The Review of Litigation

Winter 2018 Pages 579 to 785 Vol. 36, No. 4
Published by The University of Texas School of Law

THE REVIEW OF LITIGATION

VOLUME 36 WINTER 2018 NUMBER 4

ARTICLES

NOTES

ADVISORY BOARD

THE REVIEW OF LITIGATION

VOLUME 36 WINTER 2018 NUMBER 4

ACKNOWLEDGMENTS

The Review of Litigation thanks its sponsors for their generous financial support:

Underwriter

Vinson & Elkins

Supporters

Jones Day
Sidley Austin

Associates

Beck Redden
Norton Rose Fulbright
Weil, Gotshal & Manges

SUBSCRIPTIONS

The Review of Litigation is published by The University of Texas School of Law Publications, four times a year, including Winter, Spring, and a Symposium Edition. *But see* PUBLICATION NOTE *infra*.

Annual subscriptions to *The Review* are available at the following rates:

$30.00 for all United States residents
$35.00 for subscribers outside the United States
$15.00 for single copies of the current volume

The Review offers a discount on the regular subscription rate to the following individuals:

Alumni members of *The Review of Litigation*
Students, faculty, and staff of The University of Texas School of Law
Members of the Litigation Section of the Texas Bar

To subscribe to *The Review of Litigation*, inquire into discounts, or to indicate a change of address, please write to:

The University of Texas at Austin
School of Law Publications
P.O. Box 8670
Austin, TX 78713-8670

www.texaslawpublications.com

For any questions or problems concerning a subscription, please contact our Business Manager, Paul Goldman, at (512) 232-1149. Subscriptions are renewed automatically unless timely notice of termination is received.

REPRINTS AND BACK ISSUES

William S. Hein & Co. has purchased the back stock and reprint rights to all previous volumes of *The Review of Litigation*. Please direct reprint requests by written inquiry to:

William S. Hein & Co., Inc.
1285 Main Street
Buffalo, NY 14209

www.wshein.com
Tel: (800) 828-7571 / Fax: (716) 883-8100

Back issues can also be found in electronic format for all your research needs on HeinOnline: http://heinonline.org.

Issue and article copies of *The Review of Litigation* are available on 16mm microfilm, 35mm microfilm, and 105mm microfiche. Send written requests to:

University Microfilms
300 North Zeeb Road
Ann Arbor, MI 48106

COPYRIGHT

MANUSCRIPT SUBMISSIONS AND EDITORIAL POLICIES

The Review of Litigation is published four times annually by The University of Texas School of Law Publications. The editorial board and The University of Texas are not in any way responsible for the views expressed by the contributors.

The Review welcomes articles on litigation-related issues of a national or international scope. All submissions are reviewed throughout the year on a rolling basis.

Please send article submissions, accompanied by a curriculum vitae and a cover letter, to the attention of the Chief Articles Editor. Manuscripts should conform to *The Bluebook: A Uniform System of Citation* (20th ed. 2015), published by the Harvard Law Review Association. Additionally, submissions should, to the extent feasible, follow *The Chicago Manual of Style* (16th ed. 2014) and the *Manual on Usage & Style* (12th ed. 2012), published by the Texas Law Review Association. Manuscripts should be typewritten and footnoted where necessary. *The Review* welcomes electronic submissions, which may be emailed to: TheReviewofLitigation@gmail.com.

All submissions inquiries and requests for review should be directed to the Chief Articles Editor at:

The Review of Litigation
The University of Texas School of Law
727 East Dean Keeton Street
Austin, TX 78705-3299

Tel: (512) 471-4386
Email: TheReviewofLitigation@gmail.com
www.TheReviewofLitigation.org

GIVING

Please consider supporting *The Review* this year with a financial contribution. In order to successfully hold and promote major events we require financial support. Gifts of any amount will be recognized in every issue of *The Review*. Even a small contribution will help us ensure that *The Review* remains a premier specialty journal and continues to train capable editors. Please view our giving information at http://www.thereviewoflitigation.org/becomeasponsor/.

THE REVIEW OF LITIGATION

2016 VOLUME 36 2017

Internal Separation of Powers, Compensating Adjustments, and Court Rulemaking

Mark Moller*

ABSTRACT

The Supreme Court's interpretation of the Federal Rules of Civil Procedure has attracted a bevy of critics. The Court, they note, vacillates between "statutory" and "antistatutory" approaches to interpreting the Federal Rules of Civil Procedure. This, the critics charge, is just plain incoherent. The Court needs to make up its mind about how to interpret the Federal Rules.

This article argues that these criticisms misfire because they don't take into account "compensating adjustments." In domains like administrative law, the Court compensates for the perceived underenforcement of constitutional values in formal constitutional doctrine—by giving voice to those values through sometimes unconventional interpretations of ordinary statutes.

Enclaves of civil procedure, it turns out, are also characterized by compensating adjustments. And missing this dimension of the Court's Federal Rules interpretations has led the critics astray. Viewed from the vantage of ordinary interpretive doctrine, the Court's pattern of Federal Rules interpretations in these enclaves looks *strange and incoherent. But viewed from the vantage of the literature on compensating adjustments, that pattern, I will argue, is coherent and unremarkable.*

---

* Associate Professor of Law, DePaul University College of Law. Thanks to Elizabeth Porter, David Marcus, Josh Sarnoff, Mark Weber, Stephen Siegel, Andrew Gold, and readers at a DePaul faculty workshop for helpful comments on this piece. All errors are mine alone.

INTRODUCTION

In different contexts, the Supreme Court pursues what Adrian Vermeule calls second-best constitutionalism or compensating adjustments—a plastic process of adapting non-constitutional law to compensate for the underenforcement of constitutional values in formal constitutional doctrine.[1]

Scholars of civil procedure haven't paid attention to the literature on compensating adjustments. But they ought to. That literature sheds light on a simmering controversy over how the Supreme Court should interpret the Federal Rules of Civil Procedure.

Critics argue that the Supreme Court can't make up its mind about how to approach the Federal Rules. Sometimes it pronounces that procedural reform must be adopted "through the rulemaking process and not through . . . adjudication."[2] And it, accordingly, interprets the Rules like statutes—based, that is, on evidence of the rulemakers' intent.[3]

Other times the Court takes an "antistatutory" approach.[4] It imposes procedural reform from on high—adopting constructions that reflect the Court's preferred procedural policy without reference to the intent of the rulemakers.[5]

---

1. *See generally* Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421 (2003). *See also* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1750–57 (2005) (discussing the Rehnquist Court's use of compensating adjustments in the service of vertical federalism).

2. Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 125–26 (2015). The "rulemaking process" is the system of quasi-administrative bodies within the judicial branch charged with overseeing the process of amending the Federal Rules. *See, e.g.*, Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 892 (1999) (describing the contemporary rulemaking process).

3. *See, e.g.*, Porter, *supra* note 2, at 126 ("In its statutory mode, the Court disclaims its power to influence the Rules. It frequently admonishes litigants and lower courts that changes to the Rules must come through the rulemaking process and not through judicial adjudication.").

4. *Id.*

5. *Id.* (The Court sometimes "eschews the tools of statutory interpretation in favor of the hallmark rhetorical techniques of common-law decision-making . . . ."); David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 928 (2011) (noting that sometimes "the Court opts for rule applications driven by policy preferences instead of textual exegesis").

The Court's indecisiveness has split proceduralists into warring camps, each arrayed in favor of one approach or the other.[6] Both camps, though, agree on one thing: The Court's willingness to "toggl[e]"[7] between "statutory" and "antistatutory" approaches to Rules interpretation is incoherent.[8]

This article stakes out new territory by questioning that premise. It is sometimes plausible, I will argue, to view the Supreme Court's "statutory" and "antistatutory" modes of Rules interpretation as flip-sides of the same coin: as inter-locking parts of a judicial strategy of compensating adjustment, designed to mitigate the underenforcement of constitutional norms in civil procedure.

The claim here differs from the uncontroversial observation that the Court sometimes employs an avoidance canon when interpreting procedures raise hard questions under existing constitutional doctrine.[9] Rather, my focus is on the Court's strategy for protecting constitutional values that go *un*enforced in existing constitutional doctrine.[10] When these values are at stake, I argue that the Court compensates for their under-enforcement in constitutional

---

6. For scholars that advocate in favor of some version of the Court's "statutory" approach to the Rules, see Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099 (2002); Marcus, *supra* note 5; Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188 (2012). *See also* Porter, *supra* note 2, at 150–53 (summarizing this position). For scholars favoring the "antistatutory" approach, see Joseph P. Bauer, *Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720 (1988); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039 (1993). *See also* Porter, *supra* note 2, at 148–50 (discussing Bauer and Moore).

7. Porter, *supra* note 2, at 156.

8. *See, e.g.*, *id.* at 156, 175 (arguing the court "toggles" incoherently between statutory and antistatutory modes of Rules interpretation without a guiding "theoretical framework"); Marcus, *supra* note 5, at 928 (arguing that "the Supreme Court's interpretive methodologies for the Federal Rules vary wildly and inexplicably").

9. *Cf.* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1584–85 (2000) (distinguishing compensating adjustments designed to mitigate constitutional under-enforcement from the traditional avoidance canon).

10. For the seminal description of under-enforced constitutional norms, *see generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); *see also* Young, *supra* note 9, at 1602–08 (distinguishing constitutional under-enforcement and constitutional doubt as separate focii of interpretive canons).

doctrine in a way that leaves its mark on the interpretation of ordinary civil procedure.[11]

I illustrate the relationship between the Court's interpretive moves in civil procedure and compensating adjustments through a case study, which focuses on the Burger and Rehnquist Courts' response to the rise of private attorneys general in the 1960s. This is a classic area where, from one perspective, the constitution goes underenforced: conservatives often complain, rightly or wrongly, that the modern compass for private attorneys general in existing Article III doctrine is inconsistent with the original understanding.[12]

The Burger and Rehnquist Courts addressed this concern through an institutional settlement: In the 1970s and 1980s, the Court required Congress to approve the private attorney general enforcement model (to the extent it is not prohibited by formal constitutional doctrine).[13] From conservatives' standpoint, this compensated for the underenforcement of Article III's substantive constraints (properly understood) on the private attorney-general enforcement model by turning the inertia-prone political process into a check against the expansion of that model at the federal level.

In the 1990s, the Rehnquist Court extended the settlement to civil procedure, an area that Congress has turned over to the Supreme Court. The Rehnquist Court did so by treating its own inertia-prone rulemaking bureaucracy as the centerpiece of a system of "internal" separation of powers—a substitute for congressional checks that the

---

11. *See* Young, *supra* note 1, at 1834–36 (arguing that compensating for constitutional under-enforcement often involves a "collaborative" strategy consisting of "process-based" protections for under-enforced values reinforced through interpretive moves).

12. *See, e.g.*, Robert J. Pushaw, Jr., *Fortuity and the Article III "Case": A Critique of Fletcher's "The Structure of Standing"*, 65 ALA. L. REV. 289, 301 (2013) (discussing the conservative pushback against the private attorney general model); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1182–98 (2009) (describing the sources of conservative opposition to the private attorney general model).

13. The Court's Article III standing cases have taken certain types of private attorney general suits—what I call the "pure" private attorney general, in which a private litigant pursues purely public interests—offline in a series of cases culminating in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The focus of this Article is on the Court's treatment of what might be called "impure" private attorney general actions—representative actions in which private enforcers are empowered to "advance[] the policy inherent in public interest legislation" by simultaneously pursuing their own remedial interest and the interests of a "significant class" of third parties. *See* William B. Rubenstein, *On What a Private Attorney General Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2149 (2004) (quoting BLACK'S LAW DICTIONARY).

settlement exploited to restrain the private attorney general in other areas.[14]

In civil procedure, the private attorney general model is implemented through the class-action rule, Federal Rule of Civil Procedure 23. Here, as in other areas, the Court put its settlement into action through interpretive moves. The Court rejected plausible, expansive—and, under formal doctrine, constitutionally permissible—constructions of Rule 23. It required these constructions instead to get the explicit approval of the federal rulemaking bureaucracy. Because the rulemaking bureaucracy is notoriously deadlocked, acting incrementally if at all, this checked the expansion of the private attorney general concept within civil procedure.

These moves aren't always above board. The Court, to be sure, sometimes overtly invokes a norm of deference to the rulemakers in order to shunt decisions that expand the class action to the rulemaking bureaucracy. Other times, though, the Court simply imposes a constraining default construction on the class action rule, while implicitly leaving an override to the rulemaking process.

Viewed through the lens of ordinary interpretive doctrine, this looks incoherent. But viewed from the vantage of the literature on compensating adjustments, this pattern is coherent and unremarkable: The same pattern of overt and implicit clear statement norms, employed to reinforce process-based protections for under-enforced constitutional values, is a staple of compensating adjustments in other doctrinal domains.[15]

By excluding compensating adjustments from their account of interpretive lay of the land, the Court's critics get off on the wrong foot. They not only paint the Court's interpretive method in procedure

---

14. *Cf.* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316–17 (2006) (arguing that "[t]he first-best concept of 'legislature v. executive' checks and balances must be updated to contemplate second-best 'executive v. executive' division" which is accomplished by turning the executive civil service bureaucracy into a system of "internal separation of powers").

15. *Cf.* Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 401–03 (2015) (arguing the D.C. Circuit compensates for the perceived underenforcement of constitutional values in formal constitutional doctrine in a number of ways, including through interpretive moves applied to ordinary statutes); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 468–69, 476 (1989) (noting, with a focus on the administrative context, that the Court has interpreted open-ended statutes consistently with both explicit and implicit interpretive defaults designed to mitigate constitutional underenforcement, attracting charges of incoherence); Young, *supra* note 1, at 1843–44 (noting that compensating adjustments in the domain of vertical federalism are often not explicit, and urging the Court to be "more explicit").

as less coherent than it is. They also end up treating the normative case for their preferred fix to the Court's interpretive regime as less complicated than it turns out to be.

The plan of the article is as follows. Part I reviews the preexisting literature on the Court's role in the rulemaking process.

Part II then introduces compensating adjustments and offers a taxonomy of adjustments identified in existing literature.

Part III is the article's case study. It describes how the Court's approach to Rules interpretation has been shaped by a mix of different compensating adjustments that are the hallmark of the Burger and Rehnquist Courts' private attorney general settlement. Part A traces the early phase of the settlement, which leveraged inter-branch checks to rein in the growth of private attorney general actions. Part B then traces how the settlement expanded into civil procedure, shaping both the Court's interpretive methods and its relationship to the rulemakers in key enclaves.

Part IV concludes by discussing how this account enriches our understanding of procedural interpretation and the Court's rulemaking role.

I. THE GREAT RULEMAKING DEBATE

A. The Court's Inconsistent Approach to Interpreting the Federal Rules

At an abstract level, the Court's role in the rulemaking process is clear. The Rules Enabling Act delegates the job of formulating federal procedure to the Supreme Court.[16] The Court in turn sits atop a larger rulemaking bureaucracy—a bureaucracy the Court had a substantial hand in designing.[17]

Amendments are initially drafted through subject-matter-specific Rules Advisory Committees and then pass through different tiers of review within the lower level bureaucracy before final review by the Supreme Court.[18] Amendments that secure the Court's approval become effective at the end of a statutorily prescribed period without

16. 28 U.S.C. § 2072(a) (2012) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.").

17. Bone, *supra* note 2, at 893–97 (describing the Court's creation of the Civil Rules Advisory Committee).

18. *Id.* at 892–93 (describing structure of the modern rulemaking system).

any need for congressional action.[19] During that period, though, Congress can review the amendment and take action to modify or reject it if it sees fit (something it has rarely done).[20]

Yet scholars and the Court itself have expressed uncertainty about the Court's *interpretive* power over Rules adopted through this process. Given that "the Court's position at the top of the administrative hierarchy effectively cuts it out of the process of initial revisions," it "is logical," writes Elizabeth Porter, "that the Court would use its most powerful tool—adjudication—to contribute its voice to the agenda and process."[21]

In some cases, though, the Court seems to conceive of its interpretive role in quite a conventional way—an approach on display in, for example, *Amchem Products, Inc. v. Windsor*,[22] a seminal case in which the Court adopted narrow interpretations of the scope of federal courts' authority to certify settlement class actions. In *Amchem*, the Court describes the rulemaking bureaucracy as a kind of stand-in or surrogate for Congress, to which the Court owes the same obligation of fidelity.[23]

Hence, the *Amchem* Court, in the course of reversing the certification of a sprawling asbestos settlement class, framed its task as divining the "intent" and "design" of the rulemakers—and paid close attention to the text of Rule 23 and the records of Advisory Committee hearings.[24] Porter notes that, in cases like this, the Court comes across as "practically just another member of the public."[25] It acts as though its sole power to "influence the Rules is limited to suggesting changes and—at the outside—vetoing a proposed rule with which it disagrees."[26]

Sometimes, though, the Court has interpreted the Federal Rules in ways that ignore features of their text and make no mention of the rulemakers' intent. Professor Porter argues that these exhibit what she calls the Court's "managerial" mode of procedural interpretation—one in which the Court seems to be "strategizing and

---

19. *Id.* at 892.

20. *Id.* at 893 ("[T]he assumption at the time of the Act's adoption in 1934 was that Congress would use its veto power only sparingly, and from 1934 until 1973, Congress never vetoed a rule.").

21. Porter, *supra* note 2, at 147.

22. 521 U.S. 591 (1997).

23. *Id.* at 622 ("Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted . . . .").

24. *Id.* at 625 ("[C]ertification cannot be upheld, for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design.").

25. Porter, *supra* note 2, at 152.

26. *Id.*

innovating to achieve normative goals."[27] Although critics of the Court's "managerial mode" usually cite *Bell Atlantic v. Twombly*[28] and *Ashcroft v. Iqbal*,[29] two controversial pleading decisions, Porter also thinks this mode also appears in the Court's more recent class-action decisions.[30]

Wal-Mart Stores, for example, dealt with Rule 23(a)(2)'s commonality standard and the scope for certification of Rule 23(b)(2). The Court, said Porter, "unmistakably shifts interpretive modes" as it "move[d] between the two questions."[31] And she thinks its interpretation of the "first question" was "firmly in managerial mode."[32] Justice Scalia's opinion "ignore[d] the standard of review and barely glance[d] at the text of [Rule 23](a)(2)."[33] Nor did the Court "[a]ttempt to divine the intent of the Rule 23 drafters by any of the traditional approaches of statutory interpretation."[34] Rather, "[Rule 23](a)(2) play[ed] an oddly secondary role."[35] Overall, Porter thinks "this part of *Wal-Mart* radiates a sense of the Court's inherent power to set litigation norms through common law rulings—a sense of managerial control."[36]

B. The Scholarly Response

The Court's schizophrenia—its seeming vacillation between deferring to the rulemakers and dynamically shaping procedure via interpretation—has prompted a growing scholarly literature examining the Court's role in the formulation of procedural rules. Professor Porter's article, *Pragmatism Rules*, offers a great overview of that debate.[37]

"Scholars in the 1980s and 1990s," she writes, were "frustrated with the Court's new emphasis on textualism in its Rules decisions."[38] The pushback against the Court's textualist interpretations, led by Joseph Bauer and Karen Nelson Moore, emphasized the combined force of (1) the Court's inherent power over procedure and (2) the

27. *Id.* at 137.
28. 550 U.S. 544 (2007).
29. 556 U.S. 662 (2009).
30. Porter, *supra* note 2, at 127.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *See generally id.*
38. *Id.* at 148.

Rules Enabling Act, which imbued the Court with Congress's own plenary power over federal procedure, removing, in the process, concerns that the Court's inherent authority was not potent enough to ground enactment of the revolutionary Federal Rules.[39]

Given all of this—the Court's inherent powers over rulemaking and the breadth of the Enabling Act's delegation—Bauer and Moore argued that the Court has ample authority to take an "expansive" view of the Rules in order "to do justice between the parties before the court."'[40]

For Moore, the appeal to Supreme Court's interpretive discretion also had a constitutional dimension to it. In her view, the Court's Rules formalism is not only an inappropriate interpretive methodology—one that slights the Court's ample sources of authority to adopt liberal, dynamic interpretations of the Rules.[41] Rules formalism also slights the Court's role as the oracle of larger constitutional values, like due process-based access-to-justice values, that ought to shape Rules interpretation.[42]

"More recently," Porter writes, "a handful of scholars have taken" a stance opposed to Bauer and Moore in "response to a different problem—namely a perception that the Court is ignoring the Rules in favor of its own policy preferences."[43] Driven by their distaste for cases like *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, which narrow litigants' access to the courts, these scholars argue that the Court ought to defer major changes to civil procedure to the Civil Rules Advisory Committee.[44]

The argument turns in part on an appeal to fidelity to Congress. Although the rulemaking system is in significant part a creation of the Supreme Court—the Civil Rules Advisory Committee and other Advisory Committees can, for example, trace their origin to the

---

39. Bauer, *supra* note 6, at 727; Moore, *supra* note 66 at 1040. *See also* Porter, *supra* note 2, at 148–50 (discussing Bauer and Moore).

40. Bauer, *supra* note 6, at 720.

41. Moore, supra note 5, at 1040.

42. *Id.* at 1096 (arguing Court's interpretation of the Rules should take into account "[f]airness and due process concerns" for litigants).

43. Porter, *supra* note 2, at 150.

44. Struve, *supra* note 6, at 1102 (arguing that "the terms of [Congress's] delegation [of rulemaking authority to the Court] make clear that alterations to the Rules should undergo the process specified in the Enabling Act, rather than taking effect through judicial fiat in the course of litigation"); Marcus, *supra* note 5, at 937–39 (arguing institutional competence considerations favor a statutory approach to Rules interpretation); Mulligan & Staszewski, *supra* note 6, at 1215–27 (arguing, based on an analogy to administrative procedure, that major rulemaking changes should be adopted only after notice-and-comment rulemaking process.).

Court—Congress has also regulated the rulemaking process, most notably through the 1988 Judicial Improvements Act.[45]

The 1988 Act regulated the structure of the lower-level rulemaking bureaucracy—codifying representation of diverse interest groups and stakeholders on the Advisory Committees and requiring the committees to make their work open to the public, publish notice of proposed regulations, and solicit public comments (a requirement similar to the notice-and-comment requirements applicable to agency rulemaking).[46]

Catherine Struve argues the 1988 changes are a "clear signal that Congress intended" the Court to defer to the rulemaking bureaucracy.[47] Struve's argument trades on the idea that Congress would not bother to regulate the lower level bureaucracy if it did not envision that all rulemaking would pass through it.[48] Other scholars, like David Marcus, Lumen Mulligan, and Glen Straszewski, have supplemented this fidelity-to-Congress argument with functional arguments that appeal to the rulemakers' superior rulemaking competence.[49]

---

45. Judicial Improvements and Access to Justice Act, Pub. L. No. 100–702, 102 Stat. 4649 (1988) (codified at 28 U.S.C. § 2073 (2006)).

46. Bone, *supra* note 2, at 902–03 (describing 1988 amendments); Brooke Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 278–79 (2009) (discussing the history of the Judicial Improvements Act).

47. Porter, *supra* note 2, at 151 ("To Struve, the 1988 amendments to the Enabling Act represent . . . a clear signal that Congress intended to create a more transparent, accountable process for vetting the Federal Rules—one that significantly reduced the Court's adjudicative power over policy in favor of agency-like rulemaking."); Struve, *supra* note 6, at 1105 (noting that the 1988 amendments manifest "a trend away from unilateral Supreme Court decision making and toward a process that includes multiple gatekeepers").

48. Struve, *supra* note 6, at 1126 ("[I]f the Court departed from the text and Notes of a Rule to serve its views of purpose and policy—as Moore advocates—such an interpretive practice would contravene the decision-making structure set by the Enabling Act [as amended in 1988]."). Struve also offers a textual argument—noting that while the Act vests the Court with the power to prescribe the rules, the "authorization 'is subject to the method of prescribing' set forth in the Act." *Id.* at 1126–27.

49. Marcus, *supra* note 5, at 936 ("For procedural rules, a number of institutional considerations, such as the rulemaking committees' superior procedural expertise, dovetail with the guidance Professor Struve believes the Rules Enabling Act yields."); *see generally* Lumen N. Mulligan & Glen Straszewski, *Institutional Competence and Civil Rules Interpretation*, 101 CORNELL L. REV. ONLINE 64 (2016) (arguing, based on comparative institutional competence considerations, that interpretations that reflect major policy changes or alterations of settled understandings of the Rules should be left to notice-and-comment rulemaking); Mulligan & Straszewski, *supra* note 6, at 1215–27 (same).

Although Struve's argument has proven influential among proceduralists in recent years, her position hasn't won the day, either. Critics note that the 1988 amendments are silent about the Court's ability to override the administrative process. Given the Court's repository of inherent power over rulemaking, that's a problem: Courts generally don't infer that Congress has placed constraints on a coordinate branch's exercise of its inherent constitutional powers from legislative silence.[50]

Moreover, the idea that Congress might impose some limits on the lower level bureaucracy, while leaving the Supreme Court free to side-step that bureaucracy, isn't as strange as it sounds. The bureaucracy lacks the prestige of or institutional trust engendered by the Court, and so the 1988 amendments may be less a ringing endorsement of the primacy of the rulemakers, than a mark of unease with the rise of the bureaucracy as a seemingly independent legislative force, unmediated by meaningful Supreme Court oversight.

The upshot, as Porter notes, is that "it is unclear what effect, if any, [the 1988 amendments] ha[ve] on the Court's formal rulemaking power," including its power to take back initiative from the rulemakers through Rules interpretation.[51]

C. Complicating the Debate

There are still other ways of theorizing the Court's relationship to the rulemakers. Professor Porter, for example, offers a compromise based on an analogy to administrative law. "In the administrative law context, Congress is the law giver, while the agencies interpret and implement Congress's will," "[i]n the analogous context of the Rules, the Court as rulemaker is the lawgiver, and it is the lower courts that are charged . . . with implementing the broad strokes of the law in more particularized contexts."[52]

Rather than focusing on "the tug-of-war between the Supreme Court and the rulemaking committees," she argues, consistent with this administrative-law analogy, that the effort to theorize the Court's interpretation of the Rules should shift focus to the Court's

---

50. *See, e.g.*, Chambers v. Nasco, Inc., 501 U.S. 32, 47 (1991) ("'we do not lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power") (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982)); *see also* Marcus, *supra* note 5, at 935 (noting that in the parallel administrative context, "the Court has never equated [legislative] conditions on [the process of exercising] delegated power with placing limits on the prerogative of the rulemaker, i.e., the agency, to interpret rules of its own devise").

51. Porter, *supra* note 2, at 145.

52. *Id.* at 184.

relationship with the "agencies" in her analogy, that is, the district courts.[53] For her, the best framework for thinking through this relationship is the "weak" version of *Chevron* advocated by Justices Stevens and Breyer, which favors non-deference to agencies in cases raising pure questions of statutory interpretation, but also counsels deferring to agencies in hard cases where questions "can only be given concrete meaning through a process of case-by-case adjudication."[54]

She argues for a comparable approach to Rules interpretation. Where the Rules raise questions akin to pure statutory interpretation problems, the Court should decide these cases without deference to her agency analogue, the district court. But where the Rules employ vague standards that require case-specific applications—the Court ought to get out of the way and defer to the district court's application of the Rule in question.[55] She argues the Court can build on this analogy by clarifying the standard of review—adopting a de novo standard when Rules raise "pure question[s] of statutory construction" and an abuse of discretion standard when Rules pose questions "which can only be given concrete meaning through a process of case-by-case adjudication."[56]

The result, of course, is that district courts would exercise quite broad equitable discretion under the most open-ended Federal Rules.

D. Even More Complications: Rulemaking and Compensating Adjustments

Despite the seeming disagreement among scholars who study the rulemaking process, all of these different approaches have something in common. They frame the Court itself as, in some way, off course. It is either (1) unbound—pursuing inappropriate approaches to Rules interpretation at the expense of some overriding set of legal norms (constitutional and equitable values according to Moore; fidelity to a legislatively mandated rulemaking process according to Struve, Marcus and Mulligan; or deference to trial judges, according to Porter),[57] or (2) incoherent—see-sawing indecisively

53. *Id.*

54. *Id.* at 179 (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446, 448 (1987)).

55. *Id.* at 179–84.

56. *Id.* at 179 (quoting *Cardoza-Fonseca*, 480 U.S. at 446, 448).

57. *Id.* at 156 (characterizing the Court's "managerial" interpretations as "almost unbounded").

between inconsistent approaches to Rules interpretation without any guiding theoretical framework.[58]

Below, I complicate our view of the Court by arguing that critics of the Court have missed an important dimension of its Federal Rules decisions.

In some contexts, the Court compensates for the underenforcement of constitutional values in constitutional doctrine by adjusting other areas of the law to provide those values a form of second-best protection. These compensating strategies often play out in interpretive law. The Court, first, interprets subconstitutional law consistently with the underenforced constitutional values it is concerned about. And, then, it exploits the incremental nature of the political process to entrench those interpretations—by insisting only Congress can override them. Often the Court draws cover for this strategy by appealing to a particular account of separated powers.

I argue that the Court has pursued a similar strategy in the procedural domain, but with a twist: It has retrofitted the rulemaking bureaucracy into a substitute for the entrenching role Congress plays in other contexts. It interprets some key procedures consistently with under-enforced constitutional norms. The Court then shifts the choice to override those interpretations to the slow-moving, incremental rulemaking process—sometimes making Struve-like arguments about the primacy of the rulemaking process as a cover—in order to entrench these norms in the fabric of procedural law.

The account reconciles the Court's seemingly inconsistent modes of interpretation. Its strategy of compensating adjustment appeals to the primacy of a quasi-legislative body but combines these appeals with departures from ordinary interpretive practice. The literature on compensating adjustments offers a plausible way to understand this pattern as both coherent and faithful to an underlying set of legal norms, albeit ones that are exogenous to ordinary procedural law.

In the next two Parts, I develop this claim through a case-study, which focuses on the Court's strategy for compensating for the perceived underenforcement of Article III constraints on private attorneys general. To set up this case study, the next Part begins by

58. *Id.* ("When it wants to declaim interpretive power, the Court interprets the Rules narrowly using traditional statutory interpretation tools, and urges dissatisfied parties to seek recourse through rulemaking. But when it is frustrated with the rulemaking process or otherwise wants to recalibrate litigation norms, the Court toggles seamlessly into the other paradigm—the paradigm of broad, almost unbounded, common-law power.").

summarizing the literature on compensating adjustments, which is central to the account that follows.

II. COMPENSATING ADJUSTMENTS AND THE CONSTITUTIONAL SECOND BEST

A. A Short Introduction to Compensating Adjustments

The Constitution occasionally goes unenforced. Constitutional commitments prove difficult to operationalize through constitutional doctrine. Or meaningful protection of the Constitution becomes unsustainable in the face of political pressure.

Lawrence Sager, decades ago, argued that judicially underenforced constitutional norms are not really *un*enforced. When the Court is unable to give voice to constitutional values through formal doctrine, those values often inspire the political process to action and so take on a new life through statutes and regulatory elaboration.[59]

But it turns out that judicially underenforced norms aren't always *judicially un*enforced, either. Even if the Supreme Court has failed to incorporate some constitutional commitments into formal constitutional doctrine, it sometimes mitigates this lapse by adjusting other areas of law to give these values a kind of "second-best" protection.

Adrian Vermuele terms this mitigating strategy "second-best constitutionalism" (after the economic theory of the second-best developed by Richard Lipsey and Kelvin Lancaster) or, alternatively, the strategy of "compensating adjustments"—and it seems to explain a pattern of decisionmaking that run through various areas of law.[60]

Ernest Young—one of the leading defenders of compensating adjustments—offers the example of the Rehnquist (and early Roberts) Courts' federalism caselaw.[61] The New Deal had shown the old Commerce Clause doctrine to be unworkable, thanks to the difficulty

---

59. *See generally* Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Norms*, 91 HARV. L. REV. 1212 (1978).

60. Vermeule, *supra* note 1, at 422 (discussing "second-best constitutionalism" and the "second-best idea of compensating adjustments").

61. Young, *supra* note 1, at 1733, 1758 (arguing that several of the Rehnquist Court's federalism cases "are best understood as compensating adjustments meant to push the system back toward balance"); *see also* Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival after* Gonzales v. Raich, 2005 SUP. CT. REV. 1; Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1 (2004) [hereinafter, Young, *Two Federalisms*].

of drawing lines between national and local economic activity.[62] To compensate for the collapse of doctrinal limits on the federal commerce power, the Court folded the value of federal-state "balance"—what Young views as the core federalism commitment animating the Commerce Clause and other inputs into the structure of vertical federalism—into keystone regulatory schemes that regulate areas of commerce traditionally left to states.[63]

One of Young's centerpiece examples is *Gonzales v. Oregon*,[64] where the Court confronted efforts by then-Attorney-General John Ashcroft to criminalize drugs administered under Oregon's pro-euthanasia law. Despite arguments by originalists that this power grab exceeded the federal commerce power, striking down that power grab under the Commerce Clause wasn't in the cards, thanks to the Court's then-recent decision in *Gonzales v. Raich*.[65] Instead, the Court protected the value that underlies the Commerce Clause, state regulatory autonomy, interpretively—by construing the authority given the Attorney General by the Controlled Substances Act "in light of the traditional primacy of the states in regulating the medical profession."[66]

---

62. Young, *supra* note 1, at 1782 (noting that "policing separate state and federal spheres" via Commerce Clause doctrine "turned out to be a highly complex and ultimately unsustainable task"); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 153–67 (2001) (surveying the line-drawing problems confronted by early Commerce Clause doctrine).

63. *See, e.g.*, Young, *supra* note 1, at 1801–02 (describing federal-state balance as the Constitution's "core" structural commitment); *id.* at passim (discussing the Court's promotion of the norm of balance through adjustment of subconstitutional law); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 458 (2007) (discussing statutory schemes that play a core role in constituting the federal-state relationship and noting that "where a statutory scheme plays [such] a constitutive role . . . courts should not hesitate to employ normative canons of statutory construction that reflect the constitutional values underlying the relevant aspect of the structure") [hereinafter Young, *Outside*].

64. 546 U.S. 243 (2006).

65. Young, *Outside*, *supra* note 63, at 430.

66. Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CALIF. L. REV. 1371, 1387 (2010) [hereinafter Young, *Continuity*]; *see Oregon*, 546 U.S. at 274 (noting "the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power"). *See also* Young, *Outside*, *supra* note 63, at 429–33 ("[T]he Court's reading of the statute was plainly influenced by a baseline assumption that primary responsibility for regulating the medical profession remains with the states.").

The result "remand[ed]" the decision to expand federal authority over euthanasia to Congress, where the "inertial barriers" of "re-enact[ing] legislation" tend to entrench the limits on federal authority that the Court has read into the statute.[67] This, he argues, compensates for collapse of the hard protections of Commerce Clause doctrine by replacing them with "soft" interpretive and process-based protections.[68]

More recently Cass Sunstein and Adrian Vermeule (writing from a less sympathetic standpoint) see the same process of compensating adjustments in administrative law. There, they write, conservative and libertarian judges on the D.C. Circuit have developed judge-made doctrines that "lack solid support in the standard legal sources" in an attempt to "compensate for perceived departures during the New Deal from the baseline of the original constitutional order."[69] These judges have done so, in part, by construing the Administrative Procedure Act or agencies' organic statutes consistently with what they view as the Constitution's underenforced commitments.[70]

This is not the place to mount a defense of compensating adjustments. (Ernest Young's work, which appeals to a synthesis of originalism and Burke-inspired common law constitutionalism, offers the best version.)[71] But whether or not you think the strategy is

---

67. Young, *Two Federalisms*, *supra* note 61, at 91 ("While Congress may still reinstate its earlier decision, the inertial barriers to doing so are often high.").

68. *Id.* ("[S]oft rules may go a long way to stem centralization, even though they leave final decision to Congress."); Young, *Outside*, *supra* note 63, at 468 ("[t]he obsolescence of canonical boundaries for national power means that statutory boundaries like those in the CSA . . . will increasingly define the federal balance," making the Court's interpretive inter-weaving of "constitutional values" into its construction of these statues "essential" to maintaining a proper balance); Young, *Continuity*, *supra* note 66, at 1388 ("there is little doubt that—owing to [line-drawing] difficulties [under the Commerce Clause]—the constitutional principle of limited and enumerated powers is 'underenforced.'").

69. Sunstein & Vermeule, *supra* note 14, at 398–99.

70. *Id.* at 401–03 (arguing judges in the D.C. Circuit adhere to the "Constituiton in Exile" movement, which believes that the Constitution's central, underenforced constitutional commitment "to protect liberty and property, rightly understood, by diminishing the authority of powerful private groups (or factions)" is underenforced by modern constitutional doctrine); *id.* at 427–34 (discussing the D.C. Circuit's adoption of a requirement that agencies use notice and comment procedures to change an agency's prior interpretation of its own legislative rules, in order to promote rule-of-law values like consistency and predictability); *id.* at 457–62 (discussing the D.C. Circuit's reluctance to construe statutes to displace agency's enforcement discretion when such displacement would have an "anti-liberty" (that is, pro-regulatory) valence).

71. *See, e.g.*, Young, *supra* note 1, at 1755–56 (noting that "one key aspect of this project is to operationalize a Burkean approach to constitutional interpretation");

legitimate, it has some descriptive relevance to the debate over procedural interpretation because it can help make some sense of Supreme Court interpretive moves in the procedural area that otherwise seem inexplicable or incoherent

B. A Taxonomy of Compensating Adjustments

In the next Part, this article will explore the Court's use of compensating adjustments in the procedural domain through a case study. Before doing so, though, it helps to tease out a short taxonomy of compensating adjustments. As I will detail later, procedural compensating adjustments involve a new combination of the different strategies outlined below.

Compensating adjustments take three standard forms—they include what I will call reinforcements, switching, and substitution.

1. Reinforcements

One of the most basic types of adjustment is what I will call a "reinforcing adjustment."

One way to think about reinforcements is through an analogy to building restoration. Old buildings, over time, develop structural flaws. Renovators, to keep the building standing, must add new materials (iron rods or other supports) to reinforce the existing structural elements. The Court's "reinforcing adjustments" do something similar: They employ interpretive canons designed to patch or shore up faltering components of the structural constitution.

One area where reinforcements play a prominent role is the law of federal jurisdiction. The law of federal jurisdiction is organized around a basic structural principle: Congress controls federal jurisdiction.

By putting Congress in control, the framers ensured that a combination of states' representation in the political process, "the . . . hoops that bills must jump through and the many opportunities those hoops afford for opponents to derail a legislative proposal" would thwart federal jurisdictional overreach.[72] The framers, in effect,

---

id. at 1801–03 (the originalist component of his approach to constitutional interpretation relies, in part, on history to distill the "core structural principle[s]" that guide compensating adjustments); *see also* Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874 (2006).

72. Ernest Young, *Federalism as Constitutional Principle*, 83 U. CINN. L. REV. 1057, 1069 (2015); *cf.* Young, *Two Federalisms*, *supra* note 61, at 88 ("[T]he federal political process may protect state autonomy simply because it is cumbersome."); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L.

designed the system of separated powers to supplement Article III's hard limits on federal jurisdiction with a backstop of inertial, process-based protections for state judicial autonomy.

Over time though, this structure started to show cracks. Interest groups can hack Congress's inertial checks, by passing ambiguous statutes that punt hard decisions to courts.[73] Because members of Congress are now popularly elected rather than selected by state legislators (as Senators once were), they tend to vote the interests of individual constituents—not states as institutions—and so undervalue federalism.[74] And legislators who feel uncomfortable taking a fine-grained approach to technical areas of the law, like jurisdiction, may simply pass vague and open-ended jurisdictional statutes with expectation that judges will do the hard, technical work of filling in the details.[75] On top of this, judges construing Congress's sloppy or ambiguous handwork may be biased in favor of expanding their power.[76]

REV. 1321, 1339 (2001) ("[t]he lawmaking procedures prescribed by the Constitution safeguard federalism in an important respect simply by requiring the participation and assent of multiple actors," thereby creating a series of "veto gates" that make federal law harder to adopt.).

73. *Cf.* Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) (pointing out, in the parallel context of vertical legislative federalism, that giving the "state-displacing weight of federal law to mere congressional *ambiguity*" evades "the very procedure for lawmaking on which *Garcia* [the Supreme Court decision] relied to protect states' interests") (quoting 1 LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 480 (2d. ed. 1988)).

74. Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1358 (2001) ("We have good reason to suspect, for example, that while members of the national Congress represent the interests of their constituents back home, they may see state *politicians* and state governmental institutions as political competitors. National representatives thus may act in ways that are at best indifferent to the interests of state politicians, and that at worst seek to undermine the relative influence of state institutions."); Clark, *supra* note 72, at 1369–70 (discussing how the Seventeenth Amendment and "changes in constitutional law [that] have limited the states' ability to influence House members through control of voter qualifications and districting" have weakened Congress's role as a federalism safeguard); Lynn A. Baker, *Putting the Safeguards Back into the Safeguards of Federalism*, 46 VILL. L. REV. 951, 958 (2001) ("[t]he only constitutional institution that arguably *did* promote the representation of state *institutional* interests, the selection of senators by state legislatures, is now gone.").

75. *Cf.* Young, *supra* note 1, at 1792 (noting, in the legislative federalism context, Congress's ability to bypass the political safeguards by delegating tough choices to executive agencies); Clark, *supra* note 72, at 1376 (noting that delegating policymaking to agencies allows Congress to "circumvent federal lawmaking procedures designed to safeguard federalism").

76. Young, *supra* note 1, at 1842 ("[F]ederal courts are staffed by federal officials whose bias toward national power has been evident for two centuries.").

The result is that the original system has proven infirm. Its structural supports require some modern reinforcement—that is, an "intermediate role for the courts . . . as collaborators who sit to ensure that the essential checks and balances within the political branches remain in place."[77]

One way the Court reinforces Congress's role in the checks and balances system is through interpretive canons. It directs lower federal courts to construe their jurisdiction narrowly, in a way that preserves more rather than less state judicial authority.

These normative canons are familiar. They direct courts to, for example, interpret grants of jurisdiction to be concurrent unless the grant explicitly says otherwise; and to interpret statutes against granting broad removal.[78] Unstated applications of these canons have led federal courts to construe the grant of original federal question and diversity jurisdiction in a way that empowers plaintiffs to block removal of their claims from state courts.[79] The normative canons embed in jurisdictional doctrine a corrective against judicial bias in favor of exploiting statutory ambiguity to grab more jurisdiction.

Second, the Court has put the onus on Congress to repeal these narrow constructions by dictating that it must do so clearly or explicitly. This clear condition "forces Congress to make a deliberative political decision about how far it wants to intrude on state autonomy . . . . with all the procedural hurdles and roadblocks that process entails."[80] Together, interpretive defaults combined with clear statement norms build a pro-federalism structural bias back into the political process.[81]

---

77. *Id.* at 1836; Young, *Two Federalisms*, *supra* note 61, at 121–30.

78. *See, e.g*, Tafflin v. Levitt, 493 U.S. 455 (1990) (holding that states have concurrent jurisdiction of civil RICO claims); Am. Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951) (holding that a defendant was not estopped from protesting removal of a case from state court when there was no right of removal).

79. *See generally* Mark Moller, *Separation of Powers and the Class Action*, 95 NEB. L. REV. 366 (2016); Mark Moller, *The Checks and Balances of Forum Shopping*, 1 STAN. J. COMPLEX LITIG. 107 (2012).

80. Young, *supra* note 74, at 1385; Young, *Two Federalisms*, *supra* note 61, at 126 ("Certain kinds of soft limits—particularly clear statement canons of statutory construction—function effectively by increasing the political costs of particular kinds of government action. Requiring Congress to state its purpose with special clarity both imposes an additional drafting hurdle and may serve to mobilize opposition by highlighting the proposed intrusion on state authority.").

81. Young, *supra* note 1, at 1849–50 (noting, in an analogous context, that "[r]ules of statutory construction are a form of collaborative enforcement: They employ judicial doctrine not to limit federal authority in its own right, but rather to enhance the political and procedural safeguards that safeguard state regulatory autonomy").

2. Switching

Some buildings have redundant structural supports. If one support falls, the structure remains standing because the stress is transferred to different support.

The same is true of constitutional structure. It protects core constitutional values through redundant strategies. If one strategy fails, the system can switch to another.

Switching is central to the familiar theory of process federalism, first theorized by Herbert Weschler and controversially embraced by the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*.[82] The original constitution, the leading contemporary version of the theory goes, afforded state authority overlapping protections—textual limits on Congress's power under the Commerce Clause, enforced by the Supreme Court, and Congress's control over federal lawmaking.[83] Ernest Young calls the textual limits on Congress's power invalidation rules—they prohibit or invalidate certain exercises of legislative authority.[84]

When the Court proved ill-equipped to meaningfully enforce the Commerce Clause through invalidation rules, it switched its focus in the 1980s, starting with *Garcia*, to the political process's federalism safeguards.[85] Congress's control over federal legislation, "with all the procedural hurdles and roadblocks that entails"[86] was, according to *Garcia*, the major remaining safeguard for state regulatory authority.[87] This is a classic switching strategy.

Sometimes, a switching strategy must be supplemented with reinforcement. To continue the architectural metaphor, we might imagine that in our building with redundant structural "supports," one

---

82. *See generally* Herbert L. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

83. Young, *supra* note 1, at 1781–82 (discussing framers' strategy of redundant protections for state regulatory authority).

84. Young, *supra* note 9, at 1602–08 (discussing "invalidation rules" or "invalidation norms").

85. *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 550–51 (1985) (finding previous efforts in *National League of Cities* to articulate doctrinal limits on federal authority to regulate states' interstate commercial activity unworkable, and holding that "the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority").

86. Young, *supra* note 74, at 1385.

87. Clark, *supra* note 72, at 1339–42.

support has collapsed, but the building can remain standing, but only if a second support, which is also at risk of failing, gets some patching.

The need to combine switching with reinforcement is a central claim of the contemporary process federalism literature: Although the collapse of the Court's Commerce Clause doctrine left Congress's political safeguards as the remaining structural support for vertical federalism, that support, scholars like Ernest Young argue, is also compromised. Yes, state representation in Congress and the cumbersome nature of federal lawmaking were *meant* to be a last ditch safeguard for state regulatory autonomy. But, the pathologies that we just noted—the ability of interest groups to hack legislative inertia, the collapse of meaningful representation of states qua states in Congress, and so on—undermine Congress's ability to fill its safeguarding role effectively.[88]

Here, too, modern process federalism theorists argue, Congress's checking function needs reinforcement—in the form of normative canons of construction that require federal courts to construe statutes impinging on areas historically reserved to states narrowly, coupled with a clear statement hurdle for legislative overrides of those statutory constructions.[89]

Vertical federalism isn't the only domain that combines switching and reinforcement. Nondelegation canons in administrative law work similarly. Unable to enforce traditional limits on Congress's delegation of its legislative power to agencies through invalidation norms, thanks to line-drawing problems, the Court has protected the values that underpin the nondelegation doctrine by directing agencies to construe open-ended grants of authority *against* particularly "controversial" delegations that threaten the "central aspiration[s] of the constitutional structure."[90] This installs the soft checks of the political process, rather than hard constitutional doctrine, as the main

88. *See, e.g.*, Young, *supra* note 1, at 1782–83 (noting that "the notion of political enforcement has been undermined by changes in the incentives facing federal politicians, the severance of direct ties between federal representatives and state political institutions, and the watering-down of institutional mechanisms at the national level that once encumbered federal lawmaking").

89. *Id.* at 1787 ("[T]he failure of the original enforcement strategy requires either that we accept a basic alteration in the character of our federal system or that new doctrines be constructed to preserve the original norm of balance."); *id.* at 1787, 1849–50 (classing rules of statutory construction among the "new doctrines" that help preserve the "original norm of balance," by "enhanc[ing] the political and procedural safeguards that safeguard state regulatory autonomy").

90. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317, 339 (2000).

barrier against the most problematic delegations of congressional authority—a switching strategy.[91]

But, as their name suggests, nondelegation canons also *reinforce* the constraints on the political process on problematic delegations through interpretation—by requiring Congress's decision to delegate away its authority to be express or clear.[92]

3. Substitution

The most radical type of compensating adjustment involves what might be called substitution. Rather than (1) switching from one original safeguard to another or (2) reinforcing original structural supports that have proven shaky, it (3) creates new institutions that substitute or fill in for preexisting institutions that have failed in their intended structural role

To continue our architectural metaphor, we can imagine an old building that's in very bad shape. Its original structural supports are on the verge of collapse and can't be reinforced. There are no substitute supports left within the teetering original structure that we can switch to. But creative architects can save the failing building by adding a totally new component that serves the function of the old, collapsed structural components.

This is like switching, in the sense that we are compensating for a failed support by falling back on a different one. But its unlike switching in that the fall-back strategy involves building something new rather than turning to another part of the original constitutional design.

One example of this type of compensating strategy is what Neal Katyal, writing with a focus on national security law, calls "internal separation of powers."[93] Although the framers envisioned Congress would check against executive national security overreach, "Congress has been absent" in the war on terror "or content to pass vague, open-ended statutes."[94] In effect, Congress has abdicated its original oversight role, with the result that the original Madisonian

---

91. Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 898 (2008) (noting that nondelegation canons employ interpretation to "raise[] the threshold for congressional delegations of authority . . . without attempting to set a hard limit on such delegations").

92. Sunstein, *supra* note 90, at 337.

93. Katyal, *supra* note 14, at 2317.

94. *Id.* at 2316.

system of national security checks and balances is "broken," probably beyond repair.[95]

That doesn't, though, mean that we are left with an unbounded executive. A well-motivated executive might compensate by building a new structure of checks and balances within the executive branch—what he calls "internal separation of powers"—to replace Congress's abdicated checking function.[96] Or, as he puts it, the key is to replace the original, "first-best" system of "'legislative v. executive'" checks, with a new "second-best" system of "'executive v. executive'" checks.[97] Katyal argues we already have the rudiments of such a system: the executive national security bureaucracy, which plays an important role (one that can be improved and rationalized) in checking against executive overreach.[98]

Substitution sounds, as I describe it above, like a kind of grand top-down re-engineering. But substitution can occur gradually, in an organic way. New institutions come into being, persist, and over time can come to fill structural roles abdicated by Congress in a way that observers only later come to fully appreciate.[99]

4. Compensating Adjustments versus Compromising Adjustments

The preceding sections paint compensating adjustments as a strategy pursued by disappointed factions unable to enforce their first-best conception of the Constitution. But it bears emphasizing that sometimes, compensating adjustments are vehicles for compromise between different factions on the Court: one with an idealized vision of the constitution (the "compensators") and another that disagrees with that vision (the "compromisers").

---

95. *Id.* at 2317 (stating that the original system of legislative checks on the executive has "broken down").

96. *Id.* at 2316–17.

97. *Id.* at 2316 ("The first-best concept of 'legislature v. executive' checks and balances must be updated to contemplate second-best 'executive v. executive' division," accomplished by leveraging the internal checking potential of the executive civil service bureaucracy on presidential adventurism.).

98. *Id.* at 2317 ("A critical mechanism to promote internal separation of powers is bureaucracy."); *id.* ("A well-functioning bureaucracy contains agencies with differing missions and objectives that intentionally overlap to create friction. Just as the standard separation-of-powers paradigms (legislature v. courts, executive v. courts, legislature v. executive) overlap to produce friction, so too do their internal variants.").

99. Vermeule, *supra* note 1, at 422 (noting that compensating adjustments may arise organically, even if judges do not attempt to "identify" or "promote them").

From the perspective of the first camp, these adjustments are "compensating"—they compensate for an inability to enact their vision in current doctrine, thanks to an inability to marshal a majority or other barriers. But from the perspective of the other camp, these are "compromising adjustments"—a way of building a majority by giving compensators something, while preserving space for the law to develop away from the compensators' vision.[100]

III. COMPENSATING ADJUSTMENTS IN CIVIL PROCEDURE: A CASE STUDY

This part turns to the literature on compensating adjustments to challenge current accounts of the Court's interpretive method in the procedural arena. It does so through case study that focuses on the evolution of the Supreme Court's response, from 1968–1999 (or thereabouts), to criticisms leveled at private attorney general actions.

The private attorney general is a settled feature of our system of judicial enforcement. It has, though, attracted a fair share of criticism, and a good deal of this, as I will explore below, is premised on the idea they are in tension with or prohibited by Article III.[101]

The Court, in the 1970s and 1980s, moved toward a compromise that employs both reinforcement and switching. It abandoned attempts to prohibit private attorney general suits, leaving their scope instead to the political process subject to some minimum, albeit significant, justiciability constraints—a *switching* strategy.

Assigning control over this enforcement model to Congress appealed to the checks and balances concept of separated powers, in which Congress's control over federal courts checks the expansion of national judicial authority. And so it was, the Court intimated, that decisions to adopt the private attorney general model, which transform the regulatory role of federal courts, belong in Congress.

---

100. On the Rehnquist Court, for example, compensating strategies were embraