xecutive [B]ranch will draft entire pieces of legislation and transmit that legislation to Congress."); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1037 & fig.6 (2015) (reporting that nearly 80% of surveyed agency officials regularly participate in "a technical drafting role" for statutes administered by their agencies, and that nearly 60% regularly participate in a "policy or substantive drafting role").

142. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193, 203 (1979) (citing remarks of Senator Humphrey and noting that they echoed "President Kennedy's original message to Congress upon the introduction of the Civil Rights Act in 1963[:] 'There is little value in a Negro's obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job.'").

143. Kesavan & Sidak, *supra* note 3, at 5 (noting the paucity of literature on the Recommendations and State of the Union Clauses). To be sure, some excellent work describes the President's role in the legislative process; my point is only that it does not focus on interpretation. *See, e.g.*, Andrew Rudalevige, *The Executive Branch and the Legislative Process*, *in* INSTITUTIONS OF AMERICAN DEMOCRACY: THE EXECUTIVE BRANCH 419 (Joel D. Aberbach & Mark A. Peterson eds., 2005).

144. With apologies to Stephen Skowronek. *See* STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE (1997).

145. This list is not exhaustive, but it does encompass the categories of presidential speech that are most likely to appear in litigation. Other categories—promises, exhortations, and threats, to name a few examples—are simply less likely to end up before courts, so I have not considered them here.

146. 272 U.S. 52 (1926).

all expressed doubts about the constitutionality of laws requiring congressional consultation or approval prior to removal.[147] These included a speech by President Jackson explaining that "[t]he President in cases of this nature possesses the exclusive power of removal from office,"[148] and a similar statement by President Wilson, who contended that "the Congress is without constitutional power to limit the appointing power and its incident, the power of removal, derived from the Constitution."[149]

In contrast to *Myers*, an infrequently cited fragment of Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*[150] strikes a cautionary note about the relevance, in a constitutional case, of executive branch speech delivered both in the spirit of advocacy[151] and in a decidedly nonjudicial setting. In the relevant passage, Justice Jackson brushed away the significance of statements made by a previous Attorney General (as it happened, Jackson himself) defending President Roosevelt's seizure of the Inglewood Plant of North American Aviation.[152] Justice Jackson explained that "a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself."[153]

Two of the opinions in *Hamdan v. Rumsfeld*[154] clashed quite explicitly over the significance of executive branch statements to the case before the Court. Dissenting from the majority opinion invalidating the use of military commissions, Justice Thomas criticized the majority's conclusion that the

147. *See id.* at 152, 167–70 (quoting Presidents Jackson, Grant, Cleveland, Wilson, and Coolidge).

148. *Id.* at 152.

149. *Id.* at 169. The Court cited actions, as well as statements, by previous Presidents, but presidential statements were an important type of evidence on which the Court relied. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 479 (2012) (describing the *Myers* Court as having "privileg[ed] various expressions of executive disapproval").

150. 343 U.S. 579 (1952).

151. *See* Louis Jaffe, *Mr. Justice Jackson*, 68 HARV. L. REV. 940, 989 & n.199 (1955) (citing this language as an example of Jackson's "acknowledg[ing], sometimes with charming humor, the inconsistencies of his successive avatars").

152. Of Roosevelt's seizure, then-Attorney General Jackson stated that "[t]here can be no doubt that the duty constitutionally and inherently rested upon the President to exert his civil and military, as well as his moral, authority to keep the Defense effort of the United States a going concern." 89 CONG. REC. 3992 (1943) (statement of Sen. Barkely, quoting Jackson); *see also* Patricia L. Bellia, *The Story of the* Steel Seizure *Case*, *in* PRESIDENTIAL POWER STORIES 233, 238–39 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (quoting and discussing same). This statement was excerpted in the major newspapers at the time, *see, e.g.*, Louis Stark, *Roosevelt Explains Seizure; Jackson Cites Insurrection*, N.Y. TIMES, June 10, 1941, at 1, 16, and the government seized upon it in its brief in *Youngstown*. *See* Brief for Petitioner at 109 n.11, *Youngstown*, 343 U.S. 579 (No. 745), at 109 n.11.

153. *Youngstown*, 343 U.S. at 647 (Jackson, J., concurring).

154. 548 U.S. 557 (2006). *See generally* Dawn E. Johnsen, *The Story of* Hamdan v. Rumsfeld, *in* PRESIDENTIAL POWER STORIES 447 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

military commissions' failure to comply with the requirements for courts-martial doomed them. According to Justice Thomas, the majority agreed that "the President is entitled to prescribe different rules for military commissions than for courts-martial when he determines that it is not 'practicable' to prescribe uniform rules."[155] And, Justice Thomas explained, the President *had* made such a determination here; as evidence, Justice Thomas offered press statements by the Secretary and Under Secretary of Defense describing the President's conclusion and motivation.[156] Writing for the majority, Justice Stevens responded sharply to Justice Thomas's argument: "We have not heretofore, in evaluating the legality of executive action, deferred to comments made by [executive branch] officials to the media."[157]

Many of the invocations of presidential speech in these cases seem to employ such speech as a component of a separation-of-powers "historical gloss" analysis, of the sort Justice Frankfurter urged in *Youngstown*.[158] Together, they suggest that one underappreciated element of gloss analysis may be statements made by Presidents or other executive branch officials. But no clear principles distinguish cases in which such statements will be deemed relevant and those in which they will not.

Indeed, in some constitutional cases, presidential statements appear in briefing or oral argument, but are conspicuously absent from a court's final opinion. *NFIB v. Sebelius*[159] represents the most high-profile example in

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155. *Hamdan*, 548 U.S. at 712 (Thomas, J., dissenting).

156. Douglas J. Feith, Under Secretary of Defense for Policy, reiterated statements made by the Secretary of Defense, stating:

> [T]he Secretary of Defense explained that "the president decided to establish military commissions because he wanted the option of a process that is different from those processes which we already have, namely, the federal court system . . . and the military court system," Dept. of Defense News Briefing on Military Commissions (Mar. 21, 2002) (remarks of Donald Rumsfeld) . . . . The President reached this conclusion because: "we're in the middle of a war, and . . . had to design a procedure that would allow us to pursue justice for these individuals while at the same time prosecuting the war most effectively. And that means setting rules that would allow us to preserve our intelligence secrets, develop more information about terrorist activities that might be planned for the future so that we can take action to prevent terrorist attacks against the United States."

Id. at 712–13 (first and third omissions in original).

157. 548 U.S. at 623 n.52.

158. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."); *see also* NLRB v. Noel Canning, 134 S. Ct. 2550, 2559 (2014) (stating that because the Recess Appointments Clause concerns the separation of elected powers, "in interpreting the Clause, we put significant weight upon historical practice" (emphasis omitted)). For discussions of "gloss" analysis, see generally Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59 (2017); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013); Bradley & Morrison, *supra* note 149.

159. 567 U.S. 519 (2012).

recent memory. The presidential remarks of interest in that case appeared in an interview with ABC's George Stephanopoulos. In response to Stephanopoulos's questions, President Obama maintained that the penalty attached to the Affordable Care Act's individual mandate "was absolutely not a tax increase."[160] This comment soon appeared in a number of press accounts and opinion pieces.[161] A Virginia district court in *Virginia v. Sebelius*[162] asked a Department of Justice attorney to explain President Obama's statements: "Let's characterize it correctly, . . . [t]hey denied it was a tax. The President denied it. Was he trying to deceive the people?"[163] Similarly, before the Supreme Court, Justice Scalia pressed Solicitor General Don Verrilli on the President's words, presumably (although not explicitly), in reference to the same interview:

> JUSTICE SCALIA: The President said it wasn't a tax, didn't he?
>
> GENERAL VERRILLI: Well, Justice Scalia, what the—two things about that. First is, it seems to me, what matters is what power Congress was exercising. And they were—and I think it's clear that the—they were exercising the tax power as well as the commerce power.
>
> JUSTICE SCALIA: You're making two arguments. Number one, it's a tax. And, number two, even if it isn't a tax, it's within the taxing power. I'm just addressing the first.

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160. Stephanopoulos asked, "Under this mandate the government is forcing people to spend money, fining you if you don't[.] How is that not a tax?" After some intervening dialogue, President Obama responded, "[F]or us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase. . . . [E]verybody in America, just about, has to get auto insurance. Nobody considers that a tax increase. People say to themselves, that is a fair way to make sure that if you hit my car, that I'm not covering all the costs." Interview by George Stephanopoulos with President Barack Obama, on *This Week* (ABC television broadcast Sept. 20, 2009) (transcript available at http://abcnews.go.com/ThisWeek/Politics/transcript-president-barack-obama/story?id=8618937 [https://perma.cc/939B-JQKN]).

161. *See, e.g.*, Chris Frates & Mike Allen, *Bill Says 'Tax' When Obama Said 'Not'*, POLITICO (Sept. 21, 2009), http://www.politico.com/story/2009/09/bill-says-tax-when-obama-said-not-027384 [https://perma.cc/NV4M-DTUD]; *Obamacare: How Many of the President's Promises Have Been Broken?*, HERITAGE FOUND., http://www.askheritage.org/obamacare-how-many-of-the-presidents-promises-have-been-broken-t3/ [https://perma.cc/V3DS-9JZH]; Shikha Dalmia, *Obama's Top Five Health Care Lies*, FORBES (July 1, 2009), http://www.forbes.com/2009/06/30/obama-health-care-reform-opinions-columnists-public-option-medicare.html [https://perma.cc/9MSS-7RLY]; Avik Roy, *The Individual Mandate is a Tax. Or Isn't. Or Is.*, FORBES (Feb. 1, 2011), http://www.forbes.com/sites/aroy/2011/02/01/the-individual-mandate-is-a-tax-or-isnt-or-is/#344723552818 [https://perma.cc/34QS-66SG]; *Obama's Tax Pledge–Documentation*, AM. FOR TAX REFORM (Aug. 3, 2010), http://www.atr.org/obamas-tax-pledge-documentation-a5282#ixzz1CHAmKYHg [https://perma.cc/N6YY-YWQW].

162. Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011).

163. Complete Transcript of Motions Before the Honorable Henry E. Hudson, United States District Court Judge at 80, *Cuccinelli*, 728 F. Supp. 2d 768 (No. 3:10 CV 188).

> GENERAL VERRILLI: What the President said—
>
> JUSTICE SCALIA: Is it a tax or not a tax? The President didn't think it was.
>
> GENERAL VERRILLI: The President said it wasn't a tax increase because it ought to be understood as an incentive to get people to have insurance. I don't think it's fair to infer from that anything about whether that is an exercise of the tax power or not.[164]

It was striking, then, that despite the debates at oral argument about its significance and the extensive media coverage, no genuine reliance on the President's statement appeared in either case—indeed, in *NFIB* it went entirely unmentioned, while the only reference in *Virginia* was oblique and glancing.[165]

2. Statutory Meaning or Purpose.—Second, presidential speech may speak to the purpose, content, or meaning of a particular legislative enactment. Much of the time, such statements of presidential views are offered in signing statements, which I do not consider here; but they can appear in speeches as well.

I'll mention just a few examples. First, the Court in the 1896 case *Wiborg v. United States*[166] used President Washington's 1793 inaugural address as a guide to interpreting a neutrality statute with founding-era roots.[167] A number of antitrust cases involving the Clayton Act have cited a 1914 speech by President Wilson on the issue of antitrust remedies; his speech specifically addressed the limitations period for private antitrust actions, and the Court has heeded his advice and tolled limitations periods during the pendency of government actions.[168] Majority or dissenting opinions have also cited presidential speech in interpreting Title VII of the

164. Transcript of Oral Argument at 48–49, Dep't of Health and Human Servs. v. Florida, 567 U.S. 904 (2012) (No. 11-398).

165. The opinion remarked: "Despite pre-enactment representations to the contrary by the Executive and Legislative branches, the Secretary now argues that the Minimum Essential Coverage Provision is, in essence, a 'tax penalty.'" *Cuccinelli*, 728 F. Supp. 2d at 782.

166. 163 U.S. 632 (1896).

167. *Id.* at 647.

168. *See, e.g.*, Minn. Min. & Mfg. Co. v. N.J. Wood Finishing Co., 381 U.S. 311, 318 (1965) (citing, in interpreting the tolling provision of the Clayton Act, President Wilson's 1914 speech to Congress calling for strengthened antitrust laws, and specifically pointing to language arguing that for such private actions, "the statute of limitations . . . be suffered to run against such litigants only from the date of the conclusion of the government's action" (quoting 59 CONG. REC. 1964 (1914)); Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 333 (1978) (quoting same).

Civil Rights Act,[169] the Equal Educational Opportunities Act,[170] the Federal Power Act,[171] and many others. For the most part, these statements appear to be used in the same way courts use legislative history to construe statutes—as one interpretive aid among many.

3. Executive Action.—Presidents may also make statements that go to either the operation and function, or to the purpose, of executive action—whether agency action or direct presidential action. In this subpart, I consider two such examples in some detail: first, the recent litigation over President Obama's executive action on immigration; second, the litigation regarding President Trump's successive "travel ban" executive orders, both issued in early 2017.

When the Obama Administration announced a major new immigration initiative in 2014, its rollout happened on two fronts: a televised address by President Obama[172] and a memorandum issued by the Secretary of Homeland Security.[173] The address explained that a new initiative, which was described in only general terms, would "bring more undocumented immigrants out of the shadows so they can play by the rules, pay their full share of taxes, pass a criminal background check, and get right with the law."[174]

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169. United Steelworkers v. Weber, 443 U.S. 193, 203 (1979) (citing remarks of Senator Humphrey and noting that they echoed "President Kennedy's original message to Congress upon the introduction of the Civil Rights Act in 1963[:] 'There is little value in a Negro's obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job.'" (quoting 109 CONG. REC. 11,159 (1963)).

170. Horne v. Flores, 557 U.S. 433, 476 (2009) (Breyer, J., dissenting) ("The provision is part of a broader Act that embodies principles that President Nixon set forth in 1972, when he called upon the Nation to provide 'equal educational opportunity to every person,' including the many 'poor' and minority children long 'doomed to inferior education' as well as those '*who start their education under language handicaps*.'" (quoting and emphasizing Educational Opportunity and Busing: The President's Address to the Nation Outlining His Proposals, 8 WEEKLY COMP. PRES. DOC. 590, 591 (Mar. 16, 1972)).

171. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 139–40 & n.20 (1960) (Black, J., dissenting) (dissenting from the majority opinion allowing the Federal Power Commission to take lands of the Tuscarora Indian Nation in order to complete a hydroelectric power project, and citing statements by Presidents Washington and Jackson).

172. Press Release, Office of the Press Sec'y, Weekly Address: Immigration Accountability Executive Action (Nov. 22, 2014), http://www.whitehouse.gov/the-press-office/2014/11/22/weekly-address-immigration-accountability-executive-action [https://perma.cc/4DFM-RXKJ].

173. Memorandum from Jeh C. Johnson, Sec'y of Homeland Sec., to Leon Rodriguez, Director, U.S. Citizenship & Immigration Servs. et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf [https://perma.cc/9YPG-J3F2].

174. Press Release, Office of the Press Sec'y, *supra* note 172.

The Secretary's memorandum actually contained the details of the Administration's "new policies for the use of deferred action."[175] The memorandum announced that it would deprioritize immigration enforcement against two categories of undocumented individuals.[176] (I'll call the new policies "DAPA" for ease of reference.)

Soon after the official announcement, Texas, joined by twenty-five other states, filed suit to enjoin the implementation of the new policies. A Texas district court granted Texas's request for a preliminary injunction on the grounds that the policy should have been adopted pursuant to the notice and comment procedures set forth in the Administrative Procedure Act (APA).[177]

One of the most striking features of the district court opinion was its treatment of presidential statements. Throughout the opinion—when discussing justiciability, describing the legal issues in general terms, and ruling on the APA claim—the court repeatedly marshaled speeches and other public statements by President Obama, appearing to accord significant weight to those statements.

First, in a portion of the opinion finding that the state challengers possessed what the court termed "abdication standing," the court wrote:

> The Court is not comfortable with the accuracy of any of these statistics [as to the likely number of beneficiaries of the program], but it need not and does not rely on them given the admissions made by the President and the DHS Secretary as to how DAPA will work.[178]

Similarly, in rejecting the government's threshold argument that DAPA represented an exercise of enforcement discretion and was therefore unreviewable, the court pointed to a presidential statement to the effect that "it was the failure of Congress to pass such a law that prompted him (through his delegate, Secretary Johnson) to 'change the law.'"[179] This "change the law" statement, the court concluded, represented a concession that nothing in existing law conferred on DHS the sort of discretionary authority that would defeat reviewability.

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175. Memorandum from Jeh C. Johnson, *supra* note 173, at 1.

176. The two categories were (1) undocumented immigrants whose children were U.S. citizens or lawful permanent residents and (2) individuals who came to the United States as children and satisfied a number of other eligibility criteria (the second group had been the subject of previous immigration executive action earlier in the Obama Administration). *Id.*

177. Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an evenly divided court*, 136 S. Ct. 2271 (2016).

178. *Id.* at 639 n.46.

179. *Id.* at 657 & n.71 (citing Press Release, Office of the Press Sec'y, Remarks by the President on Immigration—Chicago, IL (Nov. 25, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/25/remarks-president-immigration-chicago-il [https://perma.cc/WVY5-L9EN]).

Later, when considering whether DAPA was policy guidance, and therefore exempt from APA rulemaking procedures, the court wrote:

> What is perhaps most perplexing about the Defendants' claim that DAPA is merely "guidance" is the President's own labeling of the program. In formally announcing DAPA to the nation for the first time, President Obama stated, "I just took an action to change the law." He then made a "deal" with potential candidates of DAPA: "if you have children who are American citizens . . . if you've taken responsibility, you've registered, undergone a background check, you're paying taxes, you've been here for five years, you've got roots in the community—*you're not going to be deported. . . . If you meet the criteria, you can come out of the shadows. . . .*"[180]

This, the court concluded, meant that the DHS Secretary's memo set forth binding rules, rather than a general framework in which individual officials would still enjoy substantial discretion. Based largely on this presidential characterization, the court concluded that DAPA represented a substantive rule change for which notice-and-comment rulemaking had been required, and issued a nationwide injunction.

When the federal government sought to stay the injunction, the Fifth Circuit opinion denying the request cited no statements by the President or other officials.[181] But Judge Higginson's dissenting opinion objected strenuously to precisely this aspect of the district court opinion. He wrote:

> [T]he district court looked above DHS, the executive agency, to President Obama . . . to find contradiction to [DHS's] stated purpose and emphasis on case-by-case discretion. For good reason, however, the Supreme Court has not relied on press statements to discern government motivation and test the legality of governmental action, much less inaction.[182]

He continued: "Presidents, like governors and legislators, often describe law enthusiastically yet defend the same law narrowly. . . . In addition, our court has noted that 'informal communications often exhibit a lack of "precision of draftsmanship" and therefore 'are generally entitled to limited weight' . . . ."[183]

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180. *Id.* at 668 (quoting and emphasizing Press Release, Office of the Press Sec'y, Remarks by the President on Immigration (Nov. 21, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/21/remarks-president-immigration [https://perma.cc/862G-VE7T]). Interestingly, despite its focus on these presidential statements, the district court only once in passing cited the weekly address in which the President actually announced the policy. *See id.* at 610 n.9.

181. Texas v. United States, 787 F.3d 733, 743 (5th Cir. 2015), *aff'd by an evenly divided court*, 136 S. Ct. 2271 (2016).

182. *Id.* at 780 (Higginson, J., dissenting).

183. *Id.* at 780–81 (quoting Prof'ls & Patients for Customized Care v. Shalala, 56 F.3d 592, 599 (5th Cir. 1995) (quoting Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 948 (D.C. Cir. 1987))).

Before the Supreme Court, Texas continued to focus on the same statements that had proven effective before the district court. As its opening brief recounted, "Shortly after DAPA issued, the President admitted, 'I just took an action to change the law.' The President later explained that DAPA 'expanded [his] authorities,' and conceded that DAPA recipients would get 'a legal status.'"[184] In addition, there was some indication at oral argument that at least the Chief Justice was struck by the potential relevance of the President's statements; he pressed Solicitor General Don Verrilli with the following question: "[W]hen he announced—the President announced DACA, the predecessor provision, he said that if you broadened it—this is a quote, *'Then, essentially, I would be ignoring the law in a way that I think would be very difficult to defend legally.'* What was he talking about?"[185]

Because the Supreme Court deadlocked 4–4 on the case, affirming the judgment of the Fifth Circuit, there is no way to know what significance, if any, the Court might have accorded any of President Obama's statements.[186] But the oral arguments certainly suggested that such statements could have impacted at least some Justices' views of the case.[187]

The second such example involves the litigation around President Trump's "travel ban" executive orders, in which the weight courts should accord presidential speech has been perhaps *the* central legal question.

The first order, titled "Protecting the Nation from Foreign Terrorist Entry into the United States," was issued on January 27, 2017.[188] Its main operative provisions temporarily suspended admission to the United States

184. Brief for the State Respondents at 13, United States v. Texas, 136 S. Ct. 2271 (No. 15-674) (citations omitted).

185. Transcript of Oral Argument at 33–34, *Texas*, 136 S. Ct. 2271 (No. 15-674) (emphasis added). The Chief Justice's question seemed almost to suggest an estoppel argument based on the President's previous statements—an odd suggestion in light of the general rule against nonmutual collateral estoppel in the context of the federal government, particularly in the context of oral statements. *See* Heckler v. Cmty. Health Servs. of Crawford Cty., Inc., 467 U.S. 51, 60 (1984) (stating that in light of "the interest of the citizenry as a whole in obedience to the rule of law," it is "well settled that the Government may not be estopped on the same terms as any other litigant").

186. *Texas*, 136 S. Ct. at 2272. For a discussion of many of President Obama's statements on immigration and executive authority, see Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 270–80 (2015).

187. *See generally* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015) (discussing whether constitutional limitations exist on the President's power to shape immigration law through administrative channels); Peter M. Markowitz, *The Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489 (2017) (examining the President's prosecutorial-discretion power in the context of immigration and proposing potential limits).

188. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); *see* Washington v. Trump, 847 F.3d 1151, 1167–68 (9th Cir. 2017) (reserving question of impact of presidential statements on religious discrimination claims).

of individuals from seven majority-Muslim countries;[189] temporarily suspended admission of all refugees; and indefinitely suspended admission of Syrian refugees. It also contained two separate provisions prioritizing the admission of persecuted members of religious minorities.[190] The Order was swiftly challenged by the states of Washington and Minnesota on a number of statutory and constitutional grounds.[191] Central to the states' challenge was the argument that "the Executive Order was not truly meant to protect against terror attacks by foreign nationals but rather was intended to enact a 'Muslim ban' as the President had stated during his presidential campaign that he would do."[192] The Washington district court entered a Temporary Restraining Order (TRO),[193] and the federal government sought review in the Ninth Circuit.

The Ninth Circuit upheld the TRO, primarily on the basis of the strength of the plaintiffs' due process arguments, expressly reserving judgment on the religious discrimination claims. But the court noted that those claims relied heavily on "numerous statements by the President about his intent to implement a 'Muslim ban'"[194] and explained that such evidence *could* properly be considered when evaluating claims brought under the Establishment and Equal Protection Clauses.[195]

The federal government then unsuccessfully sought rehearing en banc.[196] The denial of rehearing drew a dissent from Judge Kozinski; though

189. It was initially unclear whether this restriction, contained in Section 3 of the Order, applied to valid green card holders who were temporarily out of the country. *Id.* at 8897–98. The White House initially indicated that it did, and that green card holders would need to seek a waiver to gain reentry. Interview by Chuck Todd with Reince Priebus, White House Chief of Staff, on *Meet the Press* (NBC television broadcast Jan. 29, 2017) (transcript available at https://www.nbcnews.com/meet-the-press/meet-press-01-29-17-n713751 [https://perma.cc/QY9X-VMHY]) (questioning Priebus regarding whether the Order would affect green card holders, to which Priebus responded, "Well, of course it does."). Days after the order was issued, though, the White House Counsel issued a memorandum purporting to clarify that green card holders were *not* subject to the entry ban. Memorandum from Donald F. McGahn II, Counsel to the President, to The Acting Sec'y of State et al., Authoritative Guidance on Executive Order Entitled "Protecting the Nation from Foreign Entry into the United States" (Jan. 27, 2017).

190. Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8979 (Jan. 27, 2017) (notwithstanding the suspension of the refugee program, providing for case-by-case admissions, "including when the person is a religious minority in his country of nationality facing religious persecution," and directing the Secretary of State, upon resumption of the refugee program, to "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality").

191. Challenges were brought in other districts as well, but I do not address all of those cases here.

192. Washington v. Trump, 847 F.3d 1151, 1157 (9th Cir. 2017).

193. Washington v. Trump, No. C17-0141JLR, 2017 WL 462040, at *1 (W.D. Wash. Feb. 3, 2017).

194. Washington v. Trump, 847 F.3d 1151, 1167 (9th Cir. 2017).

195. *Id.* at 1167–68.

196. Washington v. Trump, 858 F.3d 1168 (9th Cir. 2017) (mem.).

the panel opinion had expressly disavowed reliance on the President's words, the dissent charged that the opinion nevertheless "sow[ed] chaos by holding 'that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims.'"[197] Kozinski elaborated: "Candidates say many things on the campaign trail; they are often contradictory or inflammatory. No shortage of dark purpose can be found by sifting through the daily promises of a drowning candidate, when in truth the poor schlub's only intention is to get elected."[198]

After the Ninth Circuit opinion upholding the district court's TRO, the Trump Administration opted to withdraw the original executive order in favor of a new one. Issued in March 2017, the second order differed in several ways from the original order with which it shared a name, but imposed the same temporary ban on entry, this time targeting only six countries, rather than seven.[199]

This EO, too, was immediately challenged and subsequently enjoined by district courts in Maryland and Hawaii, with a Fourth Circuit opinion forcefully agreeing with the Maryland district court and a Ninth Circuit opinion affirming the bulk of the Hawaii district court's injunction, albeit on statutory rather than constitutional grounds.[200] Importantly for this Article's purposes, the Fourth Circuit found that the Order very likely violated the Establishment Clause, placing substantial reliance on statements by both candidate and President Trump, as well as his surrogates and staffers. Among other things, it referenced a March 2016 CNN interview in which then-candidate Trump said, "I think Islam hates us . . . we have to be very careful. And we can't allow people coming into this country who have this hatred of

197. *Id.* at 1172 (Kozinski, J., dissenting).

198. *Id.* at 1173 (footnote omitted).

199. Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,211 (Mar. 6, 2009).

200. Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017), *cert. granted*, 137 S. Ct. 2080 (June 26, 2017) (No. 16-1436); Hawai'i v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017), *aff'd in part, vacated in part*, 859 F.3d 741 (9th Cir. 2017), *cert. granted sub nom.* 137 S. Ct. 2080 (June 26, 2017) (No. 16-1540). The Supreme Court subsequently granted the government's cert petitions in both cases, staying the injunctions "with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States." Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2081 (2017). At the time of this writing, the Supreme Court had removed these cases from its October 2017 calendar after the expiration of the key provisions of the order. *See* Trump v. Int'l Refugee Assistance Project, No. 16-1436 (U.S. Sept. 25, 2017); Trump v. Hawaii, No. 16-1540 (Oct. 24, 2017) (vacating judgment in both cases and directing lower courts to dismiss as moot pursuant to United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950)). In September 2017 the Trump administration also issued a third order, this one styled as a Presidential Proclamation; this directive, like the first two, is also being challenged in a range of courts and under a variety of theories. *See* Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats (Sept. 24, 2017).

the United States."[201] It also cited the pledge on Trump's campaign website calling "for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on."[202] And it noted the candidate's admission that he was shifting his rhetoric from advocacy of a "Muslim ban" to a focus on "territories."[203] Declining the government's invitation to set aside such evidence, the court wrote, "[w]e cannot shut our eyes to such evidence when it stares us in the face, for 'there's none so blind as they that won't see.'"[204]

4. Statements with Direct Legal Effect.—Presidents may also make statements that have—or where one party argues they should have—direct legal effect. Some such cases present fewer thorny conceptual or institutional questions than cases involving other varieties of presidential speech. In these cases, either statute or judicially crafted doctrine provides for presidential speech to have some specified legal effect; absent any constitutional obstacle, it seems clear that courts should give the speech the prescribed legal effect. Still, these cases are worth considering, in part because parties may disagree about whether particular presidential speech satisfies the requirements of the relevant statute or doctrinal test.

The World War I-era case *Hamilton v. Kentucky Distilleries & Warehouse Co.*[205] supplies an example of such a dispute. There the plaintiff whiskey company sought relief from the application of the War-Time Prohibition Act, which by its terms prohibited most selling of spirits "until the conclusion of the present war."[206] Pointing to presidential statements to the effect that "the war has ended and peace has come,"[207] that "certain war agencies and activities should be discontinued,"[208] and that "our enemies are

201. Interview by Anderson Cooper with Donald Trump, on *Anderson Cooper 360* (CNN television broadcast Mar. 9, 2016) (transcript available at http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html [https://perma.cc/XZE8-XFBF]), *quoted in* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 576 (4th Cir. 2017).

202. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 594 (4th Cir. 2017), *cert. granted*, 137 S. Ct. 2080 (June 26, 2017).

203. *Id.* at 576 ("When asked whether he had 'pulled back' on his 'Muslim ban,' Trump replied, . . . 'I actually don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking about territory instead of Muslim.'" (quoting Interview by Chuck Todd with Donald Trump, on *Meet the Press* (NBC television broadcast July 24, 2016) (transcript available at https://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706 [https://perma.cc/3H26-AZY7])).

204. *Id.* at 599.

205. 251 U.S. 146 (1919).

206. *Id.* at 153 (quoting War-Time Prohibition Act, ch. 212, 40 Stat. 1045, 1046 (1918)).

207. *Id.* at 159.

208. *Id.*

impotent to renew hostilities,"[209] the company contended that the emergency had passed and that "when the emergency ceased the statute became void."[210] The Court rejected the company's argument, citing evidence of action, by both Congress and the President, suggesting that the statute remained in force.[211] Crucially, the Court found that notwithstanding the statements cited above, the President had "refrained from issuing the proclamation declaring the termination of demobilization *for which this act provides*."[212] So here the statute actually did identify specific legal effects that would flow from a particular form of presidential speech (here a formal written proclamation), but the speech in question did not satisfy the statute's requirements.

A much more recent lower-court opinion featured a similar set of arguments about the end of war, this time in the context of detention authority. The case featured a challenge by Guantanamo detainee Al Warafi to the legality of his continued detention.[213] The Supreme Court had held in its 2004 *Hamdi*[214] decision that the 2001 Authorization for the Use of Military Force (AUMF) provided the executive branch with the authority to detain enemy combatants "for the duration of these hostilities."[215] And the D.C. Circuit has held that pursuant to the AUMF, "individuals may be detained at Guantanamo so long as they are determined to have been part of Al Qaeda, the Taliban, or associated forces, and so long as hostilities are ongoing."[216]

In 2015, Al Warafi filed a challenge to his detention, relying for support on a number of presidential statements from 2014 and 2015.[217] In particular, he pointed to a December 2014 speech at Arlington Cemetery in which the President announced that "[t]his month, after more than 13 years, our combat

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209. *Id.*

210. *Id.*

211. *Id.* at 161–62; *see also* Deborah N. Pearlstein, *Law at the End of War*, 99 MINN. L. REV. 143, 159–60 (2014).

212. *Hamilton*, 251 U.S. at 160 (emphasis added). The statute provided that it was to remain in effect "until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States." War-Time Prohibition Act, ch. 212, 40 Stat. 1045, 1046 (1918); *see also* Pearlstein, *supra* note 208, at 160:

> While the President had indeed spoken publicly on many occasions about the end of the war, while the Treaty of Versailles had been concluded, while the President had even mentioned, in a veto message to Congress, the "demobilization of the army and navy," such popular or passing references could not overcome the reality that the President had yet "refrained from issuing the proclamation declaring the termination of demobilization for which this act provides."

213. Al Warafi v. Obama, No. 09-2368 (RCL), 2015 WL 4600420 (D.D.C. July 30, 2015), *vacated as moot*, No. 15-5266 (D.C. Cir. Mar. 4, 2016).

214. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

215. *Id.* at 521.

216. Aamer v. Obama, 742 F.3d 1023, 1041 (D.C. Cir. 2014).

217. Motion to Grant Petition for Writ of Habeas Corpus at 3–4, *Al Warafi*, 2015 WL 4600420 (No. 09-2368).

mission in Afghanistan will be over."[218] Al Warafi also cited a portion of the January 2015 State of the Union address in which the President reiterated that "our combat mission in Afghanistan is over,"[219] as well as remarks at a farewell ceremony for outgoing Defense Secretary Hagel, in which the President lauded the "responsible and honorable end" of "America's longest war."[220]

The district court made short work of Al Warafi's argument that these statements rendered his detention unlawful. The court characterized the briefs as taking the position that "the President has a peculiar strain of King Midas's curse: Everything he says turns to law."[221] The court elaborated:

> Petitioner's argument assumes that the President's stance on the existence of hostilities is conclusive in this case, and that one discerns that stance from speeches, and speeches alone. . . . But war is not a game of "Simon Says," and the President's position, while relevant, is not the only evidence that matters to this issue.[222]

The court proceeded to independently conclude, based on a fairly cursory review of other sources, that "U.S. involvement in the fighting in Afghanistan, against al Qaeda and Taliban forces alike, has not stopped,"[223] such that the continued detention was lawful.[224]

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218. *Id.* at 3 (quoting Press Release, Office of the Press Sec'y, Remarks by the President to Military and Civilian Personnel at Joint Base McGuire-Dix-Lakehurst (Dec. 15, 2015), https://obamawhitehouse.archives.gov/the-press-office/2014/12/15/remarks-president-military-and-civilian-personnel-joint-base-mcguire-dix [https://perma.cc/89VM-K24H]).

219. *Id.* (quoting Press Release, Office of the Press Sec'y, Remarks by the President in State of the Union Address (Jan. 20, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015 [https://perma.cc/Z2PJ-KAZV]).

220. *Al Warafi*, 2015 WL 4600420, at *1 (quoting Press Release, Office of the Press Sec'y, Remarks by the President at Farewell Tribute in Honor of Secretary of Defense Chuck Hagel (Jan. 28, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/01/28/remarks-president-farewell-tribute-honor-secretary-defense-chuck-hagel [https://perma.cc/NEG4-GREX]).

221. *Id.* at *5.

222. *Id.* The court continued:

> Petitioner's obsession with Presidential speeches recalls the tale of the man who lost his keys: A police officer sees a man looking for something under a streetlamp and asks the man what it is he's looking for. The man responds that he's looking for his keys, so the officer decides to help. After several minutes the officer asks the man if he's quite sure this is where he lost his keys. The man says no; he lost them over in the park. The officer, befuddled, asks why they've been looking under the streetlamp, to which the man replies "the light's better over here." A court cannot look to political speeches alone to determine factual and legal realities merely because doing so would be easier than looking at all the relevant evidence. *The government may not always say what it means or mean what it says* . . . .

Id. at *6 (emphasis added).

223. *Id.* at *7.

224. The question of when war ends, and in particular how that impacts a President's legal authorities, is far more complex than I can do justice to here. Excellent discussions of the issue

Yet another example comes from a Freedom of Information Act (FOIA) suit seeking CIA records on the use of drones in targeted killings.[225] The CIA supplied a "*Glomar*" response, in which an agency declines to confirm or deny the existence of any responsive records, on the grounds that even acknowledging the existence of particular materials would compromise national security.[226] The D.C. Circuit ruled against the CIA, noting that public disclosures amounting to an "official acknowledgment" of the subject matter of a FOIA suit will defeat a claim of exemption under *Glomar*.[227] Here, the court found that statements by the President and other executive branch officials sufficiently confirmed the existence of a drone program that the CIA could not invoke *Glomar*. So presidential and other official speech was deemed to have direct legal effect—here in the context of a judicially crafted doctrine that allows the executive branch to operate under conditions of secrecy only under certain circumstances.

The Second Circuit reached a similar conclusion in a FOIA suit seeking access to Office of Legal Counsel (OLC) documents regarding targeted killings. The court cited a number of speeches by executive branch officials—though here none by the President—in concluding that the executive branch had waived its right to claim that the documents were exempt from disclosure.[228]

Together, these cases suggest that some presidential or senior executive branch official speech will be deemed to have stand-alone legal significance, at least in instances where a statute or a judicial test so provides.

One additional context in which presidential statements might be deemed to have direct legal effect is within the military justice system. That is, where presidential statements could impact military disciplinary proceedings, military lawyers may argue that such statements constitute

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appear in Pearlstein, *supra* note 211, and Stephen I. Vladeck, Ludecke*'s Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT'L SEC. L. & POL'Y 53 (2006).

225. ACLU v. CIA, 710 F.3d 422 (D.C. Cir. 2013).

226. *Id.* at 425–26; Phillippi v. CIA, 546 F.2d 1009, 1010–11 (D.C. Cir. 1976); *see also* David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1118–19 n.120 (2017) (observing courts' acceptance of "*Glomar* responses").

227. *ACLU*, 710 F.3d at 428–29 (stating "the President of the United States has himself publicly acknowledged that the United States uses drone strikes against al Qaeda" and quoting a response to a question in a live internet video forum).

228. N.Y. Times Co. v. U.S. Dep't of Justice, 756 F.3d 100, 114, 116 (2d Cir. 2014) (citing "the numerous statements of senior Government officials discussing the lawfulness of targeted killing of suspected terrorists, which the [d]istrict [c]ourt characterized as 'an extensive public relations campaign to convince the public that [the Administration's] conclusions . . . are correct'" in concluding that "waiver of secrecy and privilege . . . has occurred"); *see also* Lena Groeger & Cora Currier, *Stacking up the Administration's Drone Claims*, PROPUBLICA (Sept. 13, 2012), https://projects.propublica.org/graphics/cia-drones-strikes?utm_campaign=sprout&utm_medium=social&utm_source=twitter&utm_content=1430423921 [https://perma.cc/3GDZ-6MWL] (quoting officials discussing the CIA's drone program on and off the record).

unlawful command influence.[229] One widely cited case describes this doctrine as designed to ensure "that every person tried by court-martial is entitled to have his guilt or innocence, and his sentence, determined solely upon the evidence presented at trial, free from all unlawful influence exerted by military superiors or others."[230] A number of "unlawful command influence" arguments have relied on presidential statements, including in the high-profile case of Bowe Bergdahl.[231]

5. Statements of Fact.—Presidents may also make truth claims, or assertions of fact.[232] When it comes to their appearance in subsequent litigation, these assertions can be further divided between "adjudicative facts" (those facts that "deal with particular circumstances, relating the actions of the parties to the law"[233]), and what are often called, in terminology that appears especially incongruous in this context, "legislative facts." Despite their name, legislative facts are "[n]ot to be confused with facts found

229. *See* Uniform Code of Military Justice art. 37, 10 U.S.C. § 837 (forbidding any commanding officer to "censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding"); Monu Bedi, *Unraveling Unlawful Command Influence*, 93 WASH. U. L. REV. 1401, 1421–22 (2016) (describing the Article 37 concerns raised by President Obama's exhortation to punish those guilty of sexual assault in the military).

230. United States v. Rodriguez, 16 M.J. 740, 742 (A.F.C.M.R. 1983).

231. *See* Motion to Dismiss, United States v. Bergdahl (A. Trial Judiciary, 2d Jud. Cir., Ft. Bragg Jan. 20, 2017), https://bergdahldocket.files.wordpress.com/2016/03/motion-to-dismiss.pdf [https://perma.cc/2CQY-GGM6] (arguing that then-candidate Trump's numerous critical statements about Bergdahl require the dismissal of the charges against him, based on principles of both due process and unlawful command influence); Bergdahl v. Nance, No. 17-0307/AR (C.A.A.F. May 5, 2017), https://bergdahldocket.files.wordpress.com/2017/02/disposition-may-5-2017.pdf [https://perma.cc/U4PG-ELPY] (denying Bergdahl's writ-appeal petition). For a discussion of Bergdahl's unlawful command influence arguments, see Steve Vladeck, *President Trump's Careless Rhetoric, Unlawful Command Influence, and the Bergdahl Court-Martial*, JUST SECURITY (Apr. 5, 2017), https://www.justsecurity.org/39541/president-trump-bowe-bergdahl-unlawful-command-influence/ [https://perma.cc/P3HL-8P3P]; *see also* Findings and Conclusions re: Defense Motion to Dismiss for Unlawful Command Influence, United States v. Johnson, (N-M. Trial Jud., Haw. Jud. Cir. June 12, 2013), https://scribd.com/doc/147972097/United-States-v-Ernest-Johnson-Ruling [https://perma.cc/G272-GBG8] (ruling that statements by President Obama on the topic of military sexual assault created a sufficiently serious danger of unlawful command influence that the remedy of discharge should be unavailable).

232. Note that I do not here consider lies or untruthful statements as such. For work that does, see Helen L. Norton, *The Government's Lies and the Constitution*, 19 IND. L.J. 73 (2015); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 358 (1991).

233. Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637, 640 (1966); *see* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 365 (1942) (defining "adjudicative facts" as "facts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were").

by a legislature," but rather "deal with the general, providing descriptive, and sometimes predictive, information about the larger world."[234]

A due process challenge brought by relatives of Anwar Al-Aulaqi, a U.S. citizen who was killed by a U.S. drone strike in 2011, featured judicial invocation of presidential speech, arguably in both categories.

First, the district court largely relied on presidential speech as establishing as a factual matter that Al-Aulaqi had been targeted and killed by the United States, citing for that admission a letter to Congress from Attorney General Holder and a speech by President Obama at the National Defense University.[235] But the court also appeared to accept a core claim made by the President in his National Defense University speech. In that speech, the President announced that he had declassified the operation that resulted in the death and, as summarized by the court, noted specifically that "Anwar Al-Aulaqi posed a continuing threat to the United States."[236] Though the court explained that it was relying on sources like the speech "only as representations of the Government's *position* that Anwar Al-Aulaqi . . . posed a continuing threat to the United States,"[237] it is not clear that the court's use was actually so limited.

The court ruled that the plaintiffs could not pursue a *Bivens* remedy, reasoning that to conclude otherwise would unduly hinder the Executive's "ability in the future to act decisively and without hesitation in defense of U.S. interests."[238] In reaching this conclusion, the court noted: "The fact is that Anwar Al-Aulaqi was an active and exceedingly dangerous enemy of the United States . . . ."[239] The court pointed to record evidence that included Al-Aulaqi's own writings and videos in which he praised individuals who had launched or attempted attacks on the United States, and in which he called for "jihad against America."[240] In this portion of the opinion, the court did not explicitly cite the President's remarks. But an earlier section of the opinion quoted Holder's letter for the proposition that "Al-Aulaqi was a

234. Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 39 (2011) (footnotes omitted); *see* Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1759 (2014) (defining legislative facts as "generalized facts about the world that are not limited to any specific case").

235. Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 59 (D.D.C. 2014).

236. *Id.* at 68; *see* Press Release, Office of the Press Sec'y, Remarks by the President at the National Defense University (May 23, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university [https://perma.cc/SR7E-9XYM].

237. *Al-Aulaqi*, 35 F. Supp. 3d at 68.

238. *Id.* at 79.

239. *Id.*

240. *Id.*

continuing and imminent threat to the United States,"[241] with a "*see also*" to the President's speech, including the line that Al-Aulaqi "was continuously trying to kill people."[242] And these sources supplied far more direct evidence of "imminent harm" than did Al-Aulaqi's videos or writings. So scratching the surface of the opinion suggests that presidential speech may in fact have played a significant role in the court's conclusion.

Although it granted the government's motion to dismiss, the court ended its opinion by excoriating the government for its "truculent" opposition to an order requiring declarations that would "provide to the Court information implicated by the allegations in this case."[243] The government's conduct, the court explained, had "made this case unnecessarily difficult," requiring it "to cobble together . . . judicially-noticeable facts from various records" to conclude that the *Bivens* "special factors" applied.[244] So it may well have been the government's failure to supply the court with other sources that caused the court to turn to presidential speech.[245] But the fact remains that presidential speech, on factual matters, seems to have played some part in the court's analysis.

Another instance of judicial reliance on this sort of presidential speech came in a district court case on the constitutionality of the 1996 Don't Ask Don't Tell law (DADT),[246] which until 2011 prevented gays and lesbians from serving openly in the military.[247] While working to repeal DADT during

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241. *Id.* at 64 (citing Letter from Eric H. Holder, Jr., Attorney Gen., to Sen. Patrick J. Leahy, Chairman, Judiciary Comm. 3 (May 22, 2013), https://fas.org/sgp/news/2013/05/ag052213.pdf [https://perma.cc/3URT-CMZA]).

242. *Al-Aulaqi*, 35 F. Supp. 3d at 64 (quoting Press Release, Office of the Press Sec'y, *supra* note 182).

243. *Id.* at 81 & n.32 (quoting Minute Order, *Al-Aulaqi*, 35 F. Supp. 3d 56 (No. 12-1192 (RMC))).

244. *Id.*

245. Defendant's Response to the Court's May 22, 2013 Order at 2, *Al-Aulaqi*, 35 F. Supp. 3d 56 (No. 12-1192 (RMC)) ("Defendants' view is that neither the AG Letter nor President Barack Obama's May 23, 2013 speech at the National Defense University, during which President Obama discussed the targeting of Anwar Al-Aulaqi and the strike against him, has any effect on the present legal posture of this case.").

246. 10 U.S.C. § 654, *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515. The statute itself actually had its roots in a 1993 speech by President Clinton, announcing the policy that was later codified. President William J. Clinton, Remarks Announcing the New Policy on Homosexuals in the Military (July 19, 1993) (transcript available at http://www.presidency.ucsb.edu/ws/index.php?pid=46867 [https://perma.cc/J4FQ-B5GR]); *see also* Paul F. Horvitz, *'Don't Ask, Don't Tell, Don't Pursue' Is White House's Compromise Solution: New U.S. Military Policy Tolerates Homosexuals*, N.Y. TIMES (July 20, 1993), www.nytimes.com/1993/07/20/news/20iht-gay_1html?mcubz=3 [https://perma.cc/W9L4-V3CR].

247. Repeal happened in several steps, beginning with the Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515, and concluding with the July 2011 certification called for in the 2010 Repeal Act. Certification by President Barack Obama, Leon Panetta, Sec'y Def., & Michael Mullen, Chairman of the Joint Chiefs of Staff (July 21, 2011),

the first term of the Obama presidency, the Administration, through the Department of Justice, continued defending the law in several constitutional challenges making their way through the courts.[248] While the Administration maintained that there was no inconsistency between these two positions—arguing in court that the law was constitutional while working to effect its repeal—it was not entirely possible to separate the two spheres, and presidential rhetoric deployed in pursuit of repeal quickly became relevant in the constitutional litigation.

The plaintiffs in one case in particular, *Log Cabin Republicans v. Obama*,[249] pointed to remarks by the President at a "Pride Month" reception at the White House, in which the President said: "'Don't Ask, Don't Tell' doesn't contribute to our national security[;] . . . preventing patriotic Americans from serving their country weakens our national security[.]"[250] The plaintiffs offered this statement as highly relevant evidence that DADT could not possibly, as the DOJ argued, "significantly further[] the Government's interests in military readiness or unit cohesion."[251]

The district court agreed with the plaintiffs that these statements were relevant, pointing to what it described as "admissions" by the President and other executive branch officials establishing that "far from being necessary to further significantly the Government's interest in military readiness, the Don't Ask, Don't Tell Act actually undermines that interest."[252] To be sure, the court did not place exclusive reliance on presidential statements. But these "admissions" did appear significant to the court's overall determination.[253]

As each of the foregoing examples makes clear, the line between facts and views is far from clear, and perhaps the President's statements on the

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https://obamawhitehouse.archives.gov/sites/default/files/uploads/dadtcert.pdf [https://perma.cc/7FAG-W34N].

248. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. Cal. 2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011); Brief for the Federal Respondents in Opposition, Pietrangelo v. Gates, 556 U.S. 1289 (2009) (No. 08-824).

249. 716 F. Supp. 2d 884 (C.D. Cal. 2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011).

250. *Id.* at 919 (quoting President Barack Obama, Remarks at a Reception Honoring Lesbian, Gay, Bisexual, and Transgender Pride Month, 1 PUB. PAPERS 927, 929 (June 29, 2009)).

251. *Log Cabin Republicans*, 716 F. Supp. 2d at 911. Not only did the plaintiffs point to such statements in their trial briefing, as Daniel Meltzer detailed in a 2012 lecture, the plaintiffs also submitted an interrogatory asking the DOJ defendants to admit the truth of the President's Pride Month remarks. Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1232–33 (2012). As Professor Meltzer explained, "the Justice Department responded by admitting the request insofar as it sought the executive's view and denying it insofar as Congress could rationally have had a different view." *Id.* at 1233.

252. *Log Cabin Republicans*, 716 F. Supp. 2d at 919.

253. The district court's opinion was subsequently vacated as moot after DADT was repealed while the appeal was pending before the Ninth Circuit. Log Cabin Republicans v. United States, 658 F.3d 1162 (9th Cir. 2011).

national security impact of DADT, as well as the continuing dangerousness of Al-Aulaqi, are better described as views than facts. There is additionally a degree of possible overlap with other categories—a presidential claim of fact can be offered as evidence of the purpose of executive action, for example. But there may be some utility in examining these presidential claims as a distinct category.

The next subpart takes up the treatment of such statements from the perspective of some key principles of the law of evidence.

B. Presidential Speech and Evidentiary Principles

At its most basic, presidential speech can serve as evidence of the legal position of the United States. This was true, for example, in the *Myers* Court's treatment of the aggregate effect of consistent statements by multiple Presidents regarding removal restrictions.[254] In *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*,[255] a case not discussed in the preceding subpart, the Court was faced with a dispute involving an attempt by the U.S. Olympic Committee to prevent a gathering calling itself the "Gay Olympic Games" from using the term "Olympic." In assessing one aspect of the case—whether the U.S. Olympic Committee was a government entity for purposes of the application of the Fifth Amendment—the Court relied heavily on statements by government officials, including a State of the Union address and other statements by the President, all of which the Court believed supported the position that the Olympic Committee was *not* a government entity.[256]

Justice Souter's opinion for the Court in *American Insurance Association v. Garimendi*[257] similarly relied on statements by subordinate executive branch officials as evidence of the position of the federal government. In deciding whether the California Holocaust Victims' Insurance Act was preempted by federal law, the Court first looked to whether the two conflicted. For evidence that "Presidential foreign policy has

254. *See supra* notes 146–49 and accompanying text. Note that in all of the foregoing, the evidence at issue consisted either of statements by a single President or consistent statements by a series of Presidents. Presumably the existence of conflicting views articulated by successive Presidents would serve to cancel out the relevance to the legal question.

255. 483 U.S. 522 (1987).

256. *Id.* at 545 n.27 ("The President thought it would be necessary to take 'legal action [if] necessary' to prevent the USOC from sending a team to Moscow. Previously, the Attorney General had indicated that the President believed that he had the power under the Emergency Powers Act to bar travel to an area that he considered to pose a threat of national emergency. The President's statement indicated a clear recognition that neither he nor Congress could control the USOC's actions directly." (alteration in original) (citations omitted) (quoting President Jimmy Carter, Remarks and a Question-and-Answer Session at the American Society of Newspaper Editors' Annual Convention, 1 PUB. PAPERS 631, 636 (Apr. 10, 1980))).

257. 539 U.S. 396 (2003).

been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions," the Court pointed to a number of executive agreements it explained embodied such policy.[258] But it also relied heavily on statements by Under Secretary of State Stuart Eizenstat, as well as Secretary of State Madeleine Albright and others,[259] including press conference statements and statements made in the course of congressional testimony.[260] On the basis of all of this evidence, the Court concluded that a conflict existed and that California law was required to yield to the federal policy.[261]

The dissenting Justices were not convinced that the executive agreements on which the majority relied clearly reflected a policy to displace laws like California's.[262] And they pointedly objected to the use of executive branch statements (appearing troubled in part by the relative lack of seniority of the officials):

> To fill the agreements' silences, the Court points to statements by individual members of the Executive Branch. But we have never premised foreign affairs preemption on statements of that order. We should not do so here lest we place the considerable power of foreign affairs preemption in the hands of individual sub-Cabinet members of the Executive Branch.[263]

The *Log Cabin Republicans* court used presidential speech slightly differently, treating the President as a witness of sorts; the court even described his statements as "admissions," which, under the rules of evidence, can be treated as party admissions[264] (though the court did not make this point explicitly). This was an intriguing move: the argument being evaluated was one about the government's potential national security and overall military-readiness interest in DADT. And the President, of course, is the commander-in-chief of the military. But, as I address in the next subpart, the use of these statements, particularly because the President's statements were inconsistent with those of other executive branch officials, raised serious questions about internal executive branch dynamics.

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258. *Id.* at 421–22.

259. *Id.* at 405 ("From the beginning, the Government's position, represented principally by Under Secretary of State (later Deputy Treasury Secretary) Stuart Eizenstat, stressed mediated settlement as an alternative to endless litigation promising little relief to aging Holocaust survivors." (quotation omitted)); *id.* at 411, 422.

260. *Id.* at 421–22.

261. *Id.* at 423–25; *see also In re* Assicurazioni Generali, S.P.A., 592 F.3d 113, 118 (2d Cir. 2010) (describing the Court's conclusion in *Garamendi* as based in part on "statements made during negotiations between the United States and Germany, Austria, and France regarding Holocaust-era insurance claims").

262. *Garamendi*, 539 U.S. at 441 & n.5 (Ginsberg, J., dissenting).

263. *Id.* at 441–42 (citations omitted).

264. FED. R. EVID. 801(d)(2).

Some of the district court invocations of presidential statements in *Texas v. United States*[265] were similar to the *Log Cabin Republicans* court's use: essentially as party admissions, here ones that both revealed the true operation of the deferred-action program and conceded that the program wrought a sizable legal change.[266]

Although both of these cases involve presidential speech with a particular valence—that is, speech that runs *against* the interests of the executive—in several of the cases surveyed above, speech is used to support, rather than to undermine, a President's position. *Garamendi* and *Myers* supply two obvious examples.[267] Similarly, in *San Francisco Arts & Athletics, Inc.*, presidential statements were used in support of a position the executive branch appeared to advocate (though it was not a party to the case).[268] And the speech Justice Thomas invoked in *Hamdan* would have shored up the President's case, though the majority declined to accord it any weight.[269]

It is also worth noting, on the question of party admissions, that a number of lower courts have concluded that party admissions under Rule 801(d)(2) are *not* admissible against the government.[270] Some of the language in these lower-court opinions may be inapplicable to the President—the rationale in these cases, which involve lower-level officials, is based in part on the principle that "no individual can bind the sovereign"[271]—but the general principle seems to warrant consideration in the context of judicial reliance on presidential speech.[272]

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265. 86 F. Supp. 3d 591 (S.D. Tex. 2015).

266. *Id.* at 677–78.

267. Note, however, that the speeches in *Garamendi* were of subordinate executive officials, and in *Myers* the speech was of previous Presidents. *See supra* notes 147–49, 258–62 and accompanying text.

268. *See supra* note 255 and accompanying text.

269. *See supra* notes 153–55 and accompanying text.

270. *E.g.*, United States v. Prevatte, 16 F.3d 767, 779 n.9 (7th Cir. 1994); United States v. Santos, 372 F.2d 177, 180 (2d Cir. 1967); *cf.* Lippay v. Christos, 996 F.2d 1490, 1497–99 (3d Cir. 1993) (questioning the principle's applicability in civil proceedings).

271. *Prevatte*, *supra* note 270, at 779 n.9.

272. Another judicial approach to presidential speech that warrants brief mention is the taking of judicial notice of the contents of a presidential speech. This sort of use appeared in a recent challenge to the force-feeding of Guantanamo detainees. Ruling that it was without jurisdiction, the district court added the following:

> Even though this Court . . . lacks any authority to rule on Petitioner's request, there is an individual who does have the authority to address the issue. In a speech on May 23, 2013, President Barack Obama stated "Look at the current situation, where we are force-feeding detainees who are holding a hunger strike . . . Is that who we are? Is that something that our founders foresaw? Is that the America we want to leave to our children? Our sense of justice is stronger than that." . . . [T]he President of the United States, as Commander-in-Chief, has the authority—and power—to directly address the issue of force-feeding of the detainees at Guantanamo Bay.

C. *Deference and Presidential Speech*

Finally, it is worth considering how judicial treatment of presidential speech interacts with deference principles—that is, whether courts may at times be utilizing some sort of unannounced form of deference in their treatment of presidential speech. Courts, of course, often defer to the President, in particular in the context of national security[273]—but to date courts have not explicitly acknowledged deference to the President's words as such.

As a descriptive matter, there are several leading candidates for the sort of deference that might be at play. First, courts may be using some form of *Chevron* deference—which, as discussed above, has been the subject of some

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Dhiab v. Obama, 952 F. Supp. 2d 154, 156 (D.D.C. 2013) (quoting *Text of President Obama's May 23 Speech on National Security (Full Transcript)*, WASH. POST (May 23, 2013), https://www.washingtonpost.com/politics/president-obamas-may-23-speech-on-national-security-as-prepared-for-delivery/2013/05/23/02c35e30-c3b8-11e2-9fe2-6ee52d0eb7c1_story.html?utm_term=.21bf7ff3019e [https://perma.cc/V2FF-SS7B]), *aff'd on other grounds*, Aamer v. Obama, 742 F.3d 1023 (D.C. Cir. 2014). Another invocation that might be viewed as falling into this category came in *Physician Hospitals of Am. v. Sebelius*, a challenge to one of the Affordable Care Act's Medicare reimbursement provisions. 691 F.3d 649, 651 (5th Cir. 2012). The case was pending in the Fifth Circuit as the Supreme Court considered *NFIB v. Sebelius*, 567 U.S. 519 (2012), and several days before the oral argument in the Fifth Circuit case, President Obama said at a press conference: "I am confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress." Chris McGreal, *Obama Warns 'Unelected' Supreme Court Not to Strike Down Healthcare Law*, GUARDIAN (Apr. 2, 2012), https://www.theguardian.com/world/2012/apr/02/barack-obama-unelected-supreme-court [https://perma.cc/2GQX-YU88] (quoting Obama). At oral argument shortly thereafter, the Fifth Circuit panel pressed the Department of Justice to explain the President's remarks, and subsequently directed DOJ to file a letter "regarding judicial review of the constitutionality of acts of Congress." Letter Filed by Appellee at 1, *Physician Hosps. of Am.*, 691 F.3d 649 (No. 11-40631), 2012 WL 1130205. The Department did so, explaining that "[t]he power of the courts to review the constitutionality of legislation is beyond dispute," that deference to the Legislature was appropriate in this case, and that "[t]he President's remarks were fully consistent with the[se] principles." *Id.* at 1–3; *see* JOSH CHAFETZ, CONGRESS'S CONSTITUTION 10–11 (2017) (discussing the episode); *see also* Tarros S.P.A. v. United States, 982 F. Supp. 2d 325, 328–29, 345–46 (S.D.N.Y. 2014) (citing several presidential speeches in a private damages case based on U.S. military involvement in Libya and noting that "[i]n holding that this case presents a nonjusticiable 'political' question, the Court merely recognizes that certain questions are not appropriate for judicial review, and are instead left to the electorally accountable branches for resolution. Nothing prevents the President from adhering to this nation's international obligations . . . .").

273. Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 650 (2000) ("[C]ourts generally . . . giv[e] substantial and sometimes absolute deference to the [E]xecutive [B]ranch in foreign affairs cases."). *But see* Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 818 (2011) ("[T]here are increasingly strong reasons to doubt both the descriptive and normative validity of [foreign relations] exceptionalism."). For a comprehensive discussion of the Supreme Court's post-9/11 treatment of deference to the Executive in the context of national security, see Joseph Landau, Chevron *Meets* Youngstown*: National Security and the Administrative State*, 92 B.U. L. REV. 1917 (2012); *see also id.* at 1977 (concluding that the Court "insist[s] on meaningful dual-branch solutions to national security").

scholarly debate in the context of presidential interpretations.[274] The second candidate is *Skidmore* deference, a context-dependent mode of deference in which agency interpretations are entitled to weight according to their "power to persuade."[275] And the third is what Bill Eskridge and Lauren Baer term "consultative deference," in which "the Court, without invoking a named deference regime, relies on some input from the agency (for example, amicus briefs, interpretive rules or guidance, or manuals) and uses that input to guide its reasoning and decisionmaking process."[276]

Not all of the cases discussed here involve presidential interpretations, as such—of the Constitution, a statute, or anything else—at least in any direct or straightforward way. So there may be limits to the deference frame. But several of the examples suggest its utility. The Chief Justice's questions to the government in *Texas v. United States* quoted the President's statement, with respect to an earlier immigration executive action, that to announce a broader program would entail "*ignoring the law*."[277] There was ultimately no reliance on that statement, because the Court produced no opinion in the case. But the Chief Justice appeared at least to raise the possibility that the President's remarks—which spoke to the scope of existing statutory authority—might have been entitled to some weight. The district court's reliance in the same case could perhaps be characterized as representing a form of deference (though not of a sort the Administration would have chosen); the President's statements were arguably used, among other things, to construe the memorandum creating the program in question, providing the authoritative guidance as to the memorandum's meaning.[278]

It appears, then, that at least some courts have accorded some sort of deference to presidential statements. But whether or not reliance is framed as

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274. Peter Strauss has argued that presidential interpretations should not be eligible for *Chevron* deference. Strauss, *supra* note 85, at 748. Kevin Stack has taken the position that the President's interpretations, where they occur pursuant to delegated authority, *should* be eligible for *Chevron* deference, Stack, *supra* note 86, at 267, perhaps subject to a requirement of reason giving. Stack, *supra* note 102, at 1013–20. But neither has considered whether other forms of deference, formal or informal, might be applicable to presidential interpretations—including, as relevant here, interpretations that appear in speeches.

275. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). For thorough discussions of the *Skidmore* standard, see generally Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007); Peter L. Strauss, Essay, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143 (2012); Peter L. Strauss, *In Search of* Skidmore, 83 FORDHAM L. REV. 789 (2014).

276. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1098 (2008).

277. Transcript of Oral Argument at 33, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674) (emphasis added).

278. *See supra* notes 174–79 and accompanying text.

deference, the next Part asks what a focus on internal executive branch dynamics can teach us about the wisdom or propriety of judicial reliance on presidential speech.

IV. Presidential Speech and Intra-Executive Dynamics

Perhaps the most interesting theoretical questions presented by judicial reliance on presidential speech involve intra-Executive or internal separation-of-powers dynamics.[279] These dynamics manifest in two distinct ways: First, they may involve tension between representations made in court by the Department of Justice, on the one hand, and statements made by the President in separate venues, on the other, bringing to the fore questions about the relationship between the White House and the Department of Justice. Second, one of the functions of presidential speech may well be both to communicate with agency officials, and to claim credit for agency output. So looking to the consequences of such speech in judicial fora provides new material relevant to debates about the scope, contours, and consequences of presidential administration.

Presidents speak regularly to the press and the public, to Congress and executive branch agencies, but rarely to courts directly. When the executive branch does speak in court, it typically does so in the form of written filings (including amicus briefs) and oral arguments, ordinarily presented by the Department of Justice.[280] Occasionally, fissures within the executive branch are made visible through multiple or atypically captioned filings or arguments.[281] But for the most part, the executive branch speaks in court with one voice, and it is the voice of the Department of Justice.[282] This is not just a matter of custom or practice, but of congressional command: a federal statute provides that except where otherwise provided by law, "the conduct

279. For a description of tensions and checks within the Executive, see generally Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

280. Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 560 (2003); Michael Herz & Neal Devins, Recent Developments, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. R. 1345, 1345 (2000).

281. *See* Richard L. Hasen, *The Nine Lives of* Buckley v. Valeo, *in* FIRST AMENDMENT STORIES 345, 361 (Richard W. Garnett & Andrew Koppelman eds., 2012) (describing three briefs filed by government actors, each with a different caption and taking a different position, in *Buckley v. Valeo*, 424 U.S. 1 (1976)); Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 232 n.84 (2014) (describing the *Buckley* briefs and the Solicitor General's defending, in the government's briefing in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the constitutionality of a statute reducing the voting age, while acknowledging the President's belief that the change required a constitutional amendment).

282. For a discussion of the instances in which Congress has granted agencies independent litigating authority, see Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 274–87 (1994).

of litigation in which the United States, an agency, or officer thereof is a party . . . and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."[283]

But these representations can clash with presidential statements. Both *Texas v. United States* and *Log Cabin Republicans* involved explicit tension between positions offered by the Department of Justice, on the one hand, and out-of-court statements or representations made by the President, on the other. *Log Cabin Republicans* involved a legal argument, made by DOJ litigators and primarily based on the text of the statute and accompanying legislative findings,[284] that it was rational for Congress to have concluded that DADT advanced national security interests. Yet the district court, after complex and contentious discovery requests in which DOJ was pressed to reconcile the President's statement with its position about the statute's rationality,[285] instead privileged the President's "admission" as evidence that DADT did not advance national security interests.[286] As detailed above, the district court in *Texas v. United States* identified multiple divergences between DOJ representations and public statements by the President, and in each decided that the presidential statement controlled.[287] And the litigation over President Trump's travel ban executive orders involved judicial scrutiny of the disconnect between DOJ arguments that the purpose of the executive order was to advance national security, and presidential statements that suggested, as multiple courts concluded, that the true impetus was anti-Muslim animus.[288]

The complex relationship between the Department of Justice and the White House in the sphere of litigation, particularly litigation around topics with high political salience, has been well described in the context of the Solicitor General's office.[289] But the dynamics in the lower courts, where the

283. 28 U.S.C. § 516 (2012).

284. Memorandum of Points & Authorities in Support of Defendants' Motion for Summary Judgment at 4–7, Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. CV 04-08425-VAP (Ex)), 2010 WL 2171537.

285. *See* Defendants' Memorandum of Points & Authorities in Support of Defendants' Motion for Review of Magistrate Judge's Discovery Ruling at 4, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV 04-08425-VAP (Ex)), 2010 WL 2171536 ("The President's statements set forth the Executive's view that the statute does not contribute to national security and, indeed, that it weakens it. But it was the considered judgment of Congress in 1993 that the statute was necessary for military effectiveness, and thus to ensure national security, and that statute remains in force today. Importantly, it is the rationality of Congress' determination that is relevant and controlling for purposes of litigation in which a statute is called into question.").

286. *See supra* notes 251–53 and accompanying text.

287. *See supra* notes 177–79 and accompanying text.

288. *See supra* notes 197–203 and accompanying text.

289. *See generally* LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 33–50 (1987); Drew S. Days, III, *When the President Says "No": A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 J. APP. PRAC.

Solicitor General's office is typically not closely involved in litigation (with the exception of authorizing appeals[290]), have not been the subject of extensive analysis.[291] Although the White House may be involved in a consultative capacity in certain civil litigation,[292] it is not invariably involved, and the Department of Justice is not routinely consulted on all of the President's speeches or remarks. Despite that context, courts in some of the cases discussed above appear to be sending the message that they will not accept DOJ representations—at least under some circumstances—where the court views those representations as inconsistent with statements made by the President. Anecdotally, this appears especially likely to occur in cases in which the President has had a significant public profile with respect to the action or program in question. But no court has explained when it *will* deem a presidential statement relevant or even controlling when it clashes with DOJ representations.

The second internal-separation-of-powers dynamic implicated in these cases involves the relationship between Presidents and agencies. Such dynamics are present when a court is faced with presidential speech in a case either involving agency action—as in *Texas v. United States*—or even, as in the *Log Cabin Republicans* case, where a statute's meaning or constitutionality is implicated, but an agency (in that case, DoD) has a significant role in the implementation and the litigation. (When more direct presidential action is involved, as in the *Al Warafi* or *Al-Aulaqi* cases, these dynamics do not appear to be implicated in the same way.)

Here it is worth returning to then-Professor Kagan's celebration of presidential administration—a key aspect of which is the President's assumption of credit for regulatory action.[293] On Kagan's account, President Clinton's use of this strategy meant that he "emerged in public, and to the public, as the wielder of 'executive authority' and, in that capacity, the source of regulatory action."[294] Kathryn Watts, in a piece that picks up where *Presidential Administration* left off, argues that "presidential control has deepened during the most recent two presidencies,"[295] with President Obama in particular "elevat[ing] White House control over agencies' regulatory

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& PROCESS 509 (2001); Seth P. Waxman, *"Presenting the Case of the United States as It Should Be": The Solicitor General in Historical Context*, U.S. DEP'T JUST. (June 1, 1998), http://www.justice.gov/osg/about-office [https://perma.cc/Z5K5-DQM7].

290. Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1382 (2010) ("The Solicitor General approves only a fraction of agency requests to appeal adverse trial-level decisions.").

291. *But see* Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1232–33 (2012) (discussing DOJ's response to a request for admission in the DADT litigation).

292. PATTERSON, *supra* note 63, at 67 (describing White House–DOJ interactions).

293. Kagan, *supra* note 87, at 2299.

294. *Id.* at 2300.

295. Watts, *supra* note 92, at 685.

activity to its highest level ever."[296] One natural result of these claims of ownership might be that presidential speech ends up pressed into service in court when regulatory action is challenged. This suggests that some of the use examined here may be a consequence of "presidential administration" that the original article did not anticipate—that is, that the President's rhetorical appropriation of agency action has the potential to upend or at least impact judicial review of that action.

As a general matter, the public is for the most part unaware of the internal distinctions that exist within the executive branch, and press coverage frequently elides them.[297] But courts, of course, should in general be aware of the distinctions between a President and other arms of the executive branch. It is striking, then, that even courts appear, at least at times, to be similarly conflating role or function.

A district court case not discussed above, but featuring a discussion of the same immigration executive action at issue in *Texas v. United States*, may illustrate just this point.[298] While deciding an illegal reentry case, a Pennsylvania court *sua sponte* injected into the proceedings the constitutionality of the Deferred Action for Childhood Arrivals (DACA) program. In answering the constitutional question it had posed, the court quoted at length from comments by President Obama in 2010 and 2011, which the court read as establishing that President Obama "viewed an Executive Action, similar to the one issued, as beyond his executive authority."[299] The court explained that "[w]hile President Obama's historic statements are not dispositive of the constitutionality of *his* Executive Action on immigration, they cause this Court pause."[300] As the foregoing excerpt makes clear, the court appeared to treat the program as the result of *presidential*, rather than secretarial, action.

The court in *Texas v. United States* did not make the error of conflating the President and an agency; rather, it was only because the challenged action

296. *Id.* at 698.

297. *See, e.g.*, Binyamin Appelbaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES (Aug. 13, 2016), https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html?mcubz=0&_r=0 [https://perma.cc/E5U4-MK6P] ("Once a presidential candidate with deep misgivings about executive power, Mr. Obama will leave the White House as one of the most prolific *authors of major regulations* in presidential history." (emphasis added)).

298. United States v. Juarez-Escobar, 25 F. Supp. 3d 774, 797 (W.D. Pa. 2014) ("The Court holds that the Executive Action is unconstitutional because it violates the separation of powers and the Take Care Clause of the Constitution.").

299. *Id.* at 784.

300. *Id.* (emphasis added).

was agency action that it was subject to APA challenge.[301] But the district court's heavy reliance on presidential statements rendered the position of the agency somewhat immaterial to the legal questions in the case. In addition, it was striking that the court repeatedly cited presidential speech, but only once referenced the OLC opinion advising of the lawfulness of the program—and just for one sentence that, out of context, cut against the executive's position.[302] To be sure, courts can take different views about the relevance of OLC guidance to a court's interpretive task.[303] But in a case that relied so heavily on one sort of executive branch articulation of views, it was conspicuous not to cite the views of the entity within the executive branch that is customarily charged with advising on the lawfulness of proposed courses of action.

In addition to rhetorical appropriation, Presidents may attempt to use speechmaking to communicate policy desires and preferences, perhaps even instructions, to subordinates within the executive branch. Such a dynamic may well have been at play in the recent litigation around the FCC's "net neutrality" order, one of the centerpieces of Professor Watts's recent *Controlling Presidential Control*.[304] The opponents of the order charged that a series of presidential speeches represented a strategy to pressure the FCC and to influence the outcome of its policy process.[305] Especially since the FCC is considered an independent agency, the White House would ordinarily have remained formally hands-off in directing any particular result on the politically charged question of an open Internet.[306] But the President and

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301. *See* Franklin v. Massachusetts, 505 U.S. 788, 796 (1992) ("We hold that the final action complained of is that of the President, and the President is not an agency within the meaning of the [APA].").

302. Texas v. United States, 86 F. Supp. 3d 591, 663 (S.D. Tex. 2015) ("As the Government's own legal memorandum . . . sets out, 'the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences.'" (quoting Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. & to Defer Removal of Others, 38 Op. O.L.C. 1, 6 (2014), https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf [https://perma.cc/A539-JMXZ])), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016).

303. *See* Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 868 (2017) ("Is the OLC opinion intended to be a check on the President, or is it a check on *other* law expositors (in particular, Congress and the courts)? OLC's role has always been a mix of both . . . ."); *cf.* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451 (2010) (observing that because OLC frequently addresses issues "unlikely ever to come before a court in justifiable form, OLC's opinions often represent the final word in those areas").

304. Watts, *supra* note 92, at 716–20.

305. *See* Motion for Stay or Expedition of United States Telecom Association et al. at 8 & n.3, U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016) (No. 15-1063); Reply of United States Telecom Association et al. in Support of Motion for Stay or Expedition at 19, *U.S. Telecom Ass'n*, 825 F.3d 674 (No. 15-1063).

306. *But see* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013) (challenging the distinction between

White House players may have had strong views on the subject, so it is certainly possible that there was some such White House strategy at play. It is notable, then, that despite the dissenting commissioner's repeated invocation of presidential speech in his opinion objecting to the net neutrality order,[307] and its prominence in the briefs challenging the order before the D.C. Circuit, that court conspicuously declined to cite the President's speech in its opinion upholding the order.[308]

Consider again the Presidential Memorandum (PM) on Hospital Visitation discussed above.[309] As detailed, the PM had a speech-like quality, but that was simply a matter of style; in substance, it was a directive document, rather than a purely rhetorical one. But what if the President had, in a speech rather than a memorandum, made the same points about the harm that flows from denial of access to loved ones during moments of medical crisis? The rule has not been challenged in litigation, so we don't know whether the Memorandum would have been cited, if it had. But the logic of the *Texas* case would suggest that, if the President had set forth his views in a speech rather than issued a memorandum, the treatment might have been the same—that the President's characterization of the contents of the Memorandum might have controlled over the representations made by HHS and DOJ about the meaning, scope, or purpose of the action (allowing for the possibility that a rule would have been subject to different treatment).

Now imagine that in the case of executive action on immigration, the President had issued a PM, rather than given a weekly address to announce the new program. And imagine that the memorandum had directed the Secretary of Homeland Security to address, through whatever vehicle he deemed appropriate, deportation priorities and eligibility for deferred action. Finally, imagine that the Secretary had issued a memorandum identical to the one he actually issued. Once again, the logic of the *Texas v. United States* decision would seem to suggest that the district court's treatment would be identical. And this does seem like a genuinely noteworthy development: the total collapse of distinctions between informal speech and presidential directives.

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executive and independent agencies); *see also* Dan Eggen, *Mukasey Limits Agency's Contacts with White House*, WASH. POST (Dec. 20, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/12/19/AR2007121902303.html [https://perma.cc/VB5S-Z35U] (reporting Attorney General Mukasey's restriction of contact between DOJ and the White House).

307. *See, e.g.*, Protecting & Promoting the Open Internet, 30 FCC Rcd. 5601, 5921 (2015) (Pai, Comm'r, dissenting) ("[W]hy is the FCC changing course? Why is the FCC turning its back on Internet freedom? . . . We are flip-flopping for one reason and one reason alone. President Obama told us to do so.").

308. *See* U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016).

309. *See supra* notes 123–26 and accompanying text.

V. Guiding Principles

In this section, I turn more fully to the normative, offering a series of principles—sensitive to both context and institutional dynamics[310]—that I argue should guide and cabin courts' use of presidential speech.

There is something undeniably appealing about the idea of courts binding Presidents to their claims and representations, preventing them from speaking in one register at the bully pulpit and another in the courts of law. But I argue here that it is for the most part inappropriate for courts to rely on presidential statements offered in the spirit of advocacy, persuasion, or pure politics, where those statements do not reflect considered legal positions. That general principle, however, should give way in a subset of cases in which a degree of judicial reliance on presidential speech is entirely appropriate.

A. Manifestation of Intent

As a general matter, courts should rely on presidential speech only where the President has publicly manifested an intent to enter the legal arena. This manifested intent should make clear that any particular speech is the product of deliberation and that relevant stakeholders have focused significant attention on the issue. So remarks that touch the subject of a case, but are embedded within larger, unrelated, or more general remarks, should presumptively *not* give rise to any sort of judicial reliance. Context and venue are relevant in this regard. A President's remarks at primarily celebratory, ceremonial, or informal occasions, particularly where they involve unscripted exchanges with members of the public or journalists, are unlikely to reflect such manifestation of intent. This is especially important given the speechwriting dynamics discussed in Part I. On this logic, the Pride Month remarks invoked in the *Log Cabin Republicans* case should not have given rise to judicial reliance. And one of the many presidential statements cited in *Texas v. United States* demonstrated an even more serious flaw: the transcript of the quoted remarks suggests that the statement "I just took action to change the law," which the district court quoted repeatedly, was made in response to hecklers at a public event[311]—clear evidence of the absence of the type of

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310. *See generally* Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 2 (describing a mode of realism in constitutional and public law that "would entail constitutional and public-law doctrines that penetrate the institutional black box and adapt legal doctrine to take account of how these institutions actually function in, and over, time").

311. The exchange is lengthy, but worth reproducing here:

> THE PRESIDENT: . . . I've said this before, so I just want to be clear, and I say it in front of immigrant rights groups all the time. Undocumented workers who broke our immigration laws should be held accountable. . . . [W]e'll keep focusing our limited enforcement resources on those who actually pose a threat to our security. Felons, not

careful deliberation that should be a prerequisite to judicial reliance.[312] In an unpublished opinion denying the government's motion to stay the preliminary injunction in the same case, the court made repeated reference to a televised "town hall" that postdated the issuance of the injunction.[313] The

> families. Gangs, not some mom or dad who are working hard just trying to make a better life for their kids. But even —
> AUDIENCE MEMBER: Mr. President, that has been a lie. You have been deporting every —
> AUDIENCE: Booo —
> THE PRESIDENT: All right. Okay. All right. That's fine. All right.
> AUDIENCE MEMBER: Not one more! Stop deportations!
> AUDIENCE MEMBER: Not one more! . . . .
> THE PRESIDENT: Here, can I just say this? All right, I've listened to you. I heard you. I heard you. I heard you. All right? Now, I've been respectful. I let you holler. So let me—(applause). All right? Nobody is removing you. I've heard you. . . . Now, you're absolutely right that there have been significant numbers of deportations. That's true. *But what you're not paying attention to is the fact that I just took action to change the law.* (Applause).

Press Release, Office of the Press Sec'y, Remarks by the President on Immigration—Chicago, IL, The White House Office of the Press Secretary (Nov. 25, 2014), https://www.whitehouse.gov/the-press-office/2014/11/25/remarks-president-immigration-chicago-il [https://perma.cc/FLR9-ZMQN] (emphasis added). An additional source on which Texas relied in the Supreme Court was an interview in which the President responded to immigration-related questions. *See* Brief of Governor Abbott et al. as Amici Curiae in Support of Respondents, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674) ("I am president, I am not king. I can't do these things just by myself." (quoting Interview by Eddie "Piolin" Sotelo with President Barack Obama, on *Piolin por la Mañana* (Univision radio broadcast, Oct. 25, 2010) (transcript available at http://latimesblogs.latimes.com/washington/2010/10/transcript-of-president-barack-obama-with-univision.html?Source=GovD [https://perma.cc/JU3M-WRVX]))).

312. The guideline outlined above bears certain similarities to the treatment in the Catholic Church's canon law of the speech of the Pope. Not all papal speech carries the full force of the authority of the office. Rather, the Pope's pronouncements are differentially weighted, from pronouncements known as "*ex cathedra*," which are the most authoritative, to those entitled to substantially less weight, depending on manifested intent, content of speech, and circumstances. *See* Ladislas Orsy, S.J., *Stability and Development in Canon Law and the Case of "Definitive" Teaching*, 76 NOTRE DAME L. REV. 865, 876 n.29 ("The Pope uses his full apostolic authority when he defines, *ex cathedra*, an article of faith; it is a rare event, having happened only twice in recent history . . . . The Pope uses his apostolic authority, but not to its fullness, in all of his other pronouncements . . . . To determine the exact weight of such teachings is always a complex task; much depends on the Pope's intention (often to be reconstructed), on the internal content of the document, and on the document's historical circumstances.").

313. Texas v. United States, No. B-14-254, 2015 WL 1540022 (S.D. Tex. Apr. 7, 2015). In that opinion, the court repeatedly cited remarks made during an immigration town hall moderated by José Diaz-Balart. On the issue of standing, the court relied on presidential remarks to the effect that there would be "consequences" in the event that immigration officials failed to adhere to the new guidance, concluding that "[t]he President's message, specifically to those law enforcement officials employed within the Executive Branch, and more generally to the nation, is clear." *Id.* at *3 (quoting Press Release, Office of the Press Sec'y, Remarks by the President in Immigration Town Hall—Miami, FL (Feb. 25, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/02/25/remarks-president-immigration-town-hall-miami-fl [https://perma.cc/ULF3-EXXY]); *see also id.* at *4 ("The President's statements have obvious significance to this case."). With respect to the APA, the court relied on the same town-hall statements. *Id.* ("Here, too, the President's explanation of the 2014 DHS Directive is important."); *see also id.* at *5 ("If there were

court found that the President's comments there cut against the government's arguments, citing them far more than any other source.

By contrast, the court in the same case made virtually no reference to the televised address at which the President actually announced the new initiative—likely drafted carefully and circulated to relevant stakeholders in advance, with contents that touched questions of legal authority and arguably manifested an intent to enter the legal arena.[314]

B. Presidential Speech and Other Executive Branch Statements

Second, under ordinary circumstances, where presidential speech is inconsistent with executive branch positions offered in other, more authoritative sorts of documents or settings—directives, official memoranda, legal briefs—those documents, rather than the contents of presidential speeches, should be deemed to contain the authoritative statements of the position of the executive branch on a legal question. Judicial adherence to this general principle would help to ensure that the careful processes and subject-matter expertise reflected in such documents are not overshadowed by the contents of presidential statements. It would also give Presidents leeway to address topics that either are or could be subject to litigation, without concern about binding themselves to particular positions in court. On this guideline, too, both *Texas v. United States* and *Log Cabin Republicans* fall short. So too may one aspect of the recent district court opinion in *County of Santa Clara v. Trump*,[315] in which the court enjoined another early executive order issued by President Trump, this one titled "Enhancing Public Safety in the Interior of the United States,"[316] and widely referred to as the "sanctuary cities" executive order. The City of San Francisco and County of Santa Clara challenged the order as violating separation-of-powers principles, due process, and the Tenth Amendment, and a major question in the case was what the order *did*—whether it imposed new conditions on the receipt of federal funds, or merely required localities to comply with existing federal law. As the court described it, "[t]he Government's primary defense is that the Order does not change the law, but merely directs the Attorney General and Secretary [of Homeland Security] to enforce existing law."[317]

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any claim that the 2014 DHS Directive does not adopt a new position inconsistent with the INA, the President's comments also lay that argument to rest.").

314. *See* Press Release, Office of the Press Sec'y, *supra* note 172 ("Nothing about this action will benefit anyone who has come to this country recently, or who might try to come to America illegally in the future. It does not grant citizenship, or the right to stay here permanently, or offer the same benefits that citizens receive. And it's certainly not amnesty, no matter how often the critics say it.").

315. Nos. 17-cv-00574-WHO, 17-cv-00485-WHO, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017).

316. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

317. *Cty. of Santa Clara*, 2017 WL 1459081, at *7.

But the court did not credit this representation—it concluded, rather, based on both the text of the Order and a number of statements by both the President and the Attorney General,[318] that the order *did* impose new conditions, and accordingly that the localities were likely to succeed in their constitutional challenge.

It was surely appropriate for the court to rely on the text of the executive order, which the court maintained swept more broadly than the government argued. But it was arguably improper for the court to so thoroughly disregard DOJ's representations regarding the reach of the Order in favor of statements by the President and other executive branch officials.[319]

This proposed guideline is perhaps a curious one from the perspective of the interests in accessibility, transparency, and accountability. Members of the public are far more likely to encounter a speech by the President than to actually read an agency-guidance memorandum or a brief filed in court. So does a proposal that would privilege those less-accessible sources above presidential speech thwart the public's ability to access and understand government action, properly attribute choices to political actors, and hold the right party or parties accountable?[320]

A partial answer may lie in the values of reason giving, procedural regularity, and rigor as administrative law (and core constitutional) values. One of the problems with reliance on presidential utterances is that they are typically not accompanied by the offering of a developed set of reasons, and they are frequently not subject to regular and rigorous processes. When their contents clash with representations that are both subject to a degree of procedural formality and (often) accompanied by reasons, the legal values of process and reason counsel in favor of the more formal and process-laden document—though it may be that the less formal the agency action, the more appropriate it is for courts to put additional stock in a presidential statement that conflicts with that document.[321]

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318. *Id.* at *14–15. In a slightly odd formulation, the court explained that it was taking judicial notice of the presidential statements; in one footnote, for example, the court wrote: "I take judicial notice of President Trump's interview statements as the veracity of these statements 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'" *Id.* at *14 n.6 (quoting FED. R. EVID. § 201(b)(2)).

319. *See id.* at *2 ("Section 9(a), by its plain language, attempts to reach all federal grants . . . . The rest of the Order is broader still, addressing all federal funding. And if there was doubt about the scope of the Order, the President and Attorney General have erased it with their public comments.").

320. For an argument that would seem to suggest resolving any such dispute in the direction of presidential speech, see Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015).

321. On this point, see generally HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS 4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("[D]ecisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed."); Frederick Schauer, *Giving Reasons*, 47

In addition, judicial reliance on agency representations in these circumstances arguably advances, rather than undermines, democratic values like accountability, even if indirectly. That is, both the President and Congress have determined that the orderly administration of justice requires designated players within the executive branch to perform particular functions, including in litigation. For courts to give effect to this considered allocation of authority, then—including by crediting the position of DOJ in litigation—actually facilitates rather than impedes democratic accountability.[322]

In some ways, courts confronting tension between these two potential sources of authority are faced with a concrete embodiment of one important current in administrative law—the tension between expertise-based and political-accountability-based rationales for deference to agency action. The President's utterances often represent the purest embodiment of politics. Filings in court and regulatory products—including the full range of formal and informal agency documents—are typically the result of expertise, though they may also reflect significant input from political leadership.[323] Because the latter may reflect both expertise and politics, the best way to resolve any tension between the two is ordinarily to privilege the agency document.

A related objection may be that this recommendation is inconsistent with the Constitution's vesting of the executive power in the President—that is, that it elevates subordinate officials above the President by privileging their contributions or views over his. But under this proposed principle, the President remains entirely free to exercise considerable authority over the executive branch, including by directing or at least influencing both agency action and particular representations in litigation. The principle merely works to ensure that courts do not become tools for the *circumvention* of the ordinary processes by which, and avenues through which, presidential power is exercised.

Properly understood, then, this principle is actually consistent with both an "overseer" and a "decider" vision of the President's relationship to the administrative state. It merely requires that a President who proceeds in directive fashion do so *within* the administrative apparatus, with all of the

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STAN. L. REV. 633, 641 (1995) ("[T]o provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself.").

322. *Cf.* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) (arguing that the reality of congressional drafting should inform both theory and judicial practice).

323. *See* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 541–47 (2015) (detailing the role of civil servants in "constraining and guiding administrative action and thus helping to preserve encumbered, heterogeneous government at the subconstitutional level").

potential consequences—friction, pushback, perhaps even resignations—entailed by the exercise of that authority.

There are two subject-matter exceptions to this general principle, and I take them up in the subparts that follow. But a third exception has to do with reliance. That is, if presidential speech induces a degree of reliance on the part of members of the public, there may be circumstances under which courts *should* give effect to that speech, even where presidential speech conflicts with other executive branch statements.[324] Some courts have essentially recognized such a doctrine, in the form of what is sometimes described as "entrapment by official misleading" or "entrapment by estoppel."[325]

C. *Presidential Speech in the Foreign Affairs and National Security Spheres*

The two preceding principles offer general guidance for judicial treatment of presidential speech. But there may be good reason to vary that guidance in the context of presidential speech that touches matters of foreign affairs and national security.

It is, of course, in the foreign affairs context that presidential power is generally understood to sweep most broadly; the Court in *Curtiss-Wright*[326] wrote of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[327] Although the Court in recent years has backed away from some of the language in *Curtiss-Wright* suggesting unbounded presidential power,[328] the President is still understood to enjoy broad power in this sphere, especially compared to the office's more limited powers in the domestic domain.[329] So there may be good reason for differential treatment of

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324. *Cf.* Mary D. Fan, *Legalization Conflicts and Reliance Defenses*, 92 WASH. U. L. REV. 907, 913 (2015) (advocating the availability of reliance defenses in the context of competing legalization regimes, so that "[l]aw enforcers cannot lull people or businesses into reasonable reliance only to later attack"); *see also* Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937 (2017) (arguing against a general due process-based doctrine of "nonenforcement reliance" but identifying several exceptions to this general rule).

325. *See, e.g.*, United States v. Batterjee, 361 F.3d 1210, 1216 & n.6 (9th Cir. 2004); United States v. Stewart, 185 F.3d 112, 124 (3d Cir. 1999).

326. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

327. *Id.* at 320.

328. *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2115 (2015) (Roberts, C.J., dissenting) ("[O]ur precedents have never accepted such a sweeping understanding of executive power [as the language in *Curtiss-Wright* would suggest].").

329. *See id.* at 2097 (majority opinion) ("The President's longstanding practice of exercising unenumerated foreign affairs powers reflects a constitutional directive that 'the President ha[s] primary responsibility—along with the necessary power—to protect national security and to conduct the Nation's foreign relations.'" (alteration in original) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting))).

presidential speech in the realm of foreign affairs, and to include within this category matters of national security, recognizing the significant elision of important distinctions such a move represents.

Kenneth Anderson and Benjamin Wittes recently argued, in a book that both reproduces and analyzes a number of Obama Administration national security speeches, that "[presidential and other senior executive officials'] speeches—at least with respect to international law—represent . . . the *opinio juris* of the United States. The speeches, in other words, are the considered, publicly articulated legal views of the [United States]."[330] And David Pozen suggests, in his review of the same book, that history supports a degree of reliance on executive branch speeches (though he does not directly address courts as such): "[Such] speeches undergo a process of interagency clearance, which makes them a reliable guide to the [E]xecutive [B]ranch's views. . . . [T]he use of high-level statements to convey the nation's positions on international law and policy has a long pedigree."[331]

The international law concept of *opinio juris*, invoked by Wittes and Anderson to describe the speeches in their collection, is closely related to the idea of a "rule of recognition"—that is, some set of criteria for identifying when rules must be treated *as law*.[332] It is widely accepted that customary international law has two key components: (1) state practice and (2) *opinio juris*.[333] *Opinio juris* is often defined as a requirement that a practice is "accepted as law"[334]—strikingly similar to many definitions of a rule of recognition. As the oft-cited *Continental Shelf* case frames it, "[t]he States concerned must . . . feel that they are conforming to what amounts to a legal obligation."[335]

Most relevant for purposes of this discussion is how the existence of *opinio juris* is ascertained—often through statements of government officials, especially executive branch officials, regarding the binding status of a law or norm. Here an example is illustrative. In 2011, President Obama

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330. KENNETH ANDERSON & BENJAMIN WITTES, SPEAKING THE LAW: THE OBAMA ADMINISTRATION'S ADDRESSES ON NATIONAL SECURITY LAW 7 (2015).

331. David Pozen, *The Rhetorical Presidency Meets the Drone Presidency*, NEW RAMBLER (2015) (reviewing ANDERSON & WITTES, *supra* note 325), http://newramblerreview.com/book-reviews/law/the-rhetorical-presidency-meets-the-drone-presidency [https://perma.cc/Y9VG-5VZD].

332. H.L.A. HART, THE CONCEPT OF LAW 94–95 (3d ed. 2012); Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 731 (2006).

333. *See, e.g.*, Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 140 (2005).

334. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

335. North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 77 (Feb. 20).

gave a speech regarding Article 75 of the Additional Protocol to the 1949 Geneva Convention.[336] Although the Senate had not ratified the treaty, the President affirmed that "[t]he U.S. Government will . . . choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well."[337] A statement of this sort may well be sufficient to qualify as *opinio juris*—a statement that a particular source is binding and will be treated as such.[338]

The clarity of President Obama's statement here seems to qualify it, in international law terms, to be treated as something like an authoritative statement of the United States' position on its legal obligations. So from the perspective of the "intent to enter the legal arena" principle set forth in the preceding subpart, courts would be entitled to rely on it even absent some special rule applicable to speechmaking in the international law domain. But in light of the description in Part I of the processes by which speeches touching international and foreign affairs law and policy are developed, as an institutional matter there is generally reason to believe these speeches do represent the considered legal positions of the United States, rendering judicial reliance appropriate even absent the degree of clarity in the Article 75 example.[339] And the same internal executive branch processes typically precede speechmaking in the national security domain, rendering similar reliance appropriate there.[340]

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336. Protocol Additional to the Geneva Conventions of August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, June 8, 1977, 1125 U.N.T.S. 3.

337. Press Release, Office of the Press Sec'y, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy [https://perma.cc/5K99-Y7WD].

338. *See, e.g.*, Eric Talbot Jensen, *Presidential Pronouncements of Customary International Law as an Alternative to the Senate's Advice and Consent*, 2015 B.Y.U. L. REV. 1525, 1547 (arguing that President Obama's 2011 statement "incorporates Article 75 into CIL").

339. One type of presidential speech that does not appear in any of the examples discussed above is the presidential threat. Matt Waxman has written of "the swelling scope of the President's practice in wielding threatened force," which no one today seriously questions the President's power to do. Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1633 (2014). And of course, threats to use force are often (though not always) communicated in public statements. But threats as such are exceedingly unlikely to end up in judicial fora, so I do not address them here. *See also* Helen L. Norton, *Government Speech and the War on Terror*, 86 FORDHAM L. REV. (forthcoming Nov. 2017) (manuscript at 2) (discussing "wartime fearmongering"—that is, the "deliberate expressive effort to instill or exacerbate public fear of certain individuals or communities through stereotyping and scapegoating").

340. *See supra* note 82 and accompanying text. *But see* Susan B. Glasser, *Trump National Security Team Blindsided by NATO Speech*, POLITICO MAG. (June 5, 2017), http://www.politico.com/magazine/story/2017/06/05/trump-nato-speech-national-security-team-215227 [https://perma.cc/2EFQ-36AK].

A note here seems in order on the applicability of this general principle in the age of President Trump. Nearly a year into the Trump Administration, public reporting suggests that the President has abandoned a number of long-standing practices in foreign affairs and national security policy development,[341] and contradictions have arisen on a number of occasions between presidential statements and statements by other senior foreign policy officials.[342] If sufficient evidence accumulates that the general premises detailed above are no longer operative, the principle offered here may warrant revisiting. But given longstanding practice, across multiple Administrations of both parties, of careful development of such presidential statements, it seems too soon to advocate a major change in course. That said, where credible reporting *does* suggest that particular presidential statements were not carefully considered or did not result from customary executive branch processes, courts are justified in approaching them with care, and perhaps discounting them, especially where they conflict with other statements by executive branch officials.

D. Presidential Speech as Evidence of (Constitutionally Forbidden) Government Purpose

Finally, judicial reliance on presidential speech may be appropriate where such speech supplies relevant evidence of intent or purpose, in particular where an established legal test provides for the invalidity of government conduct when it is animated by a constitutionally impermissible purpose.

Equal protection challenges present the most obvious example. The Court has held that discriminatory intent is a required component of a successful equal protection challenge,[343] and many courts have relied on

341. The short-lived addition of White House strategist Stephen Bannon to the National Security Council was the earliest and perhaps starkest public reflection of this change. *See* Glenn Thrush & Maggie Haberman, *Bannon Is Given Security Role Generally Held for Generals*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/us/stephen-bannon-donald-trump-national-security-council.html?mcubz=1 [https://perma.cc/DE45-XQZX]; *see also* Robert Costa & Abby Phillip, *Stephen Bannon Removed from National Security Council*, WASH. POST (Apr. 5, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/04/05/steven-bannon-no-longer-a-member-of-national-security-council/ [https://perma.cc/H5D5-HQ7U].

342. *See, e.g.*, Michele Kelemen, *In an Afternoon, Trump and Tillerson Appear to Contradict Each Other on Qatar*, NPR (June 19, 2017), http://www.npr.org/sections/parallels/2017/06/09/532294710/in-an-afternoon-trump-and-tillerson-appear-to-contradict-each-other-on-qatar [https://perma.cc/BA7S-KWTM].

343. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979) (explaining that in the context of sex discrimination claims, "purposeful discrimination is 'the condition that offends the Constitution.'" (quoting Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 16 (1971))); Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional . . . .").

statements by government officials as potentially relevant evidence of such intent.[344] The Supreme Court itself, in the *Village of Arlington Heights*[345] case, advised that in looking for evidence of the sort of discriminatory intent that would constitute a denial of equal protection, "[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body."[346] Nothing in this statement would seem by its logic to restrict consideration to statements by legislators; and where the conduct in question is executive action, statements by executive branch officials supply the most relevant evidence of intent.

The religion clauses of the First Amendment are similar. The Supreme Court has emphasized "the intuitive importance of official purpose to the realization of Establishment Clause values,"[347] and courts adjudicating both Free Exercise and Establishment Clause claims have long considered statements by government officials in assessing the existence of an impermissible purpose to discriminate on the basis of religion.[348]

A number of scholars have expressed doubts about the quest for intent in the law generally (albeit frequently in the context of ordinary statutory interpretation, not necessarily constitutional adjudication), noting in particular the difficulty of attempting to ascertain intent in the context of multimember bodies, like legislatures.[349] But whatever the merits of such

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344. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 229 (1985) (invalidating a felon-disenfranchisement provision in the Alabama constitution based in part on statements by delegates at the constitutional convention); *see also* N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 229–30 (4th Cir. 2016) (considering legislative background, including the conduct of legislators, in identifying discriminatory intent).

345. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

346. *Id.* at 268.

347. McCreary Cty., Ky. v. ACLU of Ky., 545 U.S. 844, 861 (2005); *see also* Town of Greece, N.Y. v. Galloway, 134 S. Ct. 1811 (2014) (Alito, J., concurring) (noting the absence of evidence of "discriminatory intent" and explaining, "I would view this case very differently if the omission of these synagogues were intentional."); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (requiring statutes to "have a secular legislative purpose").

348. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540–41 (1993) (explaining that "[r]elevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body," and citing numerous statements by "residents, members of the city council, and other city officials" demonstrating "significant hostility . . . toward the Santeria religion and its practice of animal sacrifice"); Larson v. Valente, 456 U.S. 228, 254 (1982) (finding in legislative history evidence that a selective registration and reporting requirement "was drafted with the explicit intention of including particular religious denominations and excluding others").

349. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 321–33 (1986); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 430 (2005) ("[T]extualists do not believe that the premises governing an individual's intended meaning translate well to a complex, multi-member legislative process."); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative*

concerns—which have not, as yet, convinced courts to retreat from a focus on intent—those concerns are arguably misplaced, or at least should have less force, in the context of the Executive, and in particular where executive action is at issue.[350] The difficulties of ascertaining intent in the context of legislatures are simply not presented in the case of an executive branch official like the President; indeed, in the context of the executive order, the only intent that *could* matter is the intent of the President.

There may be circumstances in which the recommendations offered in this Part are in some tension. When the President speaks on a matter of foreign affairs, say, but his words conflict with more authoritative representations on the same subject by other executive branch players, courts will have to choose between two of the principles I propose. But there does not seem to be any genuine tension between *this* recommendation—that is, that presidential speech may appropriately be considered when it supplies evidence of purpose—and the principle that in general, more formal documents by other executive branch entities should be entitled to more weight than presidential statements. That is because none of the arguments for privileging the other documents—particularly based in internal executive branch processes—has any force in this context. When it comes to the President's purpose, other executive branch submissions could not possibly overcome the President's own words. Accordingly, presidential statements should clearly control in such cases.

The litigation over President Trump's travel ban executive orders—still ongoing at the time of this writing—presents these questions in a direct and high-stakes context. The recommendation provided above suggests that judicial consideration of President Trump's statements *is* appropriate where those statements supply evidence of purpose. If, by contrast, the travel-ban cases had featured disputes about the *scope or operation* of the EOs—if, say, rather than a memo from the White House Counsel purporting to clarify that green card holders were exempt from the initial restriction, the President himself had made a statement in an interview to that effect—it would be appropriate for courts to decline to rely on that statement, if it conflicted with

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Intent as Oxymoron, 12 INT'L REV. L. & ECON. 239, 244 (1992) ("[T]here is not a single legislative intent, but rather many *legislators'* intents."); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition."). Professor Richard Fallon's recent piece, *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523 (2016), urges "reexamination and reform" of conceptions of forbidden legislative intent, *id.* at 527, but expressly brackets the question of executive officials' intent, acknowledging that "[c]ases involving forbidden motivations by individual officials might . . . call for a different, and more diverse, pattern of doctrinal responses than cases of forbidden legislative intent," *id.* at 531.

350. It is striking how little scholarship examines intent and the Executive in any systematic fashion. For a more detailed account of this phenomenon, see Katherine Shaw, Speech, Intent, and the Executive (unpublished manuscript) (on file with author).

either the text of the executive order or representations and arguments offered by DOJ.

Conclusion

Not just the office of the presidency but the speech of the President is in many ways unique in our constitutional scheme.[351] As Justice Jackson wrote in his concurring opinion in *Youngstown*:

> No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.[352]

Despite the mountains of literature on presidential rhetoric, the role of presidential speech in the courts has gone uniquely unexamined. But this particular site of executive–judicial interactions is a potentially significant one, with hugely consequential implications in individual cases, as well as for administrative law practice and doctrine, and both internal and external separation of powers. In light of the stakes, it is striking that our pitched battles about interpretive methodology in statutory interpretation—in particular, courts' use of legislative history in construing statutes—lack even a rough analogue when it comes to judicial treatment of statements by the President and other executive branch officials.

What this piece has attempted to show is that judicial reliance on presidential speech occurs with surprising frequency; and that, although invocations of speech can impact the results in high-stakes cases, no clear principles guide its use. By cataloging a number of such invocations, and providing an analytical framework, a critique, and a set of guiding principles, this piece aims to provide both courts and the executive branch with a new set of tools.

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351. Roderick P. Hart, *Why Do They Talk That Way? A Research Agenda for the Presidency*, 32 PRESIDENTIAL STUD. Q. 693, 707 (2002) ("What a president says today can become law tomorrow. A presidential malapropism can send the stock markets tumbling, and a presidential bon mot can give his people great joy.").

352. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653–54 (1952) (Jackson, J., concurring).

Forum Shopping and Patent Law—A Comment on *TC Heartland*

Robert G. Bone*

The Supreme Court addressed rules affecting forum-shopping incentives in three cases during its 2016–2017 term.[1] This Essay focuses on one of those cases—*TC Heartland LLC v. Kraft Foods Group Brands LLC*.[2] In *TC Heartland*, the Court narrowly interpreted the patent venue statute, 28 U.S.C. § 1400(b), to restrict where patentees can file infringement suits. The case involved a technical issue of statutory interpretation, but one that implicated substantial questions of patent policy and promised serious real-world consequences affecting the future of patent litigation, the efficacy of patent law, and even the economic health of communities in East Texas, especially the town of Marshall, Texas. For these reasons, the case attracted widespread public attention. The Court's unanimous opinion, however, ignores this broader context. It focuses narrowly on the statute and defends the holding with a largely textualist interpretation.

This is more than a little surprising. The contrast between the Court's style of reasoning and the decision's real-world consequences could hardly be more striking. It is not surprising that Justices firmly committed to textualism would insist on a textualist analysis even when statutory text offers very limited guidance. But where consequences are so significant, one might have expected Justices of a more pragmatic and functional bent, such as Justice Breyer, to have written a concurring opinion taking note of those consequences as part of a purposive interpretation of the statute. Yet, as I shall argue, constructing a convincing purposive interpretation is not easy to do. In the end, the Court's decision to ignore the broader context might make more sense than it seems at first glance.

The aim of this Essay is to review the Court's decision, assess its possible impact on patent litigation, and analyze its interpretive approach. Part I describes the factual background of the *TC Heartland* case, summarizes the Court's holding, and explains the broader patent law

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1. The three cases are: BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017) (general jurisdiction over the person); Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cty., 137 S. Ct. 1773 (2017) (specific jurisdiction over the person), and TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514 (2017) (patent venue).

2. 137 S. Ct. 1514 (2017).

context that made the case so important and newsworthy. Part II critically examines the Court's reasoning. Part III offers some reasons why it might have made sense for the Court to ignore the broader patent law context despite its key importance to the case.

I. The *TC Heartland* Case and Its Broader Context

A. Background and Holding

TC Heartland is a lawsuit for patent infringement. The plaintiff-patentee, Kraft Food Group Brands LLC (Kraft), and the defendant, TC Heartland LLC (TC Heartland), are competitors in the market for flavored drink mixes.[3] Kraft sued TC Heartland and Heartland Packaging Corporation in the District of Delaware, alleging that the defendants infringed Kraft's patents in liquid water enhancers.[4] The defendants filed a motion under Rule 12(b)(3) to dismiss the suit for improper venue, or in the alternative, to transfer the lawsuit to the Southern District of Indiana pursuant to 28 U.S.C. § 1406(a).[5]

Kraft is organized under the laws of Delaware with its principal place of business in Illinois, and TC Heartland is organized under the laws of Indiana with its headquarters in Indiana.[6] TC Heartland is not registered to do business in Delaware, nor does it have any supply contracts in Delaware, hire any local salespeople, or have any other significant "local presence" in Delaware.[7] However, TC Heartland ships allegedly infringing products into Delaware.[8]

The district court held that venue was proper based on the Federal Circuit's interpretation of the patent venue statute.[9] TC Heartland filed a petition with the Federal Circuit for a writ of mandamus, and the Federal

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3. *Id.* at 1517.

4. *In re* TC Heartland LLC, 821 F.3d 1338, 1340 (Fed. Cir. 2016).

5. *Id.* TC Heartland also moved to dismiss under Rule 12(b)(2) for lack of jurisdiction over its person. *Id.* The district court rejected this ground for dismissal, and the Federal Circuit affirmed. *Id.* at 1341. The Supreme Court did not address the personal jurisdiction issue. *See generally TC Heartland*, 137 S. Ct. 1514.

6. *TC Heartland*, 137 S. Ct. at 1517. While TC Heartland is a limited liability company, the Supreme Court decided the venue issue as if it were a corporation because that is how the parties presented the case. *See id.* at 1517 n.1 ("Because this case comes to us at the pleading stage and has been litigated on the understanding that petitioner is a corporation, we confine our analysis to the proper venue for corporations. We leave further consideration of the issue of petitioner's legal status to the courts below on remand.").

7. *Id.* at 1517; *In re TC Heartland*, 821 F.3d at 1340.

8. *In re TC Heartland*, 821 F.3d at 1340 (noting that this amounted to about 2% of TC Heartland's total 2013 sales).

9. *See id.* at 1340–41 (explaining that congressional amendments to the patent venue statute did not undo prior Federal Circuit precedent).

Circuit denied the petition.[10] The Supreme Court granted certiorari on the venue issue and reversed.[11]

The precise legal issue in the case is a technical one. Section 1400(b) creates two distinct grounds for venue: (1) in the judicial district "where the defendant resides," or (2) in any district "where the defendant has committed acts of infringement and has a regular and established place of business."[12] TC Heartland argued that the first ground could not support venue in the District of Delaware because it did not "reside" there, and Kraft disagreed.[13]

The venue issue thus turned on the proper definition of the word "resides" in § 1400(b). More specifically, the question before the Court had to do with the continuing vitality of a 1990 Federal Circuit decision, *VE Holding Corp. v. Johnson Gas Appliance Co.*,[14] which held that § 1391(c) of the general venue statute supplies the definition of "resides" for § 1400(b).[15] Section 1391(c) states that a corporation "shall be deemed to reside, if a defendant, in any judicial district in which [it] is subject to the court's personal jurisdiction."[16] Since the District of Delaware had personal jurisdiction over TC Heartland, Kraft argued, the company resided in the District of Delaware for venue purposes under *VE Holding*.

TC Heartland, for its part, relied on a 1957 Supreme Court decision, *Fourco Glass Co. v. Transmirra Products Corp.*[17] *Fourco Glass* held that § 1391(c)'s definition of "resides" does not apply to § 1400(b)—which, in light of the precedent at the time, meant that a corporation "resides" only in the place of incorporation.[18] TC Heartland argued that since it was organized under the laws of Indiana and not under the laws of Delaware, it resided in Indiana under *Fourco Glass*, and not in Delaware.

The Supreme Court sided with TC Heartland. As explained in more detail in Part II below, the Court held that *Fourco Glass* still controls the definition of residence in § 1400(b) for domestic corporations, notwithstanding subsequent amendments to the venue statutes.[19] However,

10. *Id.* at 1341.
11. *TC Heartland*, 137 S. Ct. at 1518.
12. 28 U.S.C. § 1400(b) (2012).
13. *See In re TC Heartland*, 821 F.3d at 1340–41 (summarizing the case's procedural history).
14. 917 F.2d 1574 (Fed. Cir. 1990).
15. *TC Heartland*, 137 S. Ct. at 1517–20.
16. 28 U.S.C. § 1391(c)(2) (2012). Section 1391(d) applies to cases in multidistrict states. 28 U.S.C. § 1391(d).
17. 353 U.S. 222 (1957).
18. *Id.* at 223–24, 228–29.
19. *TC Heartland*, 137 S. Ct. at 1520–21.

it left open the question of residence for unincorporated entities and foreign corporations.[20]

B. The Broader Context

One would hardly expect *TC Heartland*, with its rather dry technical issue, to attract much public attention. But it did. The Supreme Court received approximately thirty amicus briefs from a wide range of interested parties, including several major IP companies, organizations keenly interested in the future of IP law, IP scholars and economists, and a retired Chief Judge of the Federal Circuit (Judge Paul Michel).[21] The state of Texas even filed an amicus brief, joined by sixteen other states.[22] The national media also took an interest. The *New York Times*, for example, published at least one article about the case while it was pending in the Supreme Court.[23] This amount of attention is quite remarkable for a case involving such a narrow procedural issue.

The reason for the intense interest had to do with the real-world stakes of the Court's decision. For many, the case implicated the proper functioning of the patent system, the success of the patent troll strategy, and even the future of Marshall, Texas.[24] To understand why, it is necessary to focus on how venue choices affect forum shopping by patent plaintiffs and forum selling by federal district courts.[25]

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20. *Id.* at 1517 n.1, 1520 n.2; *see* Maxchief Inv. Ltd. v. Plastic Dev. Grp., LLC, No. 3:16-cv-63, 2017 WL 3479504, at *2 (E.D. Tenn. Aug. 14, 2017) (applying *TC Heartland*'s definition of residence to unincorporated associations).

21. *See TC Heartland LLC v. Kraft Foods Group Brands LLC*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/tc-heartland-llc-v-kraft-foods-group-brands-llc/ [https://perma.cc/32AP-XMJP] (listing the amicus briefs that were filed).

22. *See* Brief for the State of Texas et al. as Amici Curiae Supporting Petitioner at 2, TC Heartland LLC v. Kraft Food Brands Grp. LLC, 137 S. Ct. 1514 (2017) (No. 16-341) (arguing that the Federal Circuit erred in departing from the Supreme Court's holding that 28 U.S.C. § 1400(b) is the exclusive statute governing venue over corporations in patent cases). Arizona, Colorado, Connecticut, Hawai'i, Illinois, Iowa, Maine, Maryland, Michigan, Nebraska, North Carolina, Ohio, South Carolina, Vermont, Virginia, and Wisconsin joined the brief. *Id.* at 1.

23. Adam Liptak, *Supreme Court Considers Why Patent Trolls Love Texas*, N.Y. TIMES (Mar. 27, 2017), https://www.nytimes.com/2017/03/27/business/supreme-court-patent-trolls-tc-heartland-kraft.html [https://perma.cc/X332-2X3P]. Moreover, although it predates the Federal Circuit decision in *TC Heartland*, it is worth mentioning that comedian John Oliver did a segment on patent trolls as part of his HBO show in April 2015, which included a discussion of the concentration of lawsuits in Marshall, Texas. *Patents: Last Week Tonight with John Oliver*, YOUTUBE (Apr. 19, 2015), https://www.youtube.com/watch?v=3bxcc3SM_KA [https://perma.cc/D5T2-G6A9].

24. For a description of patent trolls and the patent troll strategy, see *infra* notes 40–46 and accompanying text.

25. *See* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 242 (2016) ("When plaintiffs have a wide choice of forum, . . . judges have incentives to make the law more pro-plaintiff because plaintiffs choose the court with the most pro-plaintiff law and procedures."). As all litigators know, choice of forum can have a major effect on outcome, which is why parties invest a lot in battling over where a suit is litigated. Kevin M. Clermont & Theodore Eisenberg,

Before *TC Heartland*, a patent owner could file a patent infringement suit in virtually any federal district court in the country. This was the result of two Federal Circuit decisions, one having to do with personal jurisdiction and the other with venue.[26] In *Beverly Hills Fan Co. v. Royal Sovereign Corp.*,[27] the Federal Circuit upheld the exercise of personal jurisdiction over an out-of-state defendant that purposefully and regularly distributed allegedly infringing products in the forum state through an intermediary in an established distribution channel.[28] In *VE Holding Corp. v. Johnson Gas Appliance Co.*,[29] the Federal Circuit held that the definition of corporate residence in § 1391 applied to § 1400(b), thereby tying venue to personal jurisdiction.[30] Together these two decisions allowed patentees to sue almost anywhere that the defendant's products were regularly sold.

With this many venue options available, patentee-plaintiffs had strong incentives to shop for a court that offered the most favorable procedures.[31] According to a number of commentators, these incentives generated a competition among federal districts eager to attract patent litigation, in which districts competed by offering pro-plaintiff procedures.[32] As a result,

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Litigation Realities, 88 CORNELL L. REV. 119, 121 (2002) (noting that "[t]he name of the game is forum-shopping" and that "[f]orum is worth fighting over because outcome often turns on forum").

26. There are three requirements that must be satisfied for a federal district court to be a proper forum: subject matter jurisdiction, jurisdiction over the person, and venue. Sections 1331 and 1338 each confer federal subject matter jurisdiction over a patent infringement suit. 28 U.S.C. §§ 1331, 1338 (2012). This leaves personal jurisdiction and venue.

27. 21 F.3d 1558 (Fed. Cir. 1994).

28. *Id.* at 1564, 1572; *see* 8 DONALD S. CHISUM, CHISUM ON PATENTS § 21.02[3][a][i] (2017). Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure authorizes personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. R. Civ. P. 4(k)(1)(A). This means that the exercise of jurisdiction must comply with the state long-arm statute and the Fourteenth Amendment's Due Process Clause. In *Beverly Hills Fan*, the Federal Circuit applied federal law to give the state long-arm statute a relatively broad reach. *Beverly Hills Fan*, 21 F.3d at 1571. As for the due process analysis, the Court held that Federal Circuit law applies rather than the law of the circuit in which the district court sits, and that Federal Circuit law endorses a broad stream-of-commerce theory. *Id.* at 1564–65 ("The creation and application of a uniform body of Federal Circuit law in this area would clearly promote judicial efficiency, would be consistent with our mandate, and would not create undue conflict and confusion at the district court level.").

29. 917 F.2d 1574 (Fed. Cir. 1990).

30. At least for single-district states. *Id.* at 1580.

31. Substantive patent law offers little reason to forum shop because it is controlled mostly by the Patent Act and Federal Circuit and Supreme Court decisions and thus is relatively uniform nationwide. *See* J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 634, 684 (2015) (noting that the "uniformity of patent law throughout the country forces forum-shopping plaintiffs to seek out advantageous case-management norms and procedural differences").

32. *See* Anderson, *supra* note 31, at 649–61 (describing the competition for patent cases in a number of federal districts); Klerman & Reilly, *supra* note 25, at 243 (discussing how judges in the Eastern District of Texas "have distorted the rules and practices relating to case assignment, joinder, discovery, transfer, and summary judgment in a pro-patentee (plaintiff) direction"). There are a number of reasons why federal judges might want to attract patent litigation. *See* Klerman &

cases ended up concentrated in a few districts: those that valued patent law business enough and were able to adjust their procedures to offer the best deals to patentee–plaintiffs.[33]

The empirical evidence of case concentration is quite striking. According to one study, 48.9% of all patent suits filed from January 2014 through June 2016 were filed in only two federal districts: the Eastern District of Texas and the District of Delaware.[34] In fact, the Eastern District of Texas by itself captured 36% of the national filings over this period, and almost 44% in 2015 alone.[35] Indeed, most Eastern District cases were routed to a single federal district judge, Judge Rodney Gilstrap, located in the small town of Marshall, Texas. The empirical studies show that Judge Gilstrap handled almost 25% of all patent cases filed nationwide from January 2014 through June 2016.[36]

The Eastern District of Texas is hardly a hotbed of innovation or a central location for patent industries. Indeed, the small town of Marshall, Texas, where Judge Gilstrap sits, has a population of approximately 25,000.[37] According to commentators, the reason the Eastern District was so attractive has to do with its pro-patentee procedures, including a restrictive approach to granting summary judgment (making it harder for defendants to exit lawsuits) and a preference for broad and expedited discovery (increasing defendant's costs relative to plaintiff's).[38] These same commentators also point out that the Eastern District has a case assignment

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Reilly, *supra* note 25, at 270–77 (discussing some reasons, including the challenge offered by patent suits, the reputational opportunities from specializing in patent litigation, the economic benefits for the local community, and the professional benefits for the local bar).

33. Klerman & Reilly, *supra* note 25, at 248–49. Defendants tried to escape these pro-plaintiff districts by filing motions to transfer, but Eastern District judges tended to delay or deny these motions. *See* Klerman & Reilly, *supra* note 25, at 260–63; Brian J. Love & James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 STAN. TECH. L. REV. 1, 22–23 (2017) (noting the differences across districts for rulings on motions to transfer); *see also* 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3848 (4th ed. 2013) (discussing the presumption in favor of plaintiff's choice of forum).

34. Love & Yoon, *supra* note 33, at 8; *see also* Mathew Sag, *IP Litigation in U.S. District Courts: 1994–2014*, 101 IOWA L. REV. 1065, 1096–99 (2016) (documenting the "remarkable ascendancy" of patent litigation in the Eastern District of Texas between 1994 and 2014 and noting that "but for the Eastern District of Texas and the District of Delaware, the geographic distribution of patent litigation over the past two decades would look remarkably stable").

35. Love & Yoon, *supra* note 33, at 8.

36. *Id.* at 6 ("[O]ne judge—Judge Rodney Gilstrap of Marshall, Texas—saw almost one quarter of all patent case filings nationwide . . . , more than all the federal judges in California, New York, and Florida combined."). In 2015 alone, Judge Gilstrap was assigned 1,686 patent cases. Jonas Anderson, *Judge Shopping in the Eastern District of Texas*, 48 LOY. U. CHI. L.J. 539, 539 (2016).

37. *See Marshall, Texas*, CITY-DATA, http://www.city-data.com/city/Marshall-Texas.html [https://perma.cc/5DEW-B84Y] (noting a population of 24,701 in 2014).

38. For a detailed description of these and other pro-plaintiff procedures, see Klerman & Reilly, *supra* note 25, at 251–70, and Love & Yoon, *supra* note 33, at 15–25.

system that allows plaintiffs to select pro-patentee judges with high confidence, offers juries that tend to be generous with damage awards, and delays or denies transfer motions with regularity in order to lock in cases.[39]

Critics argue that these pro-plaintiff procedures impose considerable pressure on defendants to settle and that patent trolls—or, less pejoratively, "patent assertion entities" (PAE)—benefit greatly from this pressure. Patent trolls are companies that buy patents not to practice or commercialize them, but to assert them against others making productive use of the technology in an effort to leverage settlements.[40] According to the critics, many of these patents are of poor quality, the suits they support are weak, and the settlements they generate greatly exceed the patent's contribution to the value of the infringing product.[41] PAEs are pervasive in the patent system; empirical evidence shows that they are responsible for more than half of all the patent infringement suits filed in the United States.[42]

Settlement is very important to the patent troll's strategy. With weak patents, there is a slim chance of winning at trial, so success depends on pressuring defendants to settle by threatening high litigation costs. According to critics, the pro-plaintiff procedures of the Eastern District of Texas, and other patentee-friendly districts, play into this strategy and, as a result, patent trolls file in those districts.[43] Many of these critics believe that the problem is particularly serious because suits by patent trolls burden IP innovators and chill incentives to invest in research and development.[44] In sum, the concern is that the Federal Circuit's liberal approach to venue and personal jurisdiction supports interdistrict competition, which leads to the concentration of patent cases in districts with patentee-favorable law, which in turn supports patent troll litigation that stifles innovation.

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39. Klerman & Reilly, *supra* note 25, at 254, 260–61.

40. *See generally* Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2118–46 (2013) (discussing patent troll business models, including settlement techniques employed by patent trolls).

41. *Id.* at 2120, 2124, 2126; *see generally* Robert P. Merges, *The Trouble With Trolls: Innovation, Rent-Seeking, and Patent Law Reform*, 24 BERKELEY TECH. L.J. 1583, 1587–88, 1591, 1599–1600 (2009) (discussing problems created by patent trolls).

42. Lemley & Melamed, *supra* note 40, at 2123.

43. For the period covering January 2014 through June 2016, about 93.9% of the patent infringement cases filed in the Eastern District of Texas were filed by patent assertion entities. Love & Yoon, *supra* note 33, at 9.

44. *See* Lemley & Melamed, *supra* note 40, at 2124–25 (listing costs imposed by patent trolls that discourage innovation). It is worth mentioning that not all commentators are hostile to PAEs or patent trolls. *See, e.g.*, David L. Schwartz & Jay P. Kesan, *Analyzing the Role of Non Practicing Entities in the Patent System*, 99 CORNELL L. REV. 425, 427 (2014); James F. McDonough III, Comment, *The Myth of the Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy*, 56 EMORY L.J. 189, 223 (2006).

The patent troll problem has been a key issue for technology firms, patent lawyers, scholars, and politicians over the past decade.[45] In recent years, Congress has considered a number of legislative proposals designed to deal with the problem, including a cleverly named bill introduced in 2016, the Venue Equity and Non-Uniformity Elimination Act (VENUE Act), which would revise the patent venue statute to spread patent suits more evenly and reduce their concentration in patent-friendly districts.[46]

This is the reason *TC Heartland* was such an important case. Many believed that by adopting a narrow interpretation of the patent venue statute, the Supreme Court could do something about patent troll filings and case concentration without the need to wait for congressional action. Indeed, it is not much of an exaggeration to say that the patent community viewed *TC Heartland* as a patent reform case aimed at the patent troll problem.[47]

II. The Court's Reasoning

Viewed in light of the high stakes for patent law, the Supreme Court's opinion is surprisingly formalistic and remarkably thin. The Court treats the case as a straightforward exercise in statutory interpretation based on text, and ignores the broader litigation and patent law context. Moreover, the statutory interpretation analysis is unpersuasive even on its own terms.

The opinion for a unanimous court,[48] authored by Justice Thomas, relies on a simple line of argument. Stripped to its core, the argument is that the definition of "resides" in the 1957 *Fourco Glass* decision still controls because there is no clear indication that Congress intended to change it. The Court's analysis, however, ignores rather strong evidence that Congress did intend to change it, evidence not only from legislative history but also from the text itself.

The following discussion first reviews the history of the venue provisions critical to the Court's analysis and then explains how the Court uses and misuses that history to support its holding.

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45. *See* Lemley & Melamed, *supra* note 40, at 2118–19 (cataloging public and private entities that have publicized the patent troll problem or taken action against patent trolls).

46. Venue Equity and Non-Uniformity Elimination Act of 2016, S.2733, 114th Cong. (2016) (pending). For a description of the bill, see Colleen V. Chien & Michael Risch, *Recalibrating Patent Venue*, 77 MD. L. REV. (forthcoming 2018) (manuscript at 23–24).

47. Many in the media characterized the Supreme Court's decision as a blow to patent trolls. *See, e.g.*, Brian Fung, *The Supreme Court's Big Ruling on 'Patent Trolls' will Rock Businesses Everywhere*, WASH. POST (May 23, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/05/23/the-supreme-court-just-undercut-patent-trolls-in-a-big-way [https://perma.cc/LL2A-KLHA]; Adam Liptak, *Supreme Court Ruling Could Hinder 'Patent Trolls'*, N.Y. TIMES (May 22, 2017), https://www.nytimes.com/2017/05/22/business/supreme-court-patent-lawsuit.html [https://perma.cc/JPU6-QSCF].

48. Justice Gorsuch did not participate in the decision. TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1521 (2017).

A. Venue History

The *TC Heartland* opinion begins by laying out the history of the patent venue statutes.[49] Congress adopted the first special venue statute for patent cases in 1897, and it amended that statute in 1948 to codify what is now § 1400(b).[50] Both the original and the amended versions recognized two grounds for patent venue: (1) the district where the defendant is an "inhabitant" (the 1897 version)—which was changed in 1948 to where it "resides"—and (2) any district where the defendant committed acts of infringement and has a regular and established place of business.[51] *TC Heartland* focuses on the meaning of "resides" in the first ground.[52]

Under the 1897 statute, a corporation was held to be an "inhabitant" of only the district where it was incorporated.[53] When "resides" replaced "inhabitant" in 1948, the question arose whether Congress intended "resides" to have a broader meaning. This question was complicated by the fact that the 1948 revision, in addition to amending § 1400(b), also altered § 1391, the general venue statute, by adding a new provision, § 1391(c). This new provision defined corporate residence to include districts where the corporation was licensed to do business or was doing business—in addition to districts where it was incorporated.[54]

Nine years after the 1948 revision, the Supreme Court addressed this interpretive question in *Fourco Glass Co. v. Transmirra Products Corp.* In that case, the Court held that the definition of corporate residence in § 1391(c) did not apply to the patent venue statute.[55] Examining the legislative history of the 1948 revision, the *Fourco Glass* Court concluded that Congress meant only to substitute "resides" for "inhabitant of" and not to make any substantive change.[56] Thus, the definition of "inhabitant" in § 1400(b), which had previously been limited to place of incorporation, carried forward to define "resides" as well.

If the venue statutes were the same today as in 1948, the *TC Heartland* Court would be justified in following *Fourco Glass*. But they are not.

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49. *Id.* at 1518 (noting that the statutory history is "important context for the issue in this case").

50. *Id.*

51. *Id.* at 1518–19.

52. *Id.* at 1517.

53. *Id.* at 1518.

54. 28 U.S.C. § 1391(c) (1948) ("A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.") (amended 1988).

55. Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 229 (1957). The Court relied on its earlier decision in *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942), which treated the patent venue statute as completely independent of the general venue statute. *Fourco Glass*, 353 U.S. at 225.

56. *Fourco Glass*, 353 U.S. at 226–28.

Congress revised § 1391 in 1988, and again in 2011.[57] In 1988, it amended § 1391(c) to change the definition of residence as follows:

> (c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.[58]

Two years later, the Federal Circuit, in *VE Holding Corp. v. Johnson Gas Appliance Co.*, construed this amendment to overrule *Fourco Glass*. The Court focused on the preamble, "[f]or purposes of venue under this chapter,"[59] which it characterized as "exact and classic language of incorporation," indicating a congressional intent to apply § 1391(c)'s definition to § 1400(b).[60] It also noted that the legislative history, while sparse, did not indicate a different intent and that the drafting history supported the view that § 1391(c) applied to patent venue.[61] Finally, the Court reasoned that the result of applying this "plain meaning" brought patent venue "more in line with venue law generally," fit the legislative trend toward liberalizing venue outside of the patent context, and was consistent with the views of leading authorities.[62]

Congress amended § 1391 again in 2011.[63] In its *TC Heartland* decision prior to Supreme Court review, the Federal Circuit considered

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57. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 202, 125 Stat. 758, 763; Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1013, 102 Stat. 4642, 4669 (1988).

58. Judicial Improvements and Access to Justice Act § 1013(a).

59. VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1580 (Fed. Cir. 1990). The words "this chapter" referred to Chapter 87 of Title 28, which included § 1400(b), the patent venue statute. *Id.*

60. *Id.* at 1579; *see also id.* at 1580 ("In the case before us, the language of the statute is clear and its meaning is unambiguous.").

61. *Id.* at 1581–82. The 1988 amendments were based in large part on recommendations by the Judicial Conference Committee on Court Administration. Notably, Professor Edward Cooper, the Reporter of the subcommittee responsible for the proposal that became § 1391(c), strongly suggested in a December 4, 1986 memorandum to the subcommittee that the new definition of corporate residence applied to all the venue provisions in Chapter 87. *Id.* at 1582; *see* Paul R. Gugliuzza & Megan M. La Belle, *The Patently Unexceptional Venue Statute*, 66 AM. U. L. REV. 1027, 1047–49 (2017) (also arguing that changes in the prefatory clause and other revisions to the statute support *VE Holding*).

62. *VE Holding*, 917 F.2d at 1583–84.

63. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 202, 125 Stat. 758, 763–64 (codified as amended at 28 U.S.C. § 1391 (2012)).

whether these 2011 amendments reflected a congressional decision to overrule its earlier *VE Holding* decision, and concluded that they did not.[64]

B. The Court's Use and Misuse of Venue History

One might have expected the *TC Heartland* Court to support its holding with a careful analysis matching the careful analysis in *VE Holding*, especially as *VE Holding* had been the law for twenty-seven years and was decided by a court (the Federal Circuit) with broad power over the development of patent law. However, the Court's analysis is extremely thin. The Court makes no effort to engage the legislative history or drafting background that influenced the Federal Circuit's analysis in *VE Holding*. Instead, it focuses mainly on a single argument, namely, that Congress would have clearly indicated it was overruling *Fourco Glass* if that were what it intended to do. More precisely, the Court invokes a general proposition: when Congress intends to amend a provision indirectly by amending a different statutory provision, "it ordinarily provides a relatively clear indication of its intent in the text of the amended provision."[65] There being no such clear indication in the 1988 amendments, the Federal Circuit's interpretation in *VE Holding* must fail.

There are several problems with this line of reasoning. First, *TC Heartland* is not a case where an amendment to one statutory provision is supposed to have amended an entirely separate statutory provision. Sections 1391(c) and 1400(b) are not entirely separate sections. The former defines a term, "resides," that appears in the latter. Thus, the question is not whether an amendment to one provision—§ 1391(c)—implicitly amends a different provision—§ 1400(b). The question is whether a particular term ("resides") is subject to a definition appearing elsewhere in the same statute.

Second, the Federal Circuit in *VE Holding* read Congress to give a relatively clear indication of its intent.[66] Indeed, it concluded that Congress adopted an *explicit* amendment, not an *implicit* one. That was, after all, the point of focusing on the preamble to § 1391(c), "[f]or purposes of venue under this chapter."[67] Evidently, the *TC Heartland* Court believes this phrase is not clear enough, but it never explains why. Maybe the Court

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64. *In re* TC Heartland LLC, 821 F.3d 1338, 1341 (Fed. Cir. 2016) (characterizing the 2011 amendments as "minor").

65. TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1520 (2017).

66. *See supra* notes 59–62 and accompanying text (discussing how the Federal Circuit interpreted congressional intent in *VE Holding*).

67. *See supra* notes 59–60 and accompanying text. It is also worth mentioning that Congress converted § 1391(c) from a substantive venue provision with a definition into a purely definitional section. *See* Gugliuzza & La Belle, *supra* note 61, at 1048–49. This change further supports the conclusion that Congress meant the § 1391(c) definition to apply. *See id.* After all, it would be perfectly sensible for someone seeking a definition of "reside" in § 1400(b) to look to a purely definitional section, and therefore reasonable as well to suppose that Congress might have contemplated that result. I am indebted to Professor Gugliuzza for alerting me to this point.

means that Congress *should* have been more explicit, but it nowhere justifies placing a clear-statement burden like this on Congress.

Third, the Court's effort to draw on the current version of § 1391 (post-2011 amendments) to support its interpretation also fails. The Court argues that "[t]he current version of § 1391 does not contain any indication that Congress intended to alter the meaning of § 1400(b) as interpreted in *Fourco*."[68] But it is not clear why this is relevant. When Congress amended § 1391 in 2011, *VE Holding* had been the law for more than two decades. Given this, Congress might reasonably have assumed that *VE Holding* defined the legal baseline and that the 1988 amendments had already overruled *Fourco Glass*. If so, there would have been no reason for Congress to say anything at all about *Fourco Glass* in 2011 or signal any intent to change the meaning of § 1400(b).

The Court attributes significance to the fact that the prefatory clause to the current § 1391(c) reads "for all venue purposes," which is very similar to the phrase "for venue purposes" in place at the time of *Fourco Glass*.[69] Apparently, the Court believes that this similarity is evidence Congress did not mean to alter the *Fourco Glass* interpretation.[70] But the Court overlooks the statute's history.[71] Recall that *VE Holding* relied on the longer phrase, "[f]or purposes of venue under this chapter," inserted by the 1988 amendments.[72] When Congress shortened the phrase in 2011 to read "for all venue purposes," it might have assumed that *VE Holding* was the law and not meant anything substantive by the change. In fact, Congress kept the longer phrase, "for purposes of venue under this chapter," for § 1391(d), which is just the equivalent to § 1391(c) for multidistrict states.[73]

The Court also emphasizes the fact that the 2011 amendments inserted a proviso, except as "otherwise provided by law," into § 1391(a).[74] Referring to this proviso as a "saving clause," the Court argues that it saves the *Fourco Glass* interpretation of § 1400(b) because that interpretation counts as "otherwise provided by law."[75] This argument, however, begs the

68. *TC Heartland*, 137 S. Ct. at 1520.

69. *Id.* at 1520–21.

70. *Id.*

71. It also gives insufficient weight to the word "all" in the current statute. "All" suggests a comprehensive application. The Court simply asserts that "for venue purposes" is as comprehensive as "[f]or all venue purposes." *Id.* This is an embarrassing move for a textualist.

72. *See supra* notes 59–60 and accompanying text.

73. In 2011, Congress divided § 1391(c) into two parts—§ 1391(c) still defines corporate residence for single-district states, and the new § 1391(d) defines corporate residence for multidistrict states. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 202, 125 Stat. 758, 763–64 (codified as amended at 28 U.S.C. §§ 1391(c)–1391(d) (2012)). There is no reason why Congress would have wanted a narrower definition of corporate residence for single-district states than for multidistrict states.

74. *TC Heartland*, 137 S. Ct. at 1521.

75. *Id.*

question. There would be nothing to save if *VE Holding* was the law—not *Fourco Glass*. More precisely, the argument works only if Congress in 2011 assumed that *Fourco Glass* still defined corporate residence for purposes of § 1400(b). But it is at least equally plausible that Congress assumed *VE Holding*, not *Fourco Glass*, supplied the definition—especially as federal courts had assumed just that for more than two decades.

My point here is not to defend any particular interpretation of § 1400(b).[76] The Federal Circuit's interpretation is at least as reasonable as *TC Heartland*'s on textualist grounds. My point is that the *TC Heartland* Court offers remarkably thin support for its conclusion.

III. The Problem with a Purposive Interpretation

Given the inadequacy of the Court's reasoning, one might have expected that at least some of the Justices would have gone beyond text and relied on legislative history, statutory purpose, and the broader patent law context. Indeed, it is possible to construct a purposive interpretation that ties naturally into this broader context. Such an interpretation would start with the general purpose of the patent venue statute, which like all venue statutes, is to promote the "convenience of litigants and witnesses" with special concern for defendants who have "not chosen the forum."[77] It would then draw on the broader patent law context to argue that a narrow interpretation of "resides," which breaks up the concentration of cases in districts like the Eastern District of Texas, better serves the venue purpose because it assures greater fairness for defendants.

Admittedly, Justice Thomas, the author of the Court's opinion, is uncomfortable with a purposive approach, but other Justices who are more comfortable could have written separately. Moreover, given the weakness of the Court's reasoning, it is surprising that none of them chose to do so. Indeed, one—Justice Breyer—went so far as to question the relevance of the broader context at oral argument.[78]

Yet this choice might be less surprising than it seems. Anyone trying to construct a purposive analysis would have faced some serious problems.

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76. For a strong argument that *VE Holding*'s interpretation is the correct one, see Gugliuzza & La Belle, *supra* note 61, at 1046–52.

77. WRIGHT ET AL., *supra* note 33, § 3801; *accord* Leroy v. Great W. United Corp., 443 U.S. 173, 183–84 (1979) (explaining that venue rules "protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial").

78. *See* Transcript of Oral Argument at 14–15, TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514 (2017) (No. 16-341), http://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/16-341_8njq.pdf [https://perma.cc/97ZS-VJ8W] (asking "what's this got to do with this?" where the first "this" refers to case concentration, questioning the "relevance" of case concentration, and later cutting off counsel's effort to discuss case concentration by saying "might be other people are interested in that"). Other Justices did ask questions about the Eastern District of Texas later in oral argument, indicating that they were at least aware of the broader policy concerns. *Id.* at 43–48.

These include: (1) uncertainty about fitting statutory interpretation to the purpose of the patent venue statute, (2) uncertainty about the impact of narrower venue options on forum competition and case concentration, and (3) uncertainty about the judiciary's ability to fashion an optimal solution to the problem. In the end, it is unclear how much *TC Heartland* will improve patent litigation or advance substantive patent policy. The patent troll problem calls for a more complex solution than the judiciary can provide through statutory interpretation.

A. The Purpose of Venue Rules

One problem with constructing a purposive interpretation has to do with bridging the gap between the general purpose of the venue statute and specific problems of case concentration in particular federal districts.[79] It is easy to state the purpose of venue limitations in general terms of fairness and convenience. It is much more difficult to apply these general norms to determine whether a particular forum qualifies as fair and convenient. General norms are not enough; one needs a more specific rendering of those norms.

For example, the mere fact that a forum burdens a defendant cannot be enough alone to condemn it. The litigation system gives plaintiffs considerable freedom to choose where to sue.[80] Obviously, a plaintiff has an incentive to choose a forum that burdens the defendant. Thus, one cannot condemn the plaintiff's choice without also condemning the freedom to choose. This means that the unfairness or inconvenience of a specific forum depends not on the mere existence of a burden but on the magnitude of the burden, or more precisely, on the relative balance of burdens and benefits. It is not clear how to strike this balance. In short, we have no generally agreed-upon theory of forum selection that can guide the evaluation of particular forum choices.[81]

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79. Another problem has to do with how to characterize statutory purpose. For example, some commentators argue that Congress's purpose in adopting the first patent venue statute in 1897 was to favor patent plaintiffs by giving them broader venue options than plaintiffs bringing other federal-question cases had at the time. *See* Gugliuzza & La Belle, *supra* note 61, at 1035–36 (arguing that because the 1897 venue statute allowed a plaintiff to sue a defendant in any district in which the defendant committed acts of infringement and had a regular place of business, it may be appropriate to interpret it as affording plaintiffs broad forum options). One could argue that Congress has not changed its original purpose and that the current patent venue statute should therefore be construed broadly to further that purpose, which means applying § 1391(c)'s definition of resides. *See id.* at 1052–53 (presenting a similar argument). My point is not to endorse this argument. My point is that any purposive argument must begin with a characterization of congressional purpose. I am grateful to Patrick Woolley for alerting me to this point.

80. *See* WRIGHT ET AL., *supra* note 33, § 3848 (reviewing the various judicial formulations of the degree of deference given to the plaintiff's forum choice).

81. A theory of this sort should be able to explain what constitutes an optimal forum, how much choice plaintiffs should have in forum selection, when defendants should be able to trump

Many critics will insist, no doubt, that we do not need a fancy theory to determine that the Eastern District of Texas is a bad venue. But the question is what makes this district so obviously bad. It is not enough to cite case concentration or asymmetric procedural burdens. Case concentration is not always bad; indeed, it can be beneficial when it enables judges to develop expertise in patent law. Moreover, asymmetric procedural burdens are common in all types of litigation. Parties often use pleading, discovery, summary judgment, and other procedures strategically to impose burdens on their opponents, and those burdens are not always reciprocated in equal measure. To be sure, a procedural system that systematically imposes an asymmetric burden should be a matter of concern, but the appropriate level of concern depends on the magnitude of the burden.

If there is reason to worry about the Eastern District, it has to do with the consequences of case concentration and asymmetric burdens and, in particular, how those features encourage patent troll litigation that chills research and development. However, venue rules seem a poor way to solve this problem. As we will see in the following section, adjusting venue can backfire. For example, *TC Heartland*'s narrow interpretation of residence in § 1400(b) might just redirect many patent infringement suits to the District of Delaware, which according to some commentators, also has a history of competing for patent business with pro-patentee rules.[82] More generally, patent trolls flourish because of a number of perverse features of the patent system, which only a substantive patent law solution can adequately fix.[83]

Finally, amending general venue statutes is not an effective way to correct a forum-specific problem. Venue statutes like § 1391 and § 1400 operate at a high level of generality. They work by identifying forum-related parameters that correlate *on average* with fair and convenient forums. For example, if the defendant has a regular and established place of business in a district, it is less likely that litigation there will be seriously inconvenient or unfair to that defendant. Moreover, linking venue with personal jurisdiction assures that the forum is one with which the defendant has sufficient contacts to make it fair, just, and reasonable to defend there.[84]

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plaintiff choice, and how much deference contractual forum selection should receive. Some scholars have made efforts along these lines. *See, e.g.*, Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245, 245–47, 249 (2014) (arguing that personal jurisdiction rules, which limit forum selection, should aim to minimize the sum of litigation costs and error costs).

82. It seems that the District of Delaware's venue competition is not limited to patent cases. Apparently, it has also been an aggressive competitor for large corporate bankruptcy cases. Klerman & Reilly, *supra* note 25, at 291–96.

83. These features include a multiplicity of broad patents on small improvements, fragmented patent ownership, excessively generous patent damages rules, and high costs of patent litigation. Lemley & Melamed, *supra* note 40, at 2172–76.

84. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945) (referring to "traditional notions of fair play and substantial justice" and to what is "reasonable, in the context of our

Even so, a district that is fair and convenient for the average case might not be fair and convenient for a particular case. However, the venue statutes already contemplate this possibility. Section 1404(a) gives district judges discretionary authority to transfer a case from a district that has venue to another district where it "might have been brought" when doing so serves the "convenience of parties and witnesses" and the "interest of justice."[85] To be sure, one complaint about the Eastern District of Texas is that judges often delay or deny transfer motions that they should grant.[86] But the solution to this problem is to change judicial behavior, not venue rules. Indeed, if judges are willing to ignore the law, the judicial system has much more to worry about than patent trolls.

Nevertheless, there might be a good reason to modify general venue statutes if defendants file transfer motions frequently enough. In that case, adjusting the general venue statute could reduce the frequency and cost of these motions and improve the efficiency of venue determinations.[87] However, this sort of reform requires a great deal of empirical information and fact-sensitive analysis, which makes it poorly suited to judicial implementation. Congress would seem the superior lawmaking institution for this purpose.

B. Effect on Case Concentration and Forum Competition

Suppose one concludes that districts where patent infringement suits concentrate, such as the Eastern District of Texas and District of Delaware, are unfair and inconvenient. To make a convincing purposive argument for *TC Heartland*'s narrow interpretation, one must still show that a narrow interpretation will substantially alleviate problematic case concentration. There are two reasons to question how much the *TC Heartland* decision will do in this regard. First, the Court's decision might simply change the locus of case concentration rather than significantly reduce it. Second, the decision might encourage patent plaintiffs to switch to the second prong of § 1400(b). The following discussion addresses each of these possibilities in turn.

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federal system of government"). This is one reason why it is difficult to condemn *VE Holding*'s broad interpretation of § 1400(b) on venue-policy grounds, since it links patent venue with personal jurisdiction. If this allows plaintiffs to make unfair forum choices, perhaps the problem lies with broad stream-of-commerce jurisdiction rather than with venue.

85. 28 U.S.C. § 1404(a) (2012).

86. Chien & Risch, *supra* note 46, at 18–19; Klerman & Reilly, *supra* note 25, at 260–63.

87. The two-part structure of venue rules—a general venue rule coupled with a case-sensitive standard permitting exceptions—is efficient as long as most cases are handled by the general rule. However, if too many cases require exceptions, then a more efficient cost–benefit balance might be achieved by adjusting the general rule.

1. Shifting the Locus of Case Concentration.—TC Heartland's interpretation of § 1400(b) might simply shift case concentration to other districts, especially the District of Delaware. Because many corporate defendants are incorporated in Delaware, equating "reside" with place of incorporation should increase case filings in Delaware, a district that some commentators have argued has a history of competing for patent infringement suits by offering pro-plaintiff procedures.[88] Apparently, some judges in the District of Delaware are moving in the direction of less biased procedures.[89] But if Delaware is inclined to compete for patent business, it is unclear how these judges will respond if *TC Heartland* strips the Eastern District of Texas of its market dominance.[90]

An empirical study by Professors Colleen V. Chien and Michael Risch supports this prediction. Their model forecasts that the Eastern District of Texas will likely sustain a substantial loss in its share of patent cases nationwide, from 44% to 14.7%, and the District of Delaware will enjoy an increase, from 9% to 23.8%.[91] Moreover, available data for the month of June 2017, which is after the *TC Heartland* decision, shows a significant reduction in patent filings in the Eastern District and a sharp increase in the District of Delaware.[92] The Chien–Risch study also predicts an overall

88. *See* Klerman & Reilly, *supra* note 25, at 281–82 (arguing that "personal gain [by judges entering private practice] may be a motive for attracting patent litigation" to the District of Delaware). In recent years, the District of Delaware has ranked second only to the Eastern District of Texas as a venue for patent suits in general and suits by nonpracticing entities in particular. Chien & Risch, *supra* note 46, at 13, 26 n.118. In fact, Kraft sued in the District of Delaware. TC Heartland LLC v. Kraft Foods Grp. LLC, 137 S. Ct. 1514, 1515 (2017).

89. Klerman & Reilly, *supra* note 25, at 282–83.

90. The incentives to adopt pro-plaintiff procedures depend on the expected benefits and costs of doing so. With the Eastern District of Texas dominating the market and presumably willing to counter any serious competition threat, the District of Delaware would not have expected to benefit as much from pro-plaintiff procedures as it did before the Eastern District's market dominance. This might be a reason for its reversal of course. If so, one might expect a shift back toward pro-plaintiff procedures and more vigorous competition with the Eastern District's grip on the market weakened by *TC Heartland*.

91. Chien & Risch, *supra* note 46, at 37. Moreover, the authors predict that the proportion of cases filed by PAEs will decline from 64.1% to 19.0% in the Eastern District and rise from 7.3% to 25.8% in the District of Delaware. *Id.* at 35.

92. Bloomberg Law reports a 47% reduction for the Eastern District compared to May 2017 and a 62% reduction compared to June 2016. Malathi Nayak & Peter Leung, *Ruling Could Halt Drop in Texas Court Patent Complaint Filings*, BLOOMBERG BNA (July 10, 2017), https://www.bna.com/ruling-halt-drop-n73014461442/ [https://perma.cc/WFM2-LNPC]. It also reports an increase in filings for the District of Delaware from 36 filings in May 2017 to 66 filings in June (although the authors point out that this is less than the same figure one year earlier, in May 2016, which is consistent with a general reduction in patent suit filings nationwide). *Id.*; *see also* Malathi Nayak, *Swelling Docket Pushing Delaware Judges to Transfer Patent Cases*, BLOOMBERG BNA (Sept. 20, 2017), https://www.bna.com/swelling-docket-pushing-n57982088314/ [https://perma.cc/83J9-372T] (reporting that 79 cases were filed in the month of August and that the resulting case congestion is prompting judges in the "shorthanded" District of Delaware, which has two vacancies and only two "active judges," to transfer patent cases elsewhere).

distribution of patent cases that features the District of Delaware as the most popular venue (capturing 23.8% of all cases) followed by the Eastern District of Texas (14.7%), the Northern District of California (13.0%), and the Central District of California (6.1%).[93]

However, this does not necessarily mean that districts will compete for patent cases as vigorously as before *TC Heartland*.[94] *VE Holding*'s broad interpretation of § 1400(b) made lots of federal districts available to patent plaintiffs. As a result, districts could compete for the same cases, and each had a chance to capture the bulk of patent litigation. After *TC Heartland*, the residence provision of § 1400(b) limits venue to the defendant's place of incorporation. Since most companies have only one place of incorporation and since that place is often Delaware, federal districts outside of the District of Delaware will have many fewer cases to capture and thus a presumably weaker incentive to compete.

This analysis focuses only on residence-based venue. Section 1400(b) also creates venue in any district where the defendant has a regular and established place of business and has committed acts of infringement.[95] For suits against large companies operating nationwide, this provision can open up a number of additional forum options. This is especially true for the digital technology cases that attract patent trolls. Many large computer, Internet, and software companies have regular and established places of business in several districts and are likely to have committed acts of infringement there.[96] This should increase the number of districts that can compete, which might lead to more vigorous competition and more pro-plaintiff procedures.

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93. Chien & Risch, *supra* note 46, at 37.

94. *See supra* notes 31–39 and accompanying text. Some commentators raise a different concern. They worry that more cases will be litigated in districts favorable to defendants, thereby creating the opposite unfairness concern. Adam Mossoff, *'Examining the Supreme Court's TC Heartland Decision': Testimony Before the House Judiciary Committee, Subcommittee on Courts, IP, and the Internet* 7–8 (George Mason Law & Economics Research Paper No. 17-29, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2993438 [https://perma.cc/L49H-YSD7]. This is probably not a big problem for *TC Heartland*, however. Local judges and juries might be favorably predisposed to defendants that are major employers and operate economically substantial facilities in the district, but I doubt they care much about incorporation.

95. 28 U.S.C. § 1400(b) (2012).

96. *See* Chien & Risch, *supra* note 46, at 40 (describing the large number of companies headquartered in Northern and Central California). Apple, Google, and Yahoo, for example, are all located in the Northern District of California, and Apple owns stores across the country. *See* Kathy C. Leong, *Apple's Eye-Catching New Home Disrupts Silicon Valley*, BOSTON GLOBE (July 5, 2017), https://www.bostonglobe.com/business/2017/07/04/apple-eye-catching-new-home-disrupts-silicon-valley/JSidLA0Vh2tiXCU6FDsoCN/story.html [https://perma.cc/DYV8-MY9F] (identifying Apple's headquarters in Cupertino, California); *see also* Mike McPhate, *California Today: Google's Idea for a New Silicon Valley*, N.Y. TIMES (June 20, 2017), https://www.nytimes.com/2017/06/20/us/california-today-google-san-jose-silicon-valley.html [https://perma.cc/5MCV-GSWC] (identifying Google's headquarters in Mountain View, California).

2. Switching to the Other Prong of Section 1400(b).—If patentees cannot use the residence prong of § 1400(b) to secure venue in the Eastern District of Texas, they will probably turn to the "regular and established place of business" prong. Moreover, Eastern District judges are likely to be receptive to this strategy and strongly disinclined to grant motions to dismiss or transfer. To be sure, the plaintiff must make a colorable argument that the defendant has a regular and established place of business in the district and committed acts of infringement there. However, these requirements are not all that difficult to satisfy.

At the time that *TC Heartland* was decided, there was considerable uncertainty about what qualifies as a "regular and established place of business."[97] Under the then-existing precedent, it was possible to argue for venue based on rather slim connections between the defendant and the district. For example, a relatively small presence, such as a small store owned by the defendant or even a warehouse or supply center, might suffice.[98] Indeed, there was precedent at the time that even a salesperson working out of a home office in a district could create a regular and established place of business there.[99]

As for the second requirement—acts of infringement in the district—the Patent Act defines infringement broadly to include making, using, offering for sale, or selling the patented invention.[100] Even just one sale in the district can support venue, as long as the defendant is responsible for the sale.[101]

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97. *See In re* Cray, Inc., 871 F.3d 1355, 1359 (Fed. Cir. 2017) (observing that trial courts after *TC Heartland* "have noted the uncertainty surrounding and the need for greater uniformity on this issue [i.e., the issue of what constitutes a regular and established place of business]"). One reason for this uncertainty has to do with the paucity of case law construing the requirement. After *VE Holding* expanded the residence prong, few patent plaintiffs relied on the "regular and established place of business" prong, so courts had little need to address its meaning in the new digital and Internet age. *See id.* (noting the change in business practices from the "brick-and-mortar model").

98. *See* CHISUM, *supra* note 28, § 21.02[2][d] (2017) ("Generally, any physical location at which business is conducted will suffice, no matter what the amount or character of the activity."); *In re* Cordis Corp., 769 F.2d 733, 737 (Fed. Cir. 1985) (noting, while denying mandamus petition, that "the appropriate inquiry is whether the corporate defendant does its business in that district through a permanent and continuous presence"). Moreover, although the matter is contested, there is precedent for the rule that the place of business need not have any relationship with the infringement alleged. CHISUM, *supra* note 28, § 21.02[2][d].

99. *See, e.g.*, *In re Cordis Corp.*, 769 F.2d at 735–37 (holding in connection with denial of mandamus petition that employees working from home qualified as a regular and established place of business and that the appropriate inquiry is not whether there is a fixed formal office in the district); Shelter-Lite, Inc. v. Reeves Bros., Inc., 356 F. Supp. 189, 195 (N.D. Ohio 1973) ("[A]n unyielding rule that a regular and established place of business cannot arise by virtue of a salesman operating out of his residence is at odds with the practicalities and necessities of the business community.").

100. 35 U.S.C. § 271(a) (2012).

101. *See* CHISUM, *supra* note 28, § 21.02[2][e][i] ("Any sale of an accused product within the district will meet the act-of-infringement requirement of Section 1400(b)."). However, a defendant does not commit an act of infringement in the district simply by selling to an intermediary outside

Thus, it would be reasonable for the *TC Heartland* Justices to have assumed that plaintiffs might be successful in keeping many suits in the Eastern District of Texas, regardless of what the Court decided. For example, Apple, Inc., a frequent defendant in patent troll suits, has stores in the Eastern District.[102] An Apple store surely qualifies as a "regular and established place of business," and sales of allegedly infringing articles from the store would almost certainly constitute "acts of infringement in the district." Indeed, in the wake of *TC Heartland*, a number of commentators predicted that plaintiffs bent on keeping cases in the Eastern District of Texas would switch to the second prong of § 1400(b).[103] And this appears to be exactly what is happening.[104]

In addition, the *TC Heartland* Justices could have assumed, quite reasonably, that Eastern District judges would interpret § 1400(b)'s second prong broadly. In fact, this is what happened about a month after the *TC Heartland* decision. Judge Gilstrap, the Eastern District judge with the most patent cases, upheld venue based on a sales representative operating from his home in the Eastern District.[105] In his opinion, Judge Gilstrap also took the opportunity to lay out a flexible balancing test for determining "regular and established place of business," a test capable of supporting broad exercises of venue.

Since our purpose is to explain why the *TC Heartland* Court ignored the broader patent law context, the relevant timeframe is the period just before the *TC Heartland* decision. Nevertheless, it is worth noting that the

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the district, who then resells the allegedly infringing product in the district. *See id.* (discussing the consummated sale doctrine, which states that there is no act of infringement unless the defendant completes a sale within the district).

102. Apple has stores in Plano and Frisco, both of which fall within the Eastern District of Texas. Jan Wolfe, *Patent Plaintiffs See Way Around U.S. Supreme Court Ruling*, REUTERS (May 23, 2017), http://www.reuters.com/article/us-usa-court-kraft-heinz-analysis-idUSKBN18J2UB [https://perma.cc/W5PD-7JL7].

103. Gene Quinn, *Industry Reaction to SCOTUS Patent Venue Decision in* TC Heartland v. Kraft Food Group, IP WATCHDOG (May 22, 2017), http://www.ipwatchdog.com/2017/05/22/industry-reaction-scotus-patent-venue-decision-tc-heartland-v-kraft-food-group/id=83518/ [https://perma.cc/68A6-UWEU]; *see* Wolfe, *supra* note 102. Also, some have predicted an increase in suits against independent retailers or even the addition of independent retailers to suits against manufacturers or distributors in an effort to keep the latter in the district. *Id.* (reporting expert opinions that manufacturers or distributors may have to indemnify retailers who sell infringing material).

104. *See In re* Cray, Inc., 871 F.3d 1355, 1359 (Fed. Cir. 2017) ("Following the Supreme Court's recent decision in *TC Heartland*, litigants and courts are raising with increased frequency the question of where a defendant has a 'regular and established place of business.'").

105. Raytheon Co. v. Cray, Inc., No. 2:15-CV-01554-JRG, 2017 WL 2813896, at *7–8 (E.D. Tex. June 29, 2017), *vacated by In re* Cray, Inc., 871 F.3d 1355 (Fed. Cir. 2017). Judge Gilstrap held that the "regular and established place of business" requirement was met in the case because Cray employed a sales representative in the Eastern District of Texas, *id.* at *7–8, and that the acts-of-infringement requirement was met because Cray induced infringement in the Eastern District by selling a supercomputer to the University of Texas at Austin, which was used by researchers at university branches located in the Eastern District, *id.* at *5.

Federal Circuit, in a September decision, vacated Judge Gilstrap's broad venue ruling mentioned above, and in so doing limited the scope of § 1400(b)'s second prong.[106] While conceding the possibility that a salesperson operating from a personal residence might sometimes create a regular and established place of business, the Federal Circuit made clear that the place of business must be a physical location established or ratified by the defendant and a place where the defendant conducts business in a regular and stable way.[107] A careful analysis of the Federal Circuit's decision is beyond the scope of this Essay, but it is reasonable to suppose that the decision will reduce the number of suits filed in the Eastern District. By how much remains to be seen.[108]

C. *Limitations on Judicial Intervention*

As a practical matter, the Supreme Court in *TC Heartland* was limited to two options: adopt *VE Holding*'s interpretation of the venue statute or *Fourco Glass*'s. Neither choice was optimal. The *VE Holding* interpretation would continue the existing interdistrict competition, and the *Fourco Glass* interpretation might just redirect that competition to different districts. Other, more promising approaches exist, but they are for Congress to implement, not the Court.[109] Moreover, Congress is better positioned than the Court to weigh the costs and benefits of alternative solutions. Given all of this, it would have been quite reasonable for the Justices to defer to Congress rather than try to address the problems through the *TC Heartland* case.[110]

It would also have been reasonable for the Justices to assume that Congress might trump any decision they reached, especially with the VENUE Act pending.[111] Given this possibility, getting the decision right might not have seemed quite so pressing. There is a rub, however. The Court's interpretation can affect the likelihood of congressional action. In

106. *In re* Cray, Inc., 871 F.3d 1355, 1366 (Fed. Cir. 2017).

107. *Id.* at 1362-63.

108. As mentioned above, several of the typical computer-company defendants in patent troll suits have stores or other places of business in the Eastern District. Also, plaintiffs can still argue for personal jurisdiction as the basis for venue for unincorporated entities, such as LLCs, and foreign corporations. The *TC Heartland* Court was clear that it only addressed venue for domestic corporations. TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1517 n.1, 1520 n.2 (2017). *But see* Maxchief Inv. Ltd. v. Plastic Dev. Grp., LLC, No. 3:16-cv-63, 2017 WL 3479504, at *2 (E.D. Tenn. Aug. 14, 2017) (applying *TC Heartland*'s definition of residence to unincorporated associations).

109. *See, e.g.*, Klerman & Reilly, *supra* note 25, at 303–05 (discussing various solutions and defending their own).

110. *See* Gugliuzza & La Belle, *supra* note 61, at 1056 ("Simply put, although the VENUE Act may not be the perfect solution to forum shopping in patent cases, putting this problem in Congress's hands makes more sense than resorting to a questionable interpretation of the venue statute that could have unintended consequences beyond patent litigation.").

111. *See supra* note 46 and accompanying text.

particular, by adopting a narrow interpretation, the *TC Heartland* Court has reduced congressional pressure to amend § 1400(b). Big technology companies that are the targets of PAE suits will have weaker incentives to push for congressional action if they believe the Court's holding will substantially reduce case concentration and pro-plaintiff bias. Patent trolls might lobby for reinstatement of *VE Holding*, but they are unlikely to have much success given the current political climate and general hostility to patent trolls.

Conclusion

This Essay began with a question. Given the generally accepted and widely publicized link between the venue issue in *TC Heartland* and the patent troll problem, why did the Court's opinion completely ignore the broader patent law context? This omission is especially puzzling because the Court's reasoning is so thin and unpersuasive. Indeed, at first glance, a purposive interpretation drawing on the broader patent law context would seem to provide stronger support.

On closer examination, however, it is not readily apparent how to construct a convincing purposive interpretation. One problem lies in building a connection between case concentration and purpose. Another problem stems from uncertainty about the effect of the Court's interpretation on case concentration. And a third problem has to do with the Court's limited ability to assess the relevant empirics, which makes it sensible to leave the issue to Congress.

Thus, the Court's unanimous support for a formalistic opinion with a thin textualist justification might be less surprising than it seems. Those Justices with a pragmatic bent were probably quite pleased with a result that made it harder for patent trolls to sue in their favorite districts, and they had no obvious way to strengthen the reasoning. Perhaps endorsing *VE Holding*'s broad interpretation of residence would have made Congressional action more likely, but that is highly speculative. In the end, *TC Heartland* might be good enough after all, despite its thin rationale.

The Boom and Bust of American Imprisonment

A Book Review of:

WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL. By Eugene Soltes. 2016.

CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE. By Samuel W. Buell. 2016.

FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW. By Darryl K. Brown. 2016.

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"I'm set up to fail here," said a miner at the Upper Big Branch mine in West Virginia.[1] He was supposed to spread rock dust around the sprawling underground mine to prevent explosions, but dusting machines were broken, and there were not adequate supplies.[2] Mining explosions can be caused when methane buildup contacts a heat source, when particles of coal dust contact a heat source, or a combination of both.[3] Large fans circulating air can prevent the buildup of both methane and dust.[4] Limestone powder or rock dust can render the coal dust inert and also absorb heat from any explosion to make it more minor.[5] Here in the Upper Big Branch mine, though, as another miner said, "so often, I couldn't count," there was "low air," or improper ventilation.[6] A mining superintendent described a far-reaching conspiracy to hide a range of persistent violations from inspectors and to

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1. Celeste Monforton, *Trial of Mining CEO Blankenship: Quotes from Week 2*, SCIENCEBLOGS: THE PUMP HANDLE (Oct. 16, 2015), http://scienceblogs.com/thepumphandle/2015/10/16/trial-of-mining-ceo-blankenship-quotes-from-week-2/ [https://perma.cc/ETV3-2DN4].

2. *Id.*

3. Nat'l Inst. for Occupational Safety & Health, CDC, *Mining Feature: Coal Mine Explosion Prevention* (Dec. 9, 2011), https://www.cdc.gov/niosh/mining/features/coalmineexplosion.html [https://perma.cc/DVT3-9UCY].

4. *Id.*

5. *Id.*

6. Monforton, *supra* note 1.

falsify records, all for cost-cutting reasons.[7] In April 2010, a massive explosion in the mine claimed the lives of twenty-nine workers.[8] It was the deadliest mining disaster in the United States in forty years.[9]

Five years later, Don Blankenship, the former CEO of Massey Coal, faced federal criminal charges at a trial. In December 2015, Blankenship was acquitted of the most serious charges of securities fraud and conspiracy and was convicted of a misdemeanor mine-safety offense.[10] The trial lasted twenty-four days, and the jury deliberated for nine days.[11] At sentencing in April 2016, he told the judge, "[i]t's important to me that everyone knows that I am not guilty of a crime."[12]

The judge, describing Blankenship's remarkable rise to head Massey Coal, said, "Instead of being able to tout you as one of West Virginia's success stories, however, we are here as a result of your part in a dangerous conspiracy."[13] Blankenship received a prison sentence of one year, less than those of underlings who pleaded guilty and fully cooperated with prosecutors.[14] The rejected charges could have earned him up to a thirty-one-year sentence.[15]

But any criminal conviction of a CEO of a corporation is a rare event. After all, Blankenship denied knowledge of day-to-day affairs at the mine.[16] He could afford top lawyers; he ran up $5.8 million in legal fees even before the trial began.[17] (By comparison, court-appointed lawyers for indigent defendants are paid on average about $53 an hour in West Virginia, and the average case charges $754 in costs.)[18] Indeed, the company that bought

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7. Howard Berkes, *Massey Mine Boss Pleads Guilty As Feds Target Execs*, NPR: THE TWO-WAY (Mar. 29, 2012), http://www.npr.org/sections/thetwo-way/2012/03/29/149639345/massey-mine-boss-pleads-guilty-as-feds-target-execs [https://perma.cc/36YB-C6R4].

8. Ian Urbina, *No Survivors Found After West Virginia Mine Disaster*, N.Y. TIMES (Apr. 9, 2010), http://www.nytimes.com/2010/04/10/us/10westvirginia.html?pagewanted=all [https://perma.cc/X39C-CL6Y].

9. *Id.*

10. Bourree Lam, *A Guilty Verdict in Don Blankenship's Trial*, ATLANTIC (Dec. 3, 2015), https://www.theatlantic.com/business/archive/2015/12/blankenship-trial-verdict/418641/ [https://perma.cc/6U8L-PWDD].

11. *Id.*

12. Alan Blinder, *Donald Blankenship Sentenced to a Year in Prison in Mine Safety Case*, N.Y. TIMES (Apr. 6, 2016), https://www.nytimes.com/2016/04/07/us/donald-blankenship-sentenced-to-a-year-in-prison-in-mine-safety-case.html [https://perma.cc/XDW5-UEEM].

13. *Id.*

14. *Id.*

15. Lam, *supra* note 5.

16. *Id.*

17. Ellen Rosen, *Judge Says Alpha Must Cover Legal Costs for Ex-CEO Blankenship*, INS. J. (May 29, 2015), http://www.insurancejournal.com/news/national/2015/05/29/369907.html [https://perma.cc/9PHH-47UC].

18. W. VA. PUB. DEF. SERV., ANNUAL REPORT FISCAL YEAR 2011–12, at 4, 17 (2012), http://www.pds.wv.gov/Documents/FY2012%20Annual%20Report.pdf [https://perma.cc/7LE7-SMYT].

Massey Coal is obligated to pay those legal fees, a court has ruled.[19] Having served his sentence and lost on appeal, Blankenship is seeking certiorari from the U.S. Supreme Court.[20]

The defense costs in that one case may run up to as high as half of the state of Louisiana's entire annual budget for public defense, and perhaps far more. In Louisiana, the criminal justice equivalent of bread lines formed in 2016 across the state as deep cuts in public defenders' budgets forced cuts to services. The entire system went bust. A person charged with a crime may literally have to take a number and wait to hear from a lawyer. In Orleans Parish, where the public defender must handle over 20,000 cases a year, hundreds of cases have been refused and more people linger on a wait list.[21] In the meantime, these people may languish in jail, perhaps for something they did not do, or for minor crimes that should not even result in jail time. Or they may plead guilty to avoid remaining in limbo. Even in the most serious death penalty cases, delays are growing, and where fourteen districts could not keep up with caseloads in 2016, 33 of 44 public defender districts could not keep up with caseloads in 2017.[22] The Chief Justice declared an emergency lack of funding, and a new constitutional challenge is underway.[23] Public defenders share a paltry $33 million annual budget[24] in a state that would, if it were a country, have the highest imprisonment rate in the entire world.[25] Perversely, the main source for public-defense budgets comes from traffic-ticket revenue.[26]

The state of criminal justice in America today is deeply paradoxical. Criminal justice is rationed in the land of the free. Indigent people may serve long sentences for crimes that many people believe do not deserve harsh punishment. In contrast, for some of the most serious business crimes, elites

19. Rosen, *supra* note 12.

20. Howard Berkes, *Convicted Coal Mine CEO is Taking His Case to the U.S. Supreme Court*, NPR: THE TWO-WAY (May 11, 2017), http://www.npr.org/sections/thetwo-way/2017/05/11/528027204/convicted-coal-mine-ceo-is-taking-his-case-to-the-u-s-supreme-court [https://perma.cc/RGH6-6EU4].

21. Lauren Zanolli, *Louisiana's Public Defender Crisis is Leaving Thousands Stuck in Jail with No Legal Help*, VICE NEWS (May 13, 2016), https://news.vice.com/article/louisianas-public-defender-crisis-is-leaving-thousands-stuck-in-jail-with-no-legal-help [https://perma.cc/9SX4-8TB7].

22. Nick Chrastil, *Death Penalty Public Defender Wait List Growing with Delays*, DAILY REVEILLE (Nov. 25, 2016), http://www.lsunow.com/daily/death-penalty-public-defender-wait-list-growing-with-delays/article_4b9ee15c-b10c-11e6-a3af-635507081549.html [https://perma.cc/Q476-34QA] (describing a wait list of twelve defendants charged with capital crimes); Debbie Elliott, *Public Defenders Hard to Come by in Louisiana*, NPR (Mar. 10, 2017), http://www.npr.org/2017/03/10/519211293/public-defenders-hard-to-come-by-in-louisiana [https://perma.cc/7C3M-P95U].

23. Elliott, *supra* note 22.

24. Chrastil, *supra* note 17.

25. Elliott, *supra* note 17.

26. *Id.*

can afford impressive legal teams to defend them. We are teetering at the edge of a mass incarceration binge. Lawmakers are reconsidering overly harsh criminal punishments. At the same time, eight years later, people are still furious that elite criminals and CEOs avoided criminal punishment in the wake of the last financial crisis. Many have complained that no Wall Street bankers went to jail. With crime dropping, prison populations are finally declining, slightly at least, after decades of explosive growth.[27] Yet the new presidential Administration has called for a renewed focus on law and order, and the Attorney General has adopted severe, new criminal-charging policies.[28] Perhaps mass incarceration will remain with us longer than optimists have thought. Regardless, to make a serious dent in mass incarceration, the reforms that so many states have adopted will have to be pushed to the next level.

What do these conflicting tendencies mean? Why do we so easily put vast numbers of people in prison for minor offenses yet struggle to hold business criminals accountable? Three new books shed light on those questions from very different perspectives. They together point the way toward a saner criminal justice system, at a moment when it seems as if some Americans are again licking their lips at the prospect of another binge of self-defeating punishment, while others remain committed to reducing the costs of mass incarceration.

First, I discuss the new book by business professor Eugene Soltes titled *Why They Do It*,[29] which explores psychological research on risk-taking by corporate criminals. Second, I discuss law professor Sam Buell's *Capital Offenses*,[30] an engaging book that examines why it is so challenging to punish business crimes due to the structure of the economy, corporations, and our federal criminal justice system. Third, I turn to law professor Darryl Brown's *Free Market Criminal Justice*,[31] which carefully argues that free market ideology defines American criminal justice. I conclude by exploring the

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27. E. Ann Carson & Elizabeth Anderson, *Prisoners in 2015*, at 1 (2016), https://www.bjs.gov/content/pub/pdf/p15.pdf [https://perma.cc/M3VV-XAVB] (describing federal data reporting that in 2015, the number of inmates held in state and federal prisons declined to 1.5 million people, the lowest level since 1994, representing a 2.4% decrease in that year); *see also* Timothy Williams, *U.S. Correctional Population at Lowest Level in Over a Decade*, N.Y. TIMES (Dec. 29, 2016), https://www.nytimes.com/2016/12/29/us/us-prison-population.html?mcubz=3&_r=0 [https://perma.cc/6MWL-YTSL] (reporting a decline in the U.S. prison population).

28. Sari Horwitz & Matt Zapotosky, *Sessions Issues Sweeping New Criminal Charging Policy*, WASH. POST (May 12, 2017), https://www.washingtonpost.com/world/national-security/sessions-issues-sweeping-new-criminal-charging-policy/2017/05/11/4752bd42-3697-11e7-b373-418f6849a004_story.html?utm_term=.a32bbff6a766 [https://perma.cc/Y5AH-PHWY].

29. EUGENE SOLTES, WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL (2016).

30. SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE (2016).

31. DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW (2016).

implications of these arguments and this research for mass incarceration as well as corporate accountability at the high and low ends of our criminal justice system—we are finally turning a corner on mass incarceration in this country, and the problems and solutions that these authors identify partly explain why and whether better things or new fears lie around that corner.

I. Why Do White-Collar Criminals Do It?

Mass incarceration is premised on the idea that criminals do morally bad things and must be locked up as punishment for those ill deeds. Corporate executives, though, when they are accused of serious business crimes, say things like "the world is not black and white," and "you can't make the argument that the public was harmed by anything I did."[32] More candidly, Bernard Madoff said, "When I look back, it wasn't as if I couldn't have said no."[33] In his revealing new book, Soltes explores, as the book is titled, *Why They Do It*. Soltes interviewed financial criminals by writing to them in prison and examined psychological research on risk-taking.

Unfortunately, Soltes uncovers how, much like our stereotype of street criminals, these sophisticated businesspeople relied on their intuitions and their gut. A cost–benefit analysis or a rational weighing of the chances and consequences of getting caught does not match how these criminals actually think, Soltes argues. He quotes a senior partner at KPMG who engaged in securities fraud and recalled later, "I never once thought about the costs versus rewards."[34] He quotes Andrew Fastow of Enron, who describes how "we thought we were really clever" when finding ways to creatively interpret the law to keep financial transactions off of balance sheets.[35] Madoff described how he knew "the rules and regulations better than most people," and could not say that he was "ignorant" of the law.[36] He described how he began to mount losses in his investment advisory business because he "figured that eventually things would change and then [he would] get to actually start doing the model trades."[37] He did not disclose these problems to clients or return the money, a "comedy of errors" began as he took money from hedge funds to "cover the losses," and then the situation got worse and worse, turning "into a total fiasco."[38] Rather than confront the problem early on and lose face to a smaller group of investors, Madoff leveraged the

32. SOLTES, *supra* note 29, at 4, 165.
33. *Id.* at 287.
34. *Id.* at 99.
35. *Id.* at 234.
36. *Id.* at 289.
37. *Id.* at 297.
38. *Id.* at 298–99.

problem even more and gave the impression that the business was going better and better, when in fact it had turned into a Ponzi scheme.[39]

These compelling accounts illustrate how executives can make decisions for personal reasons, having to do with appetite for risk and pride, that may now affect not just their friends in high society and in business but millions of shareholders and the public. Soltes argues this "fundamentally shifted the psychology of harm."[40] Executives no longer receive "emotional feedback" from their decisions.[41] The victims are anonymous. And the corporate criminals may simply not think about the broad social consequences of their actions. An executive who paid bribes to foreign government officials explained, "I looked at these payments as necessary to sell a product. I never felt I was doing anything wrong."[42] An executive who signed false reports said, "I know this is going to sound bizarre, but when I was signing the documents I didn't think of that as lying."[43] Why? It was because he felt "a difference between filling out a form," even with false information, "and flat out looking someone in the eye and lying to them."[44]

Or the executive may know it is wrong but feel justified by observing that peers are all doing the same thing. Tyco CEO Dennis Kozlowski explained that the accounting gimmicks he tried were no different than those used at General Electric (GE), which the SEC later accused of bending "the accounting rules beyond the breaking point."[45] And as to using corporate funds to support a "lavish lifestyle," well, he said, "Every CEO before me had short-term purchases that they were doing."[46] He noted that when he was CEO, the Tyco "board would give me anything I wanted. Anything."[47] Culture in industry and culture in a company can explain serious and even criminal risk-taking.

As Soltes explains, we need to make sure that people hear independent voices so that people do not just make risky or corrupt decisions because they are the path of least resistance.[48] Punishing people after the fact may not prevent corporate crime nearly as effectively. Nor may simply teaching business ethics solve the problem if the jobs themselves are not structured so that the work is done with independent review, with "uncomfortable

39. *Id.* at 300–01.
40. *Id.* at 123.
41. *Id.*
42. *Id.* at 124.
43. *Id.* at 125.
44. *Id.* at 126.
45. *Id.* at 148.
46. *Id.* at 149.
47. *Id.* at 315.
48. *See id.* (explaining the importance of uncomfortable dissonance by opining that human behavior and decision-making often remain static unless influenced by external factors).

dissonance," and with questioning of decisions.[49] Isolated people making highly significant and risky decisions is a recipe for disaster.

Corporations, Soltes argues, bear the blame for putting individuals in those situations, and they should themselves be punished for not creating better norms of conduct.[50] As one convicted CFO that Soltes quotes says, "What we all think is, when the big moral challenge comes, I will rise to the occasion."[51] However, "[t]here's not actually that many of us that will actually rise to the occasion . . . I didn't realize I would be a felon."[52] Perhaps individuals are not fully to blame, however, and we must turn to "the policies that institutions create."[53]

II. The Structure of Corporate Crime

Criminal law is designed to provide a voice of reason, to use punishment to deter people from considering committing crimes. Law professor Sam Buell has written *Capital Offenses*, an elegant book examining why it is so challenging to punish business crimes, even for our incredibly powerful and well-resourced federal prosecutors.[54]

Many prominent voices in the wake of the financial crisis have complained that individual corporate executives have eluded punishment.[55] The Department of Justice made high-profile revisions to its corporate charging policies in fall 2015 to focus on individual accountability in corporate investigations.[56] However, Buell is skeptical that such changes will lead to more accountability at the top.[57] Buell emphasizes that the one percent can elude punishment for a reason.[58] Passing harsher criminal laws and

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49. *Id.* at 311, 315.

50. *Id.* at 326.

51. *Id.* at 313.

52. *Id.*

53. *Id.* at 327.

54. BUELL, *supra* note 30, at xv.

55. *See, e.g.*, Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/ [https://perma.cc/8HDD-EBXG] (pointing out that, despite many Americans losing their jobs and homes as a result of the financial crisis, many of the high-level employees of major financial institutions have not answered for their roles in causing the downturn); Press Release, *Merkley Blasts "Too Big to Jail" Policy for Lawbreaking Banks*, JEFF MERKLEY: U.S. SENATOR FOR OREGON (Dec. 13, 2012), https://www.merkley.senate.gov/news/press-releases/merkley-blasts-too-big-to-jail-policy-for-lawbreaking-banks [https://perma.cc/WC3L-KSB4] (noting Senator Merkley's disdain for the U.S. Justice Department's "deferred prosecution" policy for large financial institutions).

56. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, §§ 9–28.000 (2015); *see also* Brandon L. Garrett, *The Metamorphosis of Corporate Criminal Prosecution*, 101 VA. L. REV. ONLINE 60, 64 (2016) (describing how the revised Department of Justice guidelines instruct prosecutors to focus on individual wrongdoing).

57. BUELL, *supra* note 30, at 257.

58. *Id.* at 178–79 (describing defenses in white-collar criminal matters that go to whether the conduct amounts to a crime).

sentences will likely make no difference, Buell describes.[59] We did not see more prosecutions when Congress enacted harsher sentences in the wake of the Enron-era financial scandals.[60] Financial crimes are complex, and CEOs and white-collar offenders can hire the best lawyers to defend them. They can take their cases to expensive, lengthy trials, and sometimes they get acquitted.

It is not just privilege, Buell describes, although he details how companies normally pay the costs of lawyers for their executives and their employees and how the costs can run into the millions of dollars.[61] It is harder than you think to prove white-collar cases. We reward, and even mythologize, "talented innovators" and companies that take risks. The line between creative business strategy—finding a loophole in the law—and outright breaking the law may be very fine. And financial crimes are often vaguely defined.

The corporation itself, however, creates a real obstacle to investigating individual accountability. Buell begins his book with a wonderful definition from Ambrose Bierce's *The Devil's Dictionary*, defining a corporation as "[a]n ingenious device for securing individual profit without individual responsibility."[62] Corporate-crime cases are so challenging to investigate precisely because corporations are complex entities. Many people may be involved in a crime, and sorting out who knew what can be impossible, even with the company providing the emails and the interviews with employees. Buell describes the aftermath of the British Petroleum (BP) Deepwater Horizon explosion, in which the company paid billions in fines, but only lower-level employees were charged and convicted.[63] The higher up the chain of responsibility, the more plausible deniability insulates. The case for criminal accountability becomes more "you didn't do your job well" and less "you did the following thing that caused that terrible explosion and spill."[64]

The case against Blankenship required the cooperation of the company that bought Massey Coal. It built on an earlier investigation and report to the

59. *See id.* at 233 (explaining that harsher punishment of business-crime offenders will not change the problem of business crime).

60. *See id.* at 225–27 (chronicling harsher sentencing for white-collar crimes following Sarbanes-Oxley and Dodd-Frank but failing to mention any change in the rate of prosecution); Alison Frankel, *Sarbanes-Oxley's Lost Promise: Why CEOs Haven't Been Prosecuted*, THOMSON REUTERS (July 27, 2012), http://blogs.reuters.com/alison-frankel/2012/07/27/sarbanes-oxleys-lost-promise-why-ceos-havent-been-prosecuted [https://perma.cc/39AH-3FJW] (describing criminal prosecutions of CEOs under the Sarbanes-Oxley Act in the ten years since its passage as "as rare as a blue moon").

61. BUELL, *supra* note 24, at 193.

62. *Id.* at ix.

63. *Id.* at 109–12.

64. *Id.* at 111.

Governor.[65] Prosecutors charged supervisors and got them to cooperate to provide evidence against the man at the top. And there was sheer happenstance. Like President Richard Nixon, Blankenship had secretly tape recorded his office.[66] In one of the eighteen tapes played at trial, Blankenship was recorded speaking about a "terrible document" outlining safety violations at the mine.[67] Without a tape like that, perhaps no one at the top would normally be held accountable. That is the typical result when corporations enter settlements with federal prosecutors—no employees are prosecuted; they are prosecuted in only about one-third of cases in which a corporation receives a federal deferred or nonprosecution agreement.[68]

Buell says it gets "trickier" when you have to confront "an actual white-collar crime."[69] The reasons flow from the very phenomenon that Soltes describes: white-collar criminals may not themselves realize they did anything wrong, and they were often taking on risks for the benefit of the corporation, without accountability within the corporation. It can be hard to decide how to calculate a white-collar sentence, for example, when the question is what the dollar amount involved was and whether to sentence purely based on that. Often business criminals do not have prior records, which is the typical way that sentences are enhanced.[70] Like Blankenship, they may deny that they knew anything or committed any crime. Buell contrasts the Enron case, where prosecutors could show that defendants knew what they were doing, with other cases where it is not so easy to prove intent.[71] Without the tapes from Blankenship's office, proving that the CEO was aware would have been very hard. Even with the tapes, the prosecutors could not prove an intentional felony. We should also be concerned with the lower-level employees and whether those who were not calling the shots may be scapegoated while the CEOs get a slap on the wrist.

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65. GOVERNOR'S INDEP. INVESTIGATION PANEL, UPPER BIG BRANCH: THE APRIL 5, 2010, EXPLOSION: A FAILURE OF BASIC COAL MINE SAFETY PRACTICES (2011), http://www.npr.org/documents/2011/may/giip-massey-report.pdf [https://perma.cc/ZNM3-F5Z7].

66. Jef Feeley, *Secret CEO Recordings Allowed in Massey Mine Blast Trial*, INS. J. (Oct. 12, 2015), http://www.insurancejournal.com/news/southeast/2015/10/12/384591.htm [https://perma.cc/6W4T-ULQH].

67. *Id.*

68. *See* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 13 (2014) (indicating that in roughly two-thirds of the cases involving deferred prosecution or nonprosecution agreements and public corporations, no employees were prosecuted); Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1791 (2015) (same).

69. BUELL, *supra* note 30, at 232.

70. The Federal Sentencing Guidelines for individuals are comprised of two main elements: offense level and criminal-history category. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (U.S. SENTENCING COMM'N 2016).

71. BUELL, *supra* note 30, at 130–36 (discussing the role of state of mind in white-collar crimes).

Why not then prosecute the company itself? Buell describes how BP was criminally fined over four billion dollars.[72] This was a record fine for an environmental crime according to my data on corporate prosecutions.[73] But it was still "only a fraction of the tens of billions" BP paid in civil suits and for cleanup costs.[74] The company's stock price "took a big hit," but the stock recovered, the company did not suffer, and Buell notes that he "didn't see anyone avoiding the pumps" at BP stations, "and neither, truth be told, did [he]."[75]

Buell is certainly right that putting more people in prison is not the way to address social problems, whether the problem is corporate crime or the opioid epidemic. We need stronger corporate regulations to prevent malfeasance in the first place. Buell suggests doing more to regulate corporations and make executives feel the consequences of taking harmful risks.[76] But he recognizes how hard this is to do, particularly since most corporate law is state law.[77] We should also hold corporations themselves accountable for crimes; settlements with corporations need not "expose" a "dilemma," as Buell suggests.[78] Settlements can force the company to pay fines, make victims whole, and reform their practices, if they are done right (although they are often not).[79] Accomplishing those goals, as Buell notes, requires making compromises.[80] Only the companies, even with careful monitoring, can assure that their business practices are reformed. Only lawmakers and regulators can assure that business practices are held to a high standard as a matter of law. These are enormously socially costly crimes. Getting corporate crime right is enormously important. Redefining the legal duties of corporate managers to include more robust duties to the public, as Buell suggests, is a very useful proposal.[81] We can require more transparency in corporate law and increase management responsibility using regulatory tools, not the blunt instrument of prosecutions.[82] And perhaps non-criminal sanctions may be more readily proved.

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72. *Id.* at 112.

73. Brandon L. Garrett & Jon Ashley, *Corporate Prosecution Registry*, U. VA. SCH. L., http://lib.law.virginia.edu/Garrett/Corporate-prosecution-registry/browse/browse.html [https://perma.cc/5D65-Z64N]; *see also* Brandon L. Garrett & Jon Ashley, *Corporate Prosecution Registry: BP Exploration & Production, Inc.*, U. VA. SCH. L., http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/detail_files/983.html [https://perma.cc/KNV4-FZDU] (documenting a $4 billion fine for environmental crime in the case of *United States v. BP Exploration & Prod., Inc.*).

74. BUELL, *supra* note 30, at 112.

75. *Id.*

76. *Id.* at 253.

77. *Id.* at 256.

78. *Id.* at 128.

79. *Id.* at 174–75.

80. *Id.*

81. *Id.* at 256.

82. *Id.* at 255.

III. Blame the Free Market

At the opposite end of the spectrum lies the other 99%, for whom income inequality means not just subpar social services but also bargain-basement criminal justice. Law professor Darryl Brown describes in his book, *Free Market Criminal Justice*, how American criminal justice is not so different in its basic goals from criminal justice in many countries around the world. We want security in society. We use public police to investigate crimes. We use public prosecutors to decide who to charge with criminal offenses. Yet in America criminal punishment is exceptionally extreme in its severity and in its scale.[83] Brown's motivating question is: What is it about American criminal justice?

The free market, or its ideology at least, may be part of the problem, Brown argues.[84] To call criminal justice a "free" market, when the end result of a transaction typically puts a person behind bars, requires a certain amount of irony. Brown takes us to that troubling place with sensitivity and great attention to detail. In what way is criminal justice a market? What is being bought and sold is nothing less than life and liberty. In a laissez-faire, free-market system, the state does not try to even out social inequality. What laissez-faire attitudes mean for criminal cases is that people get only what they can afford. The rich can hire a dream team, while poor people may barely get a lawyer. If you can't afford a lawyer, you get substandard justice. You may get a public defender, or often worse, a court-appointed lawyer. In some places, you may be detained for some time before seeing a lawyer. Or in misdemeanor cases, you may never get a lawyer, despite the serious consequences of nonfelony convictions. Your lawyer may not have the wherewithal to investigate your case. Prosecutors will propose a cookie-cutter plea bargain. If you do not accept it—as your own lawyer will tell you—the punishment at trial will be more severe. Criminal trials rarely occur anymore. After you are convicted, liberal market values will define what happens on appeal and postconviction, including that you will not get a lawyer postappeal at all, except perhaps in a death penalty case, unless you can afford one.[85]

This is a free-market system in that everyone gets the legal defense they can afford.[86] Defendants willingly and freely enter contracts to plead guilty in exchange for a reduced sentence. But that is all a fiction. These plea contracts can sometimes be about as free and willing as an agreement to pay

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83. BROWN, *supra* note 31, at 1–2.

84. *Id.* at 3.

85. *See id.* at 88 ("Instead, as the doctrine now stands, the right to retain counsel with personal funds gives the fullest protection to a private interest on which the law places great value within criminal procedure and beyond: the individual right to unfettered market access.").

86. *See id.* ("The law of privately funded defense is unusually forthright in its embrace of market values.").

into a Mafia protection racket. The poor barely get anything resembling a day in court. They are free to negotiate—from a position of abject powerlessness—and the market of plea bargaining results in prosecutors rubber stamping convictions en masse. The system efficiently and cheaply puts millions of people in prison. If free-market ideology is to blame for our severe "anything-goes" system, Brown suggests, it may also be to blame for the reason we place priority on imprisonment: to make sure that property is kept secure.[87]

Running with that market analogy, perhaps criminal justice is an example of a market failure, which is defined as a situation in which goods and services are not efficiently allocated.[88] Why do markets fail? They can permit abuse of monopoly power. There can be information failures, including those due to fraud, so people do not fully know what they are buying or selling. Or preexisting inequality can distort markets. Criminal justice suffers from all of these faults. Prosecutors have an almost complete monopoly on power, as Brown describes, and have more control over sentences and bargains than in just about any other country.[89] Inequality distorts justice, as public defenders lack resources to effectively handle their growing caseloads.

Information failures abound, as defendants have scant resources to investigate the facts or the law that might get them the sentences they really deserve or no punishment at all. Prosecutors have loose obligations to disclose the facts to defendants, particularly in cases that are plea bargained.[90] Wrongful convictions have exploded in our country, with hundreds exonerated by DNA testing and over a thousand more by other evidence in the past few decades, often because so little work is put into investigating facts before we rush to convict people.[91] Even our much-vaunted criminal procedure, layers of appeals, and habeas largely perform symbolic functions, as Brown describes, and rarely result in meaningful relief.[92]

Our criminal justice system also embraces the ideology of local democracy. Local democracy should be checked when minority rights are severely affected. Should we let a county decide not to fund its public defenders but still impose harsh justice on the poor? Should we allow states

87. *Id.* at 198.

88. *Id.* at 75.

89. *Id.* at 30.

90. *Id.* at 141–42; *see also* United States v. Ruiz, 536 U.S. 622, 629 (2002) (holding that the Constitution does not require the disclosure of impeachment information prior to a guilty plea).

91. *See Exonerations by Year: DNA and Non-DNA*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx [https://perma.cc/V4YB-EPSA] (last visited Oct. 19, 2017) (showing DNA and non-DNA exonerations by year, from 1989 to 2016, totaling over 2,000).

92. *See* BROWN, *supra* note 31, at 208 (concluding that U.S. criminal procedure is designed to achieve fair process rather than the correct outcome).

to tolerate failing public defenders funded only by unreliable and skimpy traffic-ticket revenues? Should we allow county prosecutors to seek severe sentences using near-monopoly power? We mass process cases, and we get mass incarceration, which has enormous social costs.

Nor does it have to be that way. Some jurisdictions do fine without plea bargaining the bulk of cases, as Brown describes.[93] Mass incarceration could be prevented if we had a system, Brown suggests, in which there were more meaningful checks and balances on prosecutorial and police power than democratic accountability through elections.[94] Some other form of accountability is needed. As I describe in the Conclusion to this Review, perhaps those changes are coming—only perhaps—because the market in criminal justice has come crashing down.

Now, turning back to elite criminals, even a distorted market may not be so bad for the privileged who can game it in their favor. Actual, not metaphorical, markets experience cycles of boom and bust. Many have been concerned that elites profit from these cycles while everyday people suffer harsh consequences. Corporate prosecutions follow in the wake of market busts, yet some of the largest business crimes may go unpunished. Buell, who served as a federal prosecutor, including on the Enron Task Force, explains why.[95] Buell points out that street crimes may be far easier to prove than complex financial crimes. Yet that does not mean that we should focus primarily on street crimes. The social consequences of business crimes can be enormous, as Buell describes. If white-collar offenders ignored sophisticated legal and business advice and went ahead and committed crimes, is there any reason to think they are less reprehensible? Crimes like drug possession punish the low-level addict or corner dealer and not the kingpin. And unlike business criminals, the poor do not usually get investigators and lawyers to argue that their individual life stories merits sympathy and leniency at sentencing. The results when they do get a team, for example in death penalty cases, are stunning and often make the difference between a life sentence and a death sentence.[96]

Can this longstanding inequality in our justice system ever be remedied? If anything, politics seems to be moving towards tolerating more inequality in America and not less. We punish street crimes or immigration offenses or drug possession in massive waves because it is cheap and easy to put people who lack resources to defend themselves behind bars. The role that race plays in our willingness to tolerate bargain-basement justice for the poor but not

93. BROWN, *supra* note 25, at 104–05.

94. *See id.* at 198–99 (discussing how the United States, like other jurisdictions, "rel[ies] on public prosecution and police monopolies," despite its distrust of state authority and political commitment to democracy).

95. BUELL, *supra* note 24, at xvii–xviii.

96. Brandon L. Garrett, *The Decline of the Virginia (and American) Death Penalty*, 105 GEO. L.J. 661, 724–25 (2017).

for elites cannot be ignored.[97] The role of race in policing, arrests, and plea bargaining cannot be ignored either.[98]

We do not respond the same way to white-collar crime waves.[99] In business-crime cases, jurors and judges see the full picture of a person's life. Elites get short sentences. They get fairer justice. We shouldn't wish less on anyone. The other 99% deserve the same. No one is calling for life in prison for Wall Street super-predators. The question is whether any will be jailed at all. We should respond to inequality in criminal justice by ratcheting punishment down and increasing fairness for all. Buell recommends as much, as does Brown. Yet both leave us wondering whether that can occur in the Land of the Free, where ingrained structures and thinking produced mass incarceration on a scale the world has never before seen. These books, however, leave us in a place more optimistic than one might suppose.

Conclusion

All three of these wonderful books, from different perspectives, point towards restorative justice and away from punishment. We need serious regulatory involvement to prevent corporate crimes from occurring in the first place. Better resources for mining inspectors could have prevented the Upper Big Branch disaster. More resources for the SEC and other Wall Street watchdogs can far more effectively prevent financial crimes than a few token prosecutions after the fact. Corporations can be rehabilitated, and more minor offenses and sanctions can be used to prevent corporate misconduct, as Soltes and Buell suggest.

For more-typical criminal cases, Brown describes how things could be different, and how they were different when England responded to a similar crime wave from the 1970s through the 1990s but kept more power in the hands of judges and did not completely deregulate criminal justice.[100] Local prosecutors can similarly focus on preventing crime and rehabilitating communities. Perhaps things can be different in the United States as well,

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97. *See, e.g.*, Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219, 235–36 (1994) (observing that racial minorities are disproportionally poor and that they disproportionally require public defenders).

98. For example, a recent study found that race was a statistically significant factor in plea bargaining and outcomes over a two-year period in Manhattan cases examined by the Vera Institute for Justice. Gene Demby, *Study Reveals Worse Outcomes for Black and Latino Defendants*, NPR (July 17, 2014), http://www.npr.org/sections/codeswitch/2014/07/17/332075947/study-reveals-worse-outcomes-for-black-and-latino-defendants [https://perma.cc/K535-38AR]; *see also, e.g.*, Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity'*, USA TODAY (Nov. 18, 2014), https://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/ [https://perma.cc/EPV5-GXRE] (pointing out the reality of "racially lopsided arrests" and discussing the importance of investigating potential causes of the racial disparity in arrest cases).

99. BUELL, *supra* note 24, at 213.

100. BROWN, *supra* note 31, at 212–13.

despite the loosely regulated system that has produced mass incarceration on the largest scale that the world has ever seen.

Perhaps the boom in mass incarceration in our criminal justice system is finally turning into a bust, for exactly the reasons and using exactly the tools that these authors point towards. Whether "common sense" and "comparative moderation" continue to prevail in the United States remains in question. But for over a decade, we have started to move away from criminalizing drugs,[101] from the death penalty (but not life sentences),[102] and from overly harsh sentencing laws.[103] We have started to shift towards rehabilitation and alternatives to incarceration, particularly at the state level. American mass incarceration costs over $180 billion a year, according to a Prison Policy Initiative estimate that took into account not just the costs of running prisons (over $80 billion) but also court costs and policing costs.[104] The social costs borne by families and communities are far greater.[105] Mass incarceration, however, has now become a term, and one of opprobrium for concerned policymakers and citizens on both sides of our political divide.[106]

There are two ways to reduce mass incarceration: admit fewer prisoners and keep them in prison for less time.[107] Both of those solutions are being implemented on a greater scale. For example, a "Right on Crime" coalition of legislators in Texas implemented measures to reduce incarceration by seventeen percent from 2007 to 2015, and during that time, crime fell by

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101. NAT'L CONFERENCE OF STATE LEGISLATURES, DRUG SENTENCING TRENDS (July 30, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/drug-sentencing-trends.aspx [https://perma.cc/KG66-Y2PM] ("States are rethinking how they respond to drug crimes" and "have lowered penalties.").

102. Garrett, *supra* note 87, at 663.

103. ALISON LAWRENCE, NAT'L CONFERENCE OF STATE LEGISLATURES, TRENDS IN SENTENCING & CORRECTIONS 4 (July 2013), http://www.ncsl.org/Documents/CJ/TrendsInSentencingAndCorrections.pdf [https://perma.cc/3NHQ-3W62].

104. Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html [https://perma.cc/H77B-U9VA]. For a wonderful graphical illustration, see Peter Wagner & Leah Sakala, *Mass Incarceration: The Whole Pie*, PRISON POL'Y INITIATIVE (Mar. 12, 2014), http://www.prisonpolicy.org/reports/pie.html [https://perma.cc/8VVY-MJ2A] (illustrating incarceration in the United States).

105. *See, e.g.*, Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1276, 1281–85 (2004) (discussing the high social cost of mass incarceration); Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 225 (2009) (discussing high incarceration rates in inner cities).

106. David Garland, *Introduction: The Meaning of Mass Imprisonment*, *in* MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1, 1–2 (David Garland ed., 2001); *see, e.g.*, Sen. Rand Paul, *Keep Pushing Criminal Justice Reform in Ky.*, COURIER J. (Mar. 28, 2016), http://www.courier-journal.com/story/opinion/2016/03/28/paul-keep-pushing-criminal-justice-reform-kyl/82352596/ [https://perma.cc/L7VU-7KUL] (discussing the need for reform).

107. Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 316 (2009).

twenty-seven percent.[108] Texas avoided spending half a billion dollars to build three prisons and instead closed three prisons, improved access to probation, addiction treatment, and alternatives to prison, and saved about three billion dollars.[109] California, New Jersey, and New York led the country in reducing prison populations, by twenty percent or more, and experienced the largest drops in violent crime.[110] A federal "smart on crime" initiative supports such efforts to reinvest savings from reducing incarceration by prevention.[111] More than thirty states have adopted these types of reforms, including Alaska, Georgia, Ohio, Oklahoma, Kentucky, Maryland, Mississippi, Texas, and many more.[112] Suddenly, rehabilitation and reentry are becoming a new focus for research and policy; some states are restoring voting rights to felons.[113]

Hopefully, those state and local efforts will continue, and these problems will continue to be studied, so that these efforts can be evaluated and improved upon. Far more must be done to make more lasting reductions in mass incarceration, given the scale of the increase in incarceration in this country in the 1980s and 1990s.[114] Soltes, Brown, and Buell supply answers at the top and bottom of our divided criminal justice system, and they suggest a connection between the two. The mass incarceration binge can come crashing down, and perhaps it is finally starting to do so. We need less-punitive responses to our most important social problems. Risky behavior is

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108. Tina Rosenberg, *Even in Texas, Mass Imprisonment is Going Out of Style*, N.Y. TIMES (Feb. 14, 2017), https://www.nytimes.com/2017/02/14/opinion/even-in-texas-mass-imprisonment-is-going-out-of-style.html?mcubz=1 [https://perma.cc/Z7Y7-F29Z].

109. Jason Pye, *Savings from Prison Reforms in Texas Top $3 Billion*, FREEDOMWORKS (July 6, 2015), http://www.freedomworks.org/content/savings-prison-reforms-texas-top-3-billion-crimes-rates-hit-lowest-point-1968 [https://perma.cc/874E-GXKF].

110. MARC MAUER & NAZGOL GHARDNOOSH, THE SENTENCING PROJECT, FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES (2014), http://sentencingproject.org/wp-content/uploads/2015/11/Fewer-Prisoners-Less-Crime-A-Tale-of-Three-States.pdf [https://perma.cc/G9E5-6L5X].

111. *See* U.S. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY (2013), https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf [https://perma.cc/D7BD-SG3W] (providing an overview of a federal approach to reducing incarceration).

112. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, BJA JUSTICE REINVESTMENT INITIATIVE: WHAT IS JRI?, https://www.bja.gov/programs/justicereinvestment/what_is_jri.html [https://perma.cc/VUF2-5P9N]; BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, BJA JUSTICE REINVESTMENT INITIATIVE: JRI SITES, https://www.bja.gov/programs/justicereinvestment/jri_sites.html [https://perma.cc/VQ48-KYEJ].

113. NAT'L CONFERENCE OF STATE LEGISLATORS, FELON VOTING RIGHTS (Sept. 29, 2016), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx [https://perma.cc/N8NE-GDXJ] (describing recent state legislation restoring felons' voting rights, including in Delaware, Maryland, Virginia, Washington, and Wyoming).

114. LAUREN-BROOKE EISEN ET AL., BRENNAN CTR. FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 3 (2016).

hard to deter and punishment is not the best way to prevent it, but punitive voices are now calling for a turn back to the tough-on-crime 1980s. Meanwhile, state and local governments are forging ahead with smart-on-crime reforms. We are at a crossroads. We need voices of reason, like Soltes's, Buell's, and Brown's, today more than ever.

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The Foreseeability of Human–Artificial Intelligence Interactions*

Consider the following hypotheticals:

(1) A hospital uses artificial intelligence software to analyze a patient's medical history and make a determination as to whether he or she needs surgery. One day, the artificial intelligence software incorrectly diagnoses a patient and recommends an unnecessary surgery. In preparation for the surgery, an anesthesiologist applies an incorrect dosage of the surgical anesthetic and kills the patient.

(2) An investment firm uses artificial intelligence software to identify promising stocks for investment. Without any further research, an investment banker negligently recommends stocks off of the software's prepared list. Those stocks go bust, costing their new owners thousands of dollars.

(3) A vehicle with autonomous-driving software is cruising down a two-lane road. The lane to its right is filled with cars driving in the same direction. A human driver is in oncoming traffic and recognizes the autonomous car as being from a notable autonomous car brand. The human driver decides it would be fun to "play chicken" with the car to see how it will react. The human driver proceeds to swerve into the autonomous vehicle's lane and the autonomous vehicle, *thinking* it best to avoid a head-on collision and not realizing the human driver won't hit it, swerves into the right lane, triggering a collision with an innocent third-party car.

(4) A delivery drone, piloted with autonomous-piloting software, is en route to deliver a package. On its way, it passes the home of a paranoid man who is very concerned with his privacy. He proceeds to take a baseball, and with an impressive throw, knocks the drone out of the sky. The drone crashes down and hits a child playing in a nearby park.

(5) A company selling artificial intelligence software sells its product to a racist. The racist proceeds to install the software onto a robot butler, and the robot butler proceeds to learn and develop under the teachings of its owner. One day, a black UPS driver delivers a package to the front door. The now-racist robot answers the door and upon seeing the black UPS driver, *thinks*, "The only reason a

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> black person would be on my front porch would be if he were here to burgle my owner." The robot proceeds to attack the UPS driver under the mistaken assumption that he is a burglar.

In each of the above hypotheticals, the use of artificial intelligence led to the injury of an innocent person. When faced with an injury caused by another, each of these persons may seek a remedy through the tort system. The tort system is designed to provide monetary damages for injured parties when they are harmed by the negligent conduct of another.[1] In this way, the tort system assures that the costs of negligent conduct lie with those responsible for causing the injury.[2] Each injured party in the hypotheticals above can sue the negligent actor who caused the harm—but who (or what) exactly caused the injured party's harm? In the above hypotheticals, there are human actors who cause the injured party's harm through obviously negligent conduct or even intentional conduct. These human actors present themselves as obvious targets, but what about the developers of the artificial intelligence software? When the injured parties sue in court, they are likely to sue whomever has the deepest pockets.[3] This should strike fear into the hearts of many artificial intelligence companies, because in these tort suits, they are likely to be the parties in the best financial position to pay out damages.

If artificial intelligence companies are sued for the negligent development of their software, courts will be faced with a difficult question of foreseeability. When proving a case of negligence, plaintiffs are required to show the harm that occurred was a foreseeable consequence of the defendant's negligent conduct.[4] This is also called satisfying the proximate cause requirement of a negligence case.[5] In each hypothetical, was the interaction between the artificial intelligence software and human actor foreseeable? How does the liability of the software developer fit in? Technology as a whole has grown exponentially over time and artificial intelligence technology will be no exception.[6] New advances in machine learning coupled with other continuing developments in artificial intelligence

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1. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 6 (5th ed. 1984) (describing that the goal of the tort system is to make victims whole again at the expense of tortfeasors).

2. *Id.* at 7.

3. *See* Robert MacCoun, *Is There a "Deep-Pocket" Bias in the Tort System?*, 1993 RAND INST. CIV. J. 1, 2–3 (examining the "deep-pocket bias," which suggests juries award higher damages against corporations).

4. *See* DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 162–63 (4th ed. 2011) (explaining that the trier of fact can "find proximate cause whenever the plaintiff's injury was among the array of risks the creation or exacerbation of which led to the conclusion that the defendant's conduct was negligent").

5. *Id.*

6. Hans Moravec, *When Will Computer Hardware Match the Human Brain?*, J. EVOLUTION & TECH., Mar. 1998, at 1, 1.

software will increase the prevalence of artificial intelligence in our lives, making it important to discuss the question of who will be liable when this new technology causes injury.[7] And in each of these incidents, the presence of artificial intelligence will force us to address the difficult question of whether a human's interaction with artificial intelligence was foreseeable or unexpected.[8]

Many forms of artificial intelligence, including autonomous vehicles, employ machine learning.[9] Machine learning departs from software coding in the conventional sense and begins to look more like coaching than it does programming.[10] As the software interacts with the world, it looks to see which of its actions create the most successful results. It then incorporates its most successful actions into future behavior.[11] In this way, the software *evolves* over time. A new artificial intelligence software is not unlike the brain of a human child—ready to be molded and shaped by its experiences.[12] When the software developer places the artificial intelligence into the real world, the developer cannot predict how the artificial intelligence will solve the tasks and problems it encounters. The machine will teach itself how to solve obstacles in ways that are unpredictable.[13] A side effect of humans coaching machines rather than coding line by line will be an inherent amount of unpredictability and a lack of control over the software by the developer once the software is sold.[14] Due to this unpredictability, some have suggested that the experiences of a learning artificial intelligence will cause the artificial intelligence's interactions with humans to be so unpredictable that they "could be viewed as a superseding cause—that is, 'an intervening force . . . sufficient to prevent liability for an actor whose tortious conduct was a factual cause of harm'—of any harm that such systems cause."[15]

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7. *Id.* at 1, 7–8.

8. *See* Matthew U. Scherer, *Regulating Artificial intelligence Systems: Risks, Challenges, Competencies, and Strategies*, 29 HARV. J.L. & TECH. 353, 365 (2016) (stating that, as artificial intelligence systems develop, it is "all but certain that issues pertaining to unforeseeable AI behavior will crop up with increasing frequency").

9. Jason Tanz, *Soon We Won't Program Computers. We'll Train Them Like Dogs.*, WIRED (May 17, 2016), https://www.wired.com/2016/05/the-end-of-code/ [https://perma.cc/NJ4E-XALV].

10. *Id.*

11. *Id.*

12. *Id.*

13. Scherer, *supra* note 8, at 365–66.

14. *See* Jonathan Tapson, *Google's Go Victory Shows AI Thinking Can Be Unpredictable, and That's a Concern*, CONVERSATION (Mar. 17, 2016), https://theconversation.com/googles-go-victory-shows-ai-thinking-can-be-unpredictable-and-thats-a-concern-56209 [https://perma.cc/3MNK-89L6] (discussing how artificial intelligence technology such as Google's AlphaGo behaves unpredictably).

15. Scherer, *supra* note 8, at 365; *see generally* WENDELL WALLACH & COLIN ALLEN, MORAL MACHINES: TEACHING ROBOTS RIGHT FROM WRONG 197–214 (2009) (discussing liability in relation to artificial intelligence).

Because the conduct of artificial intelligence depends on external influences after the code is out of the hands of the developers, external influences are an actual cause of any bad behavior by artificial intelligence systems. Therefore, the superseding cause doctrine could swoop in, label the situation as unforeseeable, and save the artificial intelligence developer from liability.[16] Even companies selling artificial intelligence products and developing new artificial intelligence software operate as though defects in their own systems are shielded from incurring liability by the superseding cause doctrine.[17] When reliance on the Tesla autopilot system resulted in a fatal crash in June of 2016, Tesla quickly tried to shield itself from liability by pointing out that the negligent interactions of the driver were a more immediate cause of the crash, than the actions of the programmer.[18]

Other commentators suggest that superseding cause will have no place in protecting the developers of artificial intelligence software, and such software developers will be wholly liable for the actions of their systems.[19] Placing artificial intelligence tort cases in the extremes of total liability or no liability at all is unwise. It is likely that an intervening cause won't entirely shield a developer of artificial intelligence software from liability but will reduce liability as a consideration in a comparative fault analysis. The problem of superseding cause is a familiar one, and while new cases may be cloaked in unfamiliar facts with the advent of artificial intelligence, old case law is applicable to give a good idea of how courts will respond to these new problems.[20]

This Note is offered to clarify misconceptions and uncertainty about the interplay between artificial intelligence and the superseding cause doctrine. This Note concludes that the superseding cause doctrine has begun disappearing from tort analysis and therefore will be unavailable to

16. Scherer, *supra* note 8, at 365–66.

17. *See* Matt McFarland, *Who's Responsible When an Autonomous Car Crashes?*, CNN TECH (July 7, 2016), http://money.cnn.com/2016/07/07/technology/tesla-liability-risk/index.html [https://perma.cc/B992-4F8P] (discussing Tesla's perspective on liability stemming from self-driving auto accidents); *see also* Bill Vlasic & Neal E. Boudette, *As U.S. Investigates Fatal Tesla Crash, Company Defends Autopilot System*, N.Y. TIMES (July 12, 2016), https://www.nytimes.com/2016/07/13/business/tesla-autopilot-fatal-crash-investigation.html [https://perma.cc/EXM5-NBZ7] (discussing defects in Tesla's self-driving automobiles); Interview with Akshay Sabhikhi, Chief Exec. Officer, Cognitive Scale (Apr. 3, 2017) (audio recording on file with author).

18. The Tesla Team, *A Tragic Loss*, TESLA BLOG (June 30, 2016), https://www.tesla.com/blog/tragic-loss [https://perma.cc/94SX-RJCJ].

19. Omri Ben-Shahar, *Should Carmakers Be Liable When A Self-Driving Car Crashes?*, FORBES (Sept. 22, 2016), https://www.forbes.com/sites/omribenshahar/2016/09/22/should-carmakers-be-liable-when-a-self-driving-car-crashes/#5acffecb48fb [https://perma.cc/U22K-B4H4].

20. *See generally* Nicolas Petit, Law and Regulation of Artificial Intelligence and Robots: Conceptual Framework and Normative Implications (Mar. 9, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2931339 [https://perma.cc/9TGQ-TS2F] (proposing a framework to regulate artificial intelligence based on existing legal principles).

completely shield artificial intelligence software developers from liability. Defendants that once would have escaped liability under the shield of the superseding cause doctrine will now likely be subject to a normal proximate cause analysis and will be assigned liability through a comparative fault system. With liability in future tort cases a probable reality for many software companies, those companies will need to take steps to reduce the incidents their software could cause, or figure out how to protect themselves in the legal system. Without taking steps to protect themselves from liability, artificial intelligence companies could be forced to shut their doors. Such a result would be negative not only for the companies but for society as a whole, which benefits from the innovation of artificial intelligence software developers. In order to strike a balance between protecting individuals from the potential harms of artificial intelligence and encouraging companies to develop such technology, companies must carefully evaluate the foreseeable risks of the technology they are entering into the market and take steps to minimize those risks. If companies take these steps, they will not only help to minimize their eventual liability but ensure that their artificial intelligence software is ready for the human world in which we live.

I. The Law of Superseding Causes

The superseding cause doctrine has a long history in the courts, and over time, substantial case law has developed cataloguing its many changes. While the increasing presence of artificial intelligence brings new factual scenarios where artificial intelligence causes injury, the court system is engineered to resolve new ambiguities in the law.[21] Courts have faced new and disruptive technologies many times before and proved that they are capable of addressing these issues.[22] So despite new factual scenarios that artificial intelligence tort cases will bring, the robust case law on the superseding cause doctrine will likely still be applicable:

> The peculiarities of each innovation have been worked out by the common law on a case-by-case basis until a legal consensus is reached. While legislative bodies and government agencies often end up playing catch-up to technological change, the law is a living thing and is capable of evolving with technology. Amongst legal experts

21. Adam Thierer, *When the Trial Lawyers Come for the Robot Cars*, SLATE (June 10, 2016), http://www.slate.com/articles/technology/future_tense/2016/06/if_a_driverless_car_crashes_who_is_liable.html [https://perma.cc/YK7B-DUMG].

22. *See* Dylan LeValley, Note, *Autonomous Vehicle Liability—Application of Common Carrier Liability*, 36 SEATTLE U. L. REV. 5, 9–11 (2013) (discussing the legal reactions to airplane autopilots and automated elevators).

> there is already widespread agreement that the current liability system is best-placed to handle innovation.[23]

The superseding cause doctrine impacts the tort negligence analysis in three ways, through (1) proximate cause, (2) breach, and (3) comparative fault.[24] The proximate cause element of the negligence analysis is where the superseding cause doctrine has traditionally been applied.[25] The doctrine can label an intervening cause sufficiently unforeseeable, preventing a finding of proximate cause, and thus preventing liability for the alleged tortfeasor. The breach element is characterized by Learned Hand's B<PL formula.[26] The formula seeks to explain that the tort element of breach is a balance between the burden a defendant would have to take to prevent a harm (B), the likelihood of the harm (P), and the size of the harm (L).[27] A defendant will not be considered negligent if the likelihood and size of harm caused by the conduct are not great enough to justify the burden of reforming the conduct in a way to prevent the harm.[28] The unforeseeability of a superseding cause can reduce the probability of harm to such a low value that breach cannot be found, thus eliminating liability for the alleged tortfeasor.

Comparative fault is the theory that a jury should be able to assign each negligent actor in a case a certain percentage of the fault.[29] Thus an intervening cause of harm will eat a percentage of the fault points that the defendant would otherwise be liable for.[30] This initially sounds like good news for a defendant, but may not serve much of a benefit if the jurisdiction has retained joint and several liability.[31] In jurisdictions with joint and several liability, each defendant with any fault points will be liable for the entirety of the damages.[32] The defendants will have to hold each other responsible for paying their fair share (through judicial means if need be).[33] This Note will analyze each of these areas in detail and examine how the modern outlook on superseding cause will apply to fact patterns involving artificial intelligence.

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23. AM. ASS'N FOR JUSTICE, DRIVEN TO SAFETY: ROBOT CARS AND THE FUTURE OF LIABILITY 9 (Feb. 2017), https://www.justice.org/sites/default/files/Driven%20to%20Safety%202017%20Online.pdf [https://perma.cc/HJQ5-BADZ].

24. RESTATEMENT (THIRD) OF TORTS § 34 (AM. LAW INST. 2010).

25. *See* Laurence H. Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121, 124–25 (1937) (describing the evolution of the last-wrongdoer rule as an aspect of causation and its subsequent dissipation in the early part of the 20th century).

26. United States v. Carroll Towing, 159 F.2d 169, 173 (2d Cir. 1947).

27. *Id.*

28. *Id.*

29. ROBERTSON ET AL., *supra* note 4, at 344.

30. RESTATEMENT (THIRD) OF TORTS § 34 (AM. LAW INST. 2010).

31. *See* ROBERTSON ET AL., *supra* note 4, at 372 (stating that "a pure comparative fault system with full joint and several liability . . . would generally benefit plaintiffs . . .").

32. *See id.* at 372 (explaining that defendants in joint and several liability jurisdictions normally are responsible for all "100 fault points").

33. *See id.* at 371 (explaining that defendants are left to work out apportionment of damages between themselves).

II. Proximate Cause

The superseding cause doctrine establishes that "[w]hen a force of nature or an independent act is also a factual cause of harm, an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."[34] The superseding cause doctrine applies with equal force whether the original act was innocent or tortious.[35] When applied, the superseding cause doctrine will protect the defendant from liability.[36]

The doctrine has the most force when there is "serious misconduct by someone other than the defendant [that] . . . [intervenes] between the defendant's negligent conduct and the injury" suffered by the plaintiff.[37] Consider the following examples as illustrative of the doctrine's intended effect. In *Watson v. Kentucky*,[38] the defendant was a rail carrier who negligently caused a tank car filled with gasoline to derail and spill its contents into a nearby street.[39] The gasoline caught fire and exploded, harming the nearby plaintiff.[40] The court held that if a third party intentionally lit the spilled gasoline with a match, that action would be an unforeseeable, superseding cause that would shield the railroad carrier from liability despite its negligence.[41] In *Kent v. Commonwealth*,[42] a police officer was shot by a convicted murderer who had been paroled from a life sentence by the Massachusetts parole board.[43] The officer sued the state claiming that the parole board was negligent in releasing a dangerous prisoner, but the court deemed the intervening act of the murderer sufficiently unforeseeable, thus shielding the state from liability.[44] In *Braun v. New Hope Township*,[45] a farmer broke a "road closed" sign in the middle of a road with his tractor.[46] The township learned the sign was down and reinstalled it, but reinstalled it on the right side of the road instead of the middle, and installed it in a way that was shorter than the sign had been before.[47] When an accident occurred on the road a month later, the court held the farmer was not liable because the township's negligent repair was a superseding cause.[48]

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34. RESTATEMENT (THIRD) OF TORTS § 34 (AM. LAW INST. 2010).
35. *Id.* § 34, cmt. b.
36. *Id.*
37. ROBERTSON ET AL., *supra* note 4, at 179.
38. 126 S.W. 146 (Ky. 1910).
39. *Id.* at 147.
40. *Id.*
41. *Id.* at 151.
42. 771 N.E.2d 770 (Mass. 2002).
43. *Id.* at 772.
44. *Id.* at 772, 777–78.
45. 646 N.W.2d 737 (S.D. 2002).
46. *Id.* at 739.
47. *Id.*
48. *Id.* at 743.

However, not all intervening causes are created equal. Courts will not grant all intervening causes the status of a superseding cause.[49] "An intervening act may not serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor negligent."[50] Judge Posner explains the idea:

> [T]he doctrine of [superseding] cause is not applicable when the duty of care claimed to have been violated is precisely a duty to protect against ordinarily unforeseeable conduct. . . . And so a hospital that fails to maintain a careful watch over patients known to be suicidal is not excused by the doctrine of [superseding] cause from liability for a suicide, . . . any more than a zoo can escape liability for allowing a tiger to escape and maul people on the ground that the tiger is the [superseding] cause of the mauling.[51]

Yet even when the intentional act by a third party was arguably foreseeable, the courts have historically struggled with intentional bad acts from third parties.[52] For a while, courts tended to always treat intentional bad acts as a superseding cause.[53] The rail carrier case discussed above is an example. In that case, the court said that had the gasoline been ignited intentionally, the ignition would be a superseding cause.[54] If the fire were started negligently, like by a man attempting to light his cigar, then the intervening act would have been a sufficiently foreseeable cause, and the doctrine would not apply.[55] The idea of always applying the superseding cause doctrine when dealing with intentionally bad actors can be defended on the basis of "steering plaintiffs toward the most obviously and immediately responsible tortfeasors and away from others."[56]

The problem of intentionally bad acts worked itself out as courts began to stop looking at superseding cause as a unique self-contained doctrine and began to look at these cases as a class of foreseeability problems entitled to reasoning no different than that of all foreseeability problems.[57] The majority

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49. *See* Williams v. United States, 352 F.2d 477, 481 (5th Cir. 1965) (holding that foreseeable intervening acts are not superseding causes).

50. Derdiarian v. Felix Contracting Corp., 414 N.E.2d 666, 671 (N.Y. 1980).

51. Jutzi-Johnson v. United States, 263 F.3d 753, 756 (7th Cir. 2001) (citing to DeMontiney v. Desert Manor Convalescent Ctr., 695 P.2d 255, 259–60 (Ariz. 1985), and City of Mangum v. Brownlee, 75 P.2d 174 (Okla. 1938), respectively).

52. *See* RESTATEMENT (THIRD) OF TORTS § 34 cmt. d, reporters' note (AM. LAW INST. 2010) (stating that courts "give considerably more weight to intervening . . . criminal acts [], even when they might well be within the fuzzy boundaries of foreseeability").

53. *Id.* § 34 cmt. e.

54. Watson v. Ky. & Ind. Bridge & R. Co., 126 S.W. 146, 151 (Ky. 1910).

55. *Id.* at 150–51.

56. *See* ROBERTSON ET AL., *supra* note 4, at 187 (discussing Judge Posner's reasoning behind his decision in *Edwards v. Honeywell, Inc.*, 50 F.3d 484 (7th Cir. 1995)).

57. *See* Coyne v. Taber Partners I, 53 F.3d 454, 460–61 (1st Cir. 1995) (holding that attacks from taxi-union protestors were foreseeable consequences of driving a different transportation service through the protest); Stagl v. Delta Airlines, Inc., 52 F.3d 463, 465–66, 473–74 (2d Cir.

of courts now looks at intervening acts and superseding causes as "simply subsets or particular examples of the basic scope of the risk problem [that] can be resolved under ordinary foreseeability rules."[58] Modern cases do tend to obscure this point as judges have a habit of sticking to specialized legal language, even as core ideas change.[59] Rather than debating the policy of counting intentional third party torts as a superseding cause, courts now just ask whether the intervening cause was foreseeable or not, regardless of the level of culpability within the intervening act.[60]

> Indeed, it would be anomalous and inconsistent to, on the one hand, permit an actor to be negligent because of a failure to take adequate precautions in the face of the foreseeable risk of another's misconduct but to then hold that the intervention of culpable human conduct constitutes a superseding cause that prevents the actor's negligence from being a proximate cause of the harm.[61]

As courts have moved from a refocused-breach analysis of proximate cause to an array-of-risks outlook, more and more events are considered foreseeable.[62] The array-of-risks approach states that in order to call a harm suffered by a plaintiff foreseeable, the harm need only be among the array of potential risks the creation or exacerbation of which would lead to finding a breach of duty.[63] On the other hand, a finding of foreseeability under the refocused-breach approach requires a finding that the harm suffered by the

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1995) (finding that injury from aggressive luggage retrieval at an airport could be a foreseeable result of a flight delay and inadequate regulation of baggage retrieval); Williams v. United States, 352 F.2d 477, 481 (5th Cir. 1965) (stating that "[t]he negligent act of a third party will not cut off the liability of an original wrong-doer if the intervening act is foreseeable").

58. DAN B. DOBBS, THE LAW OF TORTS 460 (1st ed. 2000).

59. *Id.*

60. *See* Summy v. City of Des Moines, 708 N.W.2d 333, 343 (Iowa 2006) (stating that the intervening act that the defendant had a duty to protect against cannot, as a matter of law, constitute sole proximate cause of plaintiff's harm); City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist., 617 N.W.2d 11, 18 (Iowa 2000) (holding that "an intervening force which falls squarely within the scope of the original risk will not supersede the defendant's responsibility" (quoting Hollingsworth v. Schminkey, 553 N.W.2d 591, 598 (Iowa 1996))); Taylor-Rice v. State, 979 P.2d 1086, 1098–99 (Haw. 1999) (finding that negligence in failing to maintain a safe highway guardrail was not superseded by foreseeable inattentive driving by an intoxicated driver); Cusenbary v. Mortensen, 987 P.2d 351, 355 (Mont. 1999) (stating that foreseeable intervening acts "do not break the chain of causation"); Stewart v. Federated Dep't Stores, Inc., 662 A.2d 753, 759 (Conn. 1995) (holding that whether the murder of a shopper in the parking lot of defendant was a superseding cause was a question of foreseeability for the factfinder); Dura Corp. v. Harned, 703 P.2d 396, 402–03 (Alaska 1985) (concluding that an intervening act that is within the scope of the foreseeable risk is not a superseding cause); Largo Corp. v. Crespin, 727 P.2d 1098, 1101, 1103 (Colo. 1986) (holding that "[a]n intentionally tortious or criminal act of a third party does not break the causal chain if it is reasonably foreseeable"); Moning v. Alfono, 254 N.W.2d 759, 766 (Mich. 1977) (finding the negligent marketing of a slingshot to minors encompasses the foreseeable risk that a child will negligently use the slingshot to cause harm to a bystander).

61. RESTATEMENT (THIRD) OF TORTS § 34, cmt. d (AM. LAW INST. 2010).

62. ROBERTSON ET AL., *supra* note 4, at 163, 166.

63. *Id.* at 163.

plaintiff would alone be sufficient for finding a breach of duty.[64] The modern trend is to use the array-of-risks approach, which results in finding many more harms foreseeable.[65] Intervening causes are no exception; the doctrine of superseding cause has lost much of its strength in tort analysis. "So far as [proximate cause] is concerned, it should make no difference whether the intervening actor is negligent or intentional or criminal. Even criminal conduct by others is often reasonably to be anticipated."[66] A trend in the courts today is to allow a finding of foreseeability even despite the seemingly unexpected act of a culpable third party.[67] For example, acts of rape and sodomy of a student have been held potentially foreseeable consequences of negligent supervision by a teacher during a field trip.[68]

The case of *Derdiarian v. Felix*[69] strongly illustrates the modern view of the superseding cause doctrine.[70] In *Derdiarian*, a third party knowingly chose not to take his epilepsy medication and suffered an epileptic seizure while driving, which caused him to lose consciousness and crash the car into a construction site.[71] The plaintiff was struck by the careening car, which knocked him into a container of boiling-hot liquid used on the construction site, turning the plaintiff into a human ball of fire.[72] The plaintiff sued the contracting corporation for failing to take adequate measures to secure the construction site. The court held that the "precise manner of the event need not be anticipated" and sent the question of the accident's foreseeability to the jury.[73]

While the above outlook describes the current trend of superseding cause, some courts do give considerably more weight to intervening criminal acts.[74] These courts will push borderline cases of foreseeability into the unforeseeable category, preventing liability for less culpable defendants.[75] Courts may also take advantage of foreseeability's inherent flexibility to find particularly egregious intervening causes to be unforeseeable even when an honest answer might point the other way.

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64. *Id.* at 166–67.

65. *Id.* at 163, 166.

66. FOWLER ET AL., HARPER, JAMES AND GRAY ON TORTS 190–92 (3rd ed. 2007).

67. *See, e.g.*, *id.* at 181 (discussing the willingness of courts to find liability where the act was unforeseeable by the negligent party but was not "highly extraordinary").

68. Bell v. Bd. of Educ., 687 N.E.2d 1325, 1327 (N.Y. 1997).

69. 414 N.E.2d 666 (N.Y. 1980).

70. *Id.* at 671.

71. *Id.* at 668.

72. *Id.*

73. *Id.*

74. *See* Hibma v. Odegaard, 769 F.2d 1147, 1156 (7th Cir. 1985) (finding the intervening acts of prison inmates who raped plaintiff were superseding causes that prevented liability from the sexual assaults for the law enforcement officers who framed plaintiff for crimes he did not commit).

75. *See id.*

The cases described above should give software developers in the artificial intelligence community pause. With artificial intelligence all around us, the software will be involved in incidents that cause harm. This is an inevitable reality of developing technology capable of use in so many contexts.[76] Artificial intelligence systems are able to perform complex tasks, such as building investment portfolios or driving cars, without human supervision.[77] The complexity of artificial intelligence software will continue to increase rapidly, and more and more tasks will be left in the hands of the machines, including most jobs.[78]

In many of the incidents involving artificial intelligence software, the artificial intelligence will have merely set the stage, giving an intervening cause the opportunity to create harm. However, as shown above, when the negligent act creates an *opportunity* for harm caused by a third party, the negligent act can be held liable as long as the third party's conduct was foreseeable. Look again at the examples outlined at the beginning of this Note. The harms created by third-party actors are only possible because of the conduct of the artificial intelligence software. When software developers sell their artificial intelligence, it could be foreseeable that third parties would interact with the software in a way that could cause harm.[79] Because of the foreseeability of these intervening causes, modern courts likely won't use the superseding cause doctrine to protect the artificial intelligence developers. The question of foreseeability of the third-party conduct in response to the artificial intelligence will go to the jury, where a finding of liability is very possible.

Artificial intelligence developers may try to argue that the precise manner in which the software reacts to human influence is unable to be anticipated. Therefore, the interactions could never be foreseeable. After all, with self-learning programs, artificial intelligence is "designed to act in a manner that seems creative, at least in the sense that the actions would be deemed 'creative' or as a manifestation of 'outside-the-box' thinking if

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76. *But see* Russell Brandom, *Humanity and AI Will Be Inseparable*, VERGE (Nov. 15, 2016), https://www.theverge.com/a/verge-2021/humanity-and-ai-will-be-inseparable [https://perma.cc/YU4E-EAVG] (emphasizing the ways in which artificial intelligence may be able to protect humans from harm).

77. *See* Neil Johnson et al., *Abrupt Rise of New Machine Ecology Beyond Human Response Time*, SCI. REPORTS (Sept. 11, 2013), https://www.nature.com/articles/srep02627 [https://perma.cc/R5X6-M65N] (using a software package to conduct a study of ultrafast extreme events in financial market stock prices).

78. STUART J. RUSSELL & PETER NORVIG, ARTIFICIAL INTELLIGENCE: A MODERN APPROACH 1034 (3d ed. 2010) (explaining the ability of artificial intelligence to quickly replace humans in many jobs).

79. *See* Gary Lea, *Who's to Blame When Artificial Intelligence Goes Wrong?*, CONVERSATION (Aug. 16, 2015), https://theconversation.com/whos-to-blame-when-artificial-intelligence-systems-go-wrong-45771 [https://perma.cc/Z8LU-QWA4] (exploring the foreseeability implications of artificial intelligence programmed by a third party).

performed by a human."[80] Artificial intelligence developers will have to admit that the software carries inherent unpredictability.[81] Once the artificial intelligence is sent off to the buyer, the programmer no longer has control and the artificial intelligence could be shaped by its new owner in uncountable ways.[82] As seen in *Derdiarian*, this argument is likely to fail. The exact manner in which the harm came about, or the exact reaction taken by the artificial intelligence software, will not be the major factor of the foreseeability analysis.[83] Instead the courts will ask if misuse of artificial intelligence by third parties was foreseeable. Not knowing exactly how the artificial intelligence will respond to misuse by third parties is unlikely to serve as any defense. Examining the superseding cause doctrine's use in the proximate cause analysis shows that the doctrine has lost much of its importance. Problems involving an intervening cause are likely to be analyzed under the lens of ordinary foreseeability. The above case law demonstrates that many fact patterns involving artificial intelligence and an intervening cause (like the hypotheticals at the beginning of this Note) will result in liability for the software developers. In many cases, artificial intelligence software will set the stage for what can be considered a foreseeable intervening act.

III. Breach

The background of superseding cause shows it is unlikely to save the developers of artificial intelligence software from potential liability as a matter of proximate cause. But that isn't the end of the road for software developers. While the incident causing harm may have been foreseeable, the artificial intelligence companies can still argue it was not sufficiently foreseeable to justify the burdens required to prevent such harms.[84] As discussed above, third-party misconduct—negligent, reckless, intentional, or criminal—will often be considered sufficiently foreseeable as to render relevant an inquiry into the burden of precautions facing the actor.[85] Yet these burdens can often be extremely high.[86] Under a negligence analysis featuring

80. Scherer, *supra* note 8, at 363.

81. *See* Tapson, *supra* note 14 (warning of the potential pervasive application of artificial intelligence).

82. *See* Tanz, *supra* note 9 (describing the limitations of developer control over artificial intelligence and the unpredictability of machine learning).

83. Derdiarian v. Felix Contracting Corp., 414 N.E.2d 666, 671 (N.Y. 1980).

84. Grace & Co. v. City of Los Angeles, 278 F.2d 771, 775 (9th Cir. 1960) (holding that the risk of a burst pipe did not outweigh the burden of digging up the entire pipe system in the area).

85. *See* David C. Vladeck, *Machines Without Principals: Liability Rules and Artificial intelligence*, 89 WASH. L. REV. 117, 123–28, 135 (2014) (analyzing liability rules as applied to highly intelligent, autonomous machines).

86. *Cf.* Ikene v. Maruo, 511 P.2d 1087, 1088–89 (Haw. 1973) (rejecting negligence claims against public highway agencies for failing to design curves and install guardrails that would protect cars that drive out of control because of the unreasonable burden that would be required of the state).

an intervening cause, the primary factors to be considered for breach are those found in Learned Hand's classic B<PL analysis:[87] L (the magnitude of the foreseeable risk), P (the probability or foreseeability of such a risk), and B (the burden of precautions that might protect against the risk).[88]

It is foreseeable, for example, that some number of motorists, while driving on the state's highways, will speed, drive drunk, or fall asleep, and thereby will fail to navigate curves or otherwise allow their cars to leave the highway. Such an intervening cause of harm is foreseeable enough to prevent the implementation of the superseding cause doctrine to absolve the state of liability. However, if the state is liable for the failure to design curves and erect barriers that would protect against such out-of-control vehicles, the overall burden on the state would be excessive, by way of either bearing and defending against liability or the cost of redesigning highways.[89] At the same time, however, the burden on the state to simply maintain a shoulder would not be so great as to prevent liability.[90]

Imagine driving south down a road. You approach an intersection where only the east–west road is governed by a stop sign, but your north–south road is not. It would be reasonable to expect you to keep an eye on the east–west road in case another driver misses the stop sign. To put it in terms of breach, the burden of monitoring the east–west road is not so great as to prevent you from doing so despite the low probability of a car accident. It would not be reasonable to expect you to slow your car as you approach the intersection and carefully confirm that no other drivers are going to miss their stop sign before you continue driving through the intersection. Such a burden is said to be too great to justify in light of the low probability of an accident. Of course, such an analysis is constantly ongoing. If, while performing your reasonable monitoring of the intersection, you do notice that another driver is going too fast to stop in time, it would be reasonable to expect you to slow your car down in light of the high probability of an accident.[91] The law performs these balancing tests through the breach analysis. We avoid "requiring excessive precautions of actors relating to harms that are

87. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

88. *Id.*

89. *See Ikene*, 511 P.2d at 1089 (finding no obligation of a city to post a speed limit of 35 miles per hour to prevent cars speeding in excess of 40 miles per hour).

90. *See* McKenna v. Volkswagenwerk Aktiengesellschaft, 558 P.2d 1018, 1022 (Haw. 1977) (finding liability when a city failed to maintain a shoulder along the highway).

91. *See* Brockett v. Prater, 675 P.2d 638, 640 (Wyo. 1984) (affirming jury's finding of no negligence in failing to halt to make sure that others will honor the right-of-way); Stirling v. Sapp, 229 So. 2d 850, 852 (Fla. 1969) (referencing Florida law that a driver with the right-of-way can legally assume that an approaching driver on an intersecting road will yield to the right-of-way); *see also* LeJeune v. Union Pac. R.R., 712 So. 2d 491, 495 (La. 1998) (noting that a railroad company can presume approaching vehicles "will obey the law and stop in time to avoid an accident" and is thus not required to slow its trains).

immediately due to the improper conduct of third parties, even when that improper conduct can be regarded as somewhat foreseeable."[92]

Through proximate cause analysis, we know most courts will find incidents involving artificial intelligence to be somewhat predictable, potentially forcing artificial intelligence developers to rely on the argument that the burden of preventing such incidents is too high. The developers are unlikely to succeed when "an accident was caused by a clear defect or malfunction in the [software] design, especially if the defect could have been prevented or fixed by an alternative design."[93] In these situations, the breach analysis does not come down to whether or not the artificial intelligence software is better than what it is replacing, but what the cost would have been to the software developer to tweak the software and make it safer.[94] Errors in software are especially susceptible to hindsight bias. Once a problem is discovered with software, a plaintiff's attorney could easily argue that the burden to the software company would only be typing in new lines of code—a burden that could sound very low to many laypeople. Leaving the complexities and difficulty of software coding up to a jury to appreciate is a dangerous proposition for artificial intelligence developers.

> [H]indsight from the accident that actually occurred will inevitably provide new insights into how the technology could have been made safer, which will then be imputed to the manufacturer. Given the complexity of an autonomous system, a plaintiff's expert will almost always be able to testify (with the benefit of hindsight) that the manufacturer should have known about and adopted the alternative, safer design.[95]

Plaintiffs' experts will be able to point to alternative software codes with the benefit of hindsight, second guessing the coding of software developers. Defendants will have a hard time because the scope of liability (the L factor in the Learned Hand Formula) could potentially "be severe—the loss of one or more lives or other serious injury," compared to a small burden that is only the "cost of the marginal improvement that might have prevented the accident."[96] The complexity of artificial intelligence software will make it very challenging for a developer to win the cost–benefit argument.

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92. RESTATEMENT (THIRD) OF TORTS § 19 cmt. g (AM. LAW INST. 2005). *Compare* McMillan v. Mich. State Highway Comm'n, 393 N.W.2d 332, 333, 337 (Mich. 1986) (imposing liability when a private utility locates a utility pole close enough to a public highway to create a risk of injury for occupants of cars that lurch off the highway), *with* Gouge v. Cent. Ill. Pub. Serv. Co., 582 N.E.2d 108, 112 (Ill. 1991) (holding no liability in a similar fact pattern).

93. Gary E. Marchant & Rachel A. Lindor, *The Coming Collision Between Autonomous Vehicles and the Liability System*, 52 SANTA CLARA L. REV. 1321, 1333 (2012).

94. *See id.* (discussing the cost–benefit analysis in the context of automobile manufacturing).

95. *Id.*

96. *Id.* at 1334.

The final product of modern artificial intelligence software is often trained and coached rather than coded.[97] Therefore, it is possible that adding new code to artificial intelligence software will not be enough to prevent the software from causing injury.[98] The only way to prevent artificial intelligence from being misused would be to strip the software of its fundamental aspects. One of the primary benefits of artificial intelligence is its ability to learn and mold itself with new experiences, resulting in it taking on almost human characteristics. Without allowing it to continue to do so, artificial intelligence is relatively useless. Artificial intelligence developers could argue that the only way to prevent artificial intelligence from being misused would be to not use the software at all. Abandoning that type of programming altogether would be too great a burden. While the harm caused by artificial intelligence software may be foreseeable, artificial intelligence is still a great substitute for human doctors (who will eventually become monkeys in lab coats by comparison), delivery men, or drivers it replaces.[99] "Robot drivers react faster than humans, have 360-degree perception and do not get distracted, sleepy or intoxicated . . . ."[100] Losing such a valuable asset would be devastating to businesses developing the software, businesses using the software, and society as a whole. In this way, artificial intelligence's benefits to society could be argued to outweigh its costs.

This argument is unlikely to work. Even if artificial intelligence software offers a net safety gain, its developers may still be held accountable if the software malfunctions or third-party interactions with the software result in harm.[101] "There are many examples of products that have a net safety benefit that are still subject to liability when an injury results."[102] The government has already tackled this problem in a similar arena: vaccines.[103] The value of vaccines is enormous and "[t]he public health benefit[s] . . . undeniable, yet they are so frequently the source of lawsuits that federal

97. Monaghan, *supra* note 9.

98. *See id.* ("[A]s networks have grown more intertwined and their functions more complex, code has come to seem more like an alien force, the ghosts in the machine ever more elusive and ungovernable.").

99. *See* Matthew Hart, *This Is Why We "Monkey Drivers" Need to Be Replaced by Self-Driving Cars*, NERDIST (Sept. 4, 2016), http://nerdist.com/this-is-why-we-monkey-drivers-need-to-be-replaced-by-self-driving-cars/ [https://perma.cc/9R64-R9Y6] (summarizing a video attributing automobile traffic to poor reactions, lack of coordination, and unpredictable behavior).

100. John Markoff, *Google Cars Drive Themselves, in Traffic*, N.Y. TIMES (Oct. 9, 2010), http://www.nytimes.com/2010/10/10/science/10google.html?mcubz=1 [https://perma.cc/33R6-YXFH].

101. *See* Marchant & Lindor, *supra* note 93, at 1330 (discussing the relative risk of autonomous vehicles compared to conventional vehicles).

102. *Id.* at 1331.

103. *See, e.g.*, National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1–34 (1986) (establishing "a National Vaccine Program to achieve optimal prevention of human infectious diseases through immunization").

preemption laws had to be passed to protect their manufacturers."[104] Despite the statutory protections, when a consumer contracted polio from an oral polio vaccine, an $8.5 million verdict was held for the injured plaintiff.[105] The arguments that the only way to prevent the harms of vaccines would be to eliminate them did not impress the courts.[106] Luckily for the vaccine producers, their argument worked better with Congress.[107]

The automobile industry has faced a similar problem.[108] General Motors (GM) was sued when a car collision caused a passenger-side airbag to fail to deploy, resulting in injuries to the plaintiff.[109] GM argued that adding the passenger airbag at all was an improvement over the industry standard at the time.[110] That argument fell on deaf ears, as did the argument that the only way for GM to avoid the risk of any malfunction altogether would be to remove the passenger airbags (at the time, that would have met the National Highway Transportation Safety Administration requirements).[111]

GM was the subject of another series of lawsuits concerning its C/K pickup.[112]

> Plaintiffs in these suits alleged that GM's placement of the gas tank on the side of the model, outside the vehicle frame, created an increased risk of fatal fires after side impacts. GM attempted to defend the safety of its vehicle with comparative analyses, contending that the overall crashworthiness of its vehicles was better than most vehicles on the road.[113]

To support its arguments, GM cited to extensive safety reports and argued that the mere existence of the gas tank would increase the likelihood of fires wherever it was located. The only way to prevent the risk of a gas tank fire would be to not have a gas tank in the vehicle at all.[114] GM's

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104. Marchant & Lindor, *supra* note 93, at 1331.

105. Strong v. Am. Cyanamid Co., 261 S.W.3d 493, 521 (Mo. Ct. App. 2007) (confirming the $8.5 million jury verdict for the plaintiff), *overruled on other grounds*, Badahmon v. Catering St. Louis, 395 S.W.3d 29 (Mo. 2013) (en banc).

106. *See id.* at 506 (focusing on the plaintiff's satisfaction of proving tort elements rather than discussing the value of vaccines).

107. *See* 42 U.S.C. §§ 300aa-1 to -34 (establishing a system of regulations and standards for vaccines rather than banning them).

108. Gen. Motors Corp. v. Burry, 203 S.W.3d 514, 525 (Tex. App.—Fort Worth 2006, pet. dism'd); *see also* Morton Int'l v. Gillespie, 39 S.W.3d 651, 654 (Tex. App.—Texarkana 2001, pet. denied) (detailing a suit brought against a vehicle manufacturer and seller for injuries caused by an airbag after the plaintiff's car accident).

109. *Burry*, 203 S.W.3d at 524–25.

110. *Id.* at 529.

111. *Id.*

112. *See* Terence Moran, *GM Burns Itself*, AM. LAW., Apr. 1993, at 69 (describing the design flaws of GM's popular pickup truck that led to extensive product liability).

113. Marchant & Lindor, *supra* note 93, at 1332.

114. *See* Moran, *supra* note 112, at 78 ("Anywhere a manufacturer puts a tank poses potential hazards . . . .").

arguments did not curry favor with juries.[115] The juries did not care about the overall greater safety and returned damages of $101 million in punitive damages.[116]

While it appears arguments citing an unbearably high burden for artificial intelligence developers are unlikely to succeed, it is important to keep in mind the policy considerations judges may employ when evaluating the burden. Toyota recently accepted liability to the tune of $1.2 billion for a defect in its cars causing sudden acceleration.[117] A $1.2 billion judgment is steep, and artificial intelligence won't be accused of just sudden acceleration, but of any behavior that could be deemed imperfect. If this is the sort of liability carmakers could be facing, frequent suits could prevent companies from entering the market with these products to begin with. The amount at stake in suits against the manufacturers could be tremendous.[118] It is possible that the potential liability is so great that judges would seek to prevent chilling the development of artificial intelligence technologies. A world without artificial intelligence could be the worst result for society as a whole, and so a judge might take the approach of keeping a thumb on the side of the scale requiring a low burden and a finding of high foreseeability.

Judges may be justified in this belief. As Elon Musk said in his Master Plan, Part Deux for Tesla, "[partial driving autonomy] is already significantly safer than a person driving by themselves and it would therefore be morally reprehensible to delay release simply for fear of . . . legal liability."[119] If autonomous driving software can already improve safety on the road, then it would make society worse off to delay the implementation of such software due to liability concerns, and while Musk himself may not be scared away by legal liability, many others might be. The same logic can apply to any form of artificial intelligence—it is able to bring such positive change to society that we should do what we can to encourage its development, including lowering tort costs.

But on the other side, a strong argument exists that large car companies (and for that matter, all large companies dealing with artificial intelligence) are unlikely to be chilled. There is a lot of profit to be made with artificial

115. *See* Sam LaManna, *GM Verdict Could Affect Future Cases*, NAT'L L.J., May 3, 1993, at 21 (reporting on a jury award including $101 million in punitive damages against GM).

116. GM v. Moseley, 447 S.E.2d 302, 305 (Ga. Ct. App. 1994) (indicating that the jury assessed $101 million in punitive damages against GM).

117. Carol J. Williams, *Toyota is Just the Latest Automaker to Face Auto Safety Litigation*, L.A. TIMES (Mar. 14, 2010), http://articles.latimes.com/2010/mar/14/business/la-fi-toyota-litigate14-2010mar14 [https://perma.cc/5AEA-3HDD].

118. *See* Thierer, *supra* note 21 (explaining that because America's legal system lacks a loser-pays rule, consumers are incentivized to file potentially frivolous lawsuits at the first sign of trouble).

119. Elon Musk, *Master Plan, Part Deux*, TESLA BLOG (July 20, 2016), https://www.tesla.com/blog/master-plan-part-deux [https://perma.cc/F8A7-NBH4].

intelligence.[120] With profit numbers reaching tens of trillions,[121] it seems silly to imagine the companies getting scared out of the market. However, not every company that is going to want to enter the market will have the safety net titans of industry have. Many smaller competitors, unable to withstand a large judgment, could be scared out of the market for fear of unlimited liability should their technology cause injury.

But even if there were a chilling effect, would that not represent the exact outcome our tort system is designed to create? If an activity is creating more harm than good, then one of the purposes of the tort system is to discourage such activity through civil liability.[122] Until the benefits outweigh the costs, a dangerous activity should be chilled. The market forces will determine value and costs of new artificial intelligence products, and companies won't proceed until the balance of values favors proceeding.[123]

Even in the face of uncertainty and potential liability, car companies don't seem to be hindered. While the fear of liability as an obstacle to innovation remains a common argument,[124] the proponents of robotics and artificial intelligence are moving full steam ahead. "At least 19 companies have announced their goal to develop driverless car technology by 2021."[125] Far from being chilled by potential liability, "Volvo, Google, and Mercedes-Benz have already pledged to accept liability if their vehicles cause an accident."[126] As far as the car industry is concerned, liability does not seem to be a big cause for alarm.

Car companies could stand to benefit from accepting all liability. If autonomous cars are as safe as their creators claim, then the rate of accidents should go down, leading to less liability for manufacturers. Offering full

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120. Donal Power, *Self-Driving Car Market Worth Trillions by 2030?*, READWRITE (June 8, 2016), http://readwrite.com/2016/06/08/self-driving-cars-speeding-toward-2-6-trillion-market-2030-tl4/ [https://perma.cc/4XKT-VAA2].

121. Jonathan Schaeffer, *Canada Must Focus Its AI Vision If It Wants to Lead the World*, GLOBE & MAIL (Mar. 3, 2017), https://beta.theglobeandmail.com/report-on-business/rob-commentary/canada-must-focus-its-ai-vision-if-it-wants-to-lead-the-world/article34204949 [https://perma.cc/ZU2A-MGT6].

122. *See* Steven Shavell, *On the Social Function and the Regulation of Liability Insurance*, 25 GENEVA PAPERS ON RISK & INS. 166, 166 (2000) (describing how civil liability discourages undesirable behavior).

123. *See* Kyle Colonna, *Autonomous Cars and Tort Liability: Why the Market Will "Drive" Autonomous Cars Out of the Marketplace*, 4 CASE W. RES. J.L. TECH. & INTERNET 81, 97 (2012) (examining how potential civil liability has affected the development and use of autopilot technology on airplanes).

124. *See* F. Patrick Hubbard, *"Sophisticated Robots": Balancing Liability, Regulation, and Innovation*, 66 FLA. L. REV. 1803, 1870 (2014) (examining whether granting immunity to sellers of robots fosters innovation).

125. Danielle Muoio, *19 Companies Racing to Put Self-driving Cars on the Road by 2021*, BUS. INSIDER (Oct. 17, 2016), http://www.businessinsider.com/companies-making-driverless-cars-by-2020-2016-10/#tesla-is-aiming-to-have-its-driverless-technology-ready-by-2018-1 [https://perma.cc/4V4N-8LD9].

126. Ben-Shahar, *supra* note 19.

protection in the case of an accident is also a great marketing tool. Consumers are "irrationally afraid of self-driving cars—55 percent of consumers say that they would not ride in them."[127] A quick way to convince people to give autonomous cars a try would be to give a full warranty.

Another argument favoring finding liability for artificial intelligence developers is that to do otherwise could hurt the incentive to innovate.[128] This effect can be seen in the vaccine industry, where vaccine manufacturers enjoy wide immunity, which has resulted in the failure to update vaccines as new technology arises.[129] If the manufacturers aren't going to be held liable, then they lose much of their incentive to improve their product. Justice Sotomayor explained that insulation from liability can have a negative impact on innovation, stating that expansion of immunity "leaves a regulatory vacuum in which no one ensures that vaccine manufacturers adequately take account of scientific and technological advancements when designing or distributing their products."[130] Just as vaccine manufacturers lost incentive, so too could car manufacturers. "[O]ne disadvantage of these approaches is that by immunizing the internalization of accident costs from vehicle manufacturers, they may reduce the pressure on manufacturers to make incremental improvements in the safety of their autonomous systems."[131]

Everything discussed here considered, developers of artificial intelligence software have several arguments to prevent a finding of liability under the breach element. To rely on these arguments may prove misguided as there are multiple policy reasons and plenty of case history to support a finding of breach.

IV. Comparative Fault

The traditional common law doctrine of contributory negligence (the precursor to modern comparative fault) served as a way for "defendants who were indisputably guilty of seriously negligent conduct [to] escape[] liability. If such a defendant could prove a negligence case against the plaintiff—i.e., if the defendant could prove that the plaintiff, too, was guilty of negligent conduct . . . the defendant would not be liable."[132] In this way, contributory

127. *Id.*

128. *See* Marchant & Lindor, *supra* note 93, at 1340 (discussing how reducing liability for vehicle manufacturers decreases the incentive to improve vehicle safety).

129. *See* Meredith Melnick, Bruesewitz v. Wyeth*: What the Supreme Court Decision Means for Vaccines*, TIME (Feb. 24, 2011), http:/healthland.time.com/2011/02/024/bruesewitz-v-wyeth-what-the-supreme-court-decision-means-for-vaccines/ [https:perma.cc/CSU7-MQPC] (discussing the Supreme Court's 6–2 ruling shielding vaccine developers from liability after a vaccine that had not been updated since the 1940s caused brain damage and seizures in a teenager).

130. Bruesewitz v. Wyeth, 562 U.S. 223, 250 (2011) (Sotomayor, J., dissenting).

131. Marchant & Lindor, *supra* note 93, at 1340.

132. ROBERTSON ET AL., *supra* note 4, at 343–44.

negligence worked a lot like a superseding cause if the plaintiff herself was a superseding cause.

This style of no-recovery contributory negligence has its roots in England.[133] The rule made its way into the United States, but did not begin to resemble the modern version of the comparative fault rule until the middle of the 20th century.[134] Because of the slow adoption of comparative fault, the doctrine of superseding cause grew up in its absence and is very much a product of the environment it was raised in.[135] "Thus, the law on intervening acts and superseding causes . . . is a product of rules that did not permit a negligent tortfeasor to obtain contribution from another negligent tortfeasor, nor from even an intentional tortfeasor who was also a cause of the plaintiff's harm."[136] When the only option left to a judge would be to bar recovery, the use of superseding cause to distinguish between a highly culpable actor and a moderately culpable actor would seem very reasonable.[137] The dilemma was summed up nicely by Charles Carpenter in 1932:

> When a damage to the plaintiff occurs through the operation of several factors some of which are more substantial than the one for which the defendant is responsible, it may appeal to most persons as unjust, particularly if the defendant's factor is trivial, to permit the plaintiff to throw the whole loss on the defendant. As there is no human method of properly apportioning the loss between the plaintiff and defendant, either the one or the other having to bear the whole loss, it will in many instances seem more satisfactory to leave the loss where it originally falls.[138]

However, the problem laid out above is mostly a problem of the past as most jurisdictions have moved towards comparative fault.[139] The modern comparative fault system is less draconian and is described as follows:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person

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133. *See* Butterfield v. Forrester (1809) 103 Eng. Rep. 926 (K.B.) (introducing the theory of contributory negligence by holding that a plaintiff could not recover for injuries from an accident when he lacked ordinary care in avoiding the accident).

134. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 337–38 (5th ed. 1984).

135. Michael D. Green, *The Unanticipated Ripples of Comparative Negligence: Superseding Cause in Products Liability and Beyond*, 53 S.C. L. REV. 1103, 1110–11 (2002).

136. RESTATEMENT (THIRD) OF TORTS § 34 cmt. c (AM. LAW INST. 2010).

137. *See* Green, *supra* note 135, at 1111, 1113 (explaining the use of proximate cause and superseding cause doctrine to limit liability, especially for more culpable or less culpable defendants).

138. Charles E. Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 229, 233 (1932).

139. *See* Green, *supra* note 135, at 1112, 1114 (explaining the decline of "all-or-nothing" liability in cases with multiple tortfeasors).

> suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility of the damage . . . .[140]

In the modern system then, when multiple tortfeasors exist, like in your standard superseding cause case, both tortfeasors will have a percentage of the fault attributed to them. In many jurisdictions today, the concerns laid out by commentators like Charles Carpenter are much less relevant.[141] With comparative fault, a negligent plaintiff can still partially recover from a significantly more culpable defendant. Under comparative fault, the difficult questions of how much more culpable a defendant may be can now just be answered in percentage terms by the jury.[142] While the superseding cause doctrine is not dead and will not go away in the minds of judges for a long time, the doctrine has been drastically reduced in importance as comparative fault answers similar questions much more cleanly than superseding cause ever did.[143]

The adoption of comparative fault in the tort system is a radical change for the superseding cause doctrine. With the use of comparative fault, there is rarely ever a need to implement superseding cause.[144] "Under a 'proportional fault' system, no justification exists for applying the doctrines of intervening negligence and last clear chance . . . . [C]omplete apportionment between the negligent parties, based on their respective degrees of fault, is the proper method for calculating and awarding damages . . . ."[145] The doctrine of superseding cause has not been completely eliminated in favor of comparative fault—many jurisdictions do still rely on it.[146] But as discussed in the proximate cause section of this Note, the modern view of superseding cause is as a specific category of foreseeability problems, which should be treated no differently than any other foreseeability question.[147]

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140. *See* ROBERTSON ET AL., *supra* note 4, at 344 (quoting the Law Reform (Contributory Negligence) Act to explain the transition to the modern comparative fault system and its implementation into American jurisprudence).

141. *See, e.g.*, Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 836–37 (1996) (noting that comparative fault rules apply to cases of admiralty jurisdiction).

142. *See, e.g.*, *id.* at 840–41 ("The issues of proximate causation and superseding cause involve application of law to fact, which is left to the factfinder, subject to limited review.").

143. *See id.* at 837 (noting that there is no inconsistency between the superseding cause doctrine and "a comparative fault method of allocating damages").

144. Hansen v. Umtech Industrieservice Und Spedition, GBmbH, No. 95-516 MMS., 1996 WL 622557, at *11 (D. Del. July 3, 1996) (rejecting the claim that a plaintiff's conduct was a superseding cause because it was inconsistent with comparative fault).

145. Hercules, Inc. v. Stevens Shipping Co., 765 F.2d 1069, 1075 (11th Cir. 1985).

146. *See Exxon*, 517 U.S. at 838 ("[O]f the 46 States that have adopted a comparative fault system, at least 44 continue to recognize and apply the superseding cause doctrine.").

147. *See* Coyne v. Taber Partners I, 53 F.3d 454, 460–61 (1st Cir. 1995) (holding that attacks from the taxi union protestors might have been a foreseeable consequence of driving a different

The rise of comparative fault and the diminished role of superseding cause likely comes as bad news for artificial intelligence software developers. The software from these developers will inevitably be involved in a considerable amount of incidents moving forward. As was demonstrated earlier in this Note, a finding of negligence is very possible, and thus the jury will have fault points to assign during the comparative fault stage of the negligence analysis.

While on the one hand the modern trend of comparative fault has largely meant the end of the superseding cause doctrine as a complete shield for potential tortfeasors, it also means that the software developer is more likely to avoid being jointly and severally liable for the entire award of damages. The interplay between joint and several liability and comparative fault varies from jurisdiction to jurisdiction. In the jurisdictions where joint and several liability has survived the move to a comparative fault system, the artificial intelligence software developer could be stuck with a lot of liability.[148] If the software developer is given even a single fault point from the jury, then the developer would be liable for the entire damage award and would be responsible for going after the intervening cause to make sure the other culpable party pays its fair share of the damages. In many instances, the more culpable actor may be just an individual who used artificial intelligence software for nefarious purposes. Those individuals won't have very deep pockets, leaving a large chance that the artificial intelligence company will be stuck holding the bill.

However, in jurisdictions where joint and several liability has been abolished, the artificial intelligence companies may see a favorable result after the tort analysis. While the artificial intelligence developer will probably receive some fault points from the jury, the vast majority of fault points will lie with the more culpable intervening cause.[149] Without joint and several liability, those are fault points the software developer won't ever be on the hook for. While not as good of a result as avoiding liability altogether under the old system of superseding cause, at least the developer avoids the risk of being stuck with the entire amount of damages.

Conclusion

Liability for artificial intelligence software developments is a very real possibility. The interactions between a third party and artificial intelligence

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transportation service through the protest); Stagl v. Delta Airlines, Inc., 52 F.3d 463, 473–74 (2d Cir. 1995) (finding that injury from aggressive luggage retrieval at an airport could be a foreseeable result of a flight delay and an inadequate regulation of baggage retrieval); Williams v. United States, 352 F.2d 477, 481 (5th Cir. 1965) (stating that "the negligent act of a third party will not cut off the liability of an original wrongdoer if the intervening act is foreseeable").

148. ROBERTSON ET AL., *supra* note 4, at 372.

149. *See id.* (describing the benefit to defendants when comparative fault points are "siphoned off" to culpable third parties).

software that have resulted in harm to another will not be a definite shield against liability for the software developer. Many interactions between intervening third parties and the software may be sufficiently unforeseeable if they are risks an artificial intelligence company cannot guard against. However, due to the wide range of potential uses for artificial intelligence, many interactions will be deemed foreseeable. In any event, there is nothing special about an intervening cause that creates a different negligence analysis than any other cause of harm. The negligence analysis will come down to the question of foreseeability, as many cases do. With the rise of comparative fault, juries will be incentivized to assign at least some fault points to the artificial intelligence developer in lieu of focusing on the more culpable intervening force altogether. In jurisdictions with joint and several liability, this could be a disastrous result for artificial intelligence companies as they could be left to foot the bill.

Artificial intelligence developers need to take steps to protect themselves from looming liability. Tesla requires its buyers to sign a contract that mandates they agree to keep their hands on the wheel at all times, even when the autopilot is engaged.[150] Artificial intelligence companies should take a page out of Tesla's book. A contract requiring buyers of artificial intelligence products to use the products responsibly could go a long way. Alternatively, artificial intelligence companies could just exercise tight control over their software post-sale and perform routine patches and updates, which would prevent the software from growing too customized in unforeseen ways. Artificial intelligence companies may also want to lobby their representatives. As discussed previously, vaccine corporations enjoy widespread immunity.[151] Congress has also passed the Protection of Lawful Commerce in Arms Act to give manufacturers of guns and ammunition immunity from tort suits arising from use of their products for criminal purposes.[152] Artificial intelligence companies could find themselves in desperate need of a similar statute to protect them from misuse of their products.

Artificial intelligence companies need to be aware of the very real threat of tort liability. If they do not take steps to protect themselves from liability, these companies could be closing their doors as quickly as they have opened them. Not only would this be bad for the artificial intelligence community, but it would hurt society as a whole to lose innovators of such a promising new technology. The tort system requires a balance between protecting individuals from the potential harms of artificial intelligence and the free

150. Ben-Shahar, *supra* note 19.

151. 42 U.S.C. §§ 300aa-1 to -34.

152. Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–03 (2012).

development of such technology. Companies must carefully evaluate the foreseeable risks of the technology they are entering into the market and take steps to minimize those risks. If companies take these steps, they will not only help to minimize their eventual liability, but ensure that their artificial intelligence software is ready for the human world in which we live.

Weston Kowert

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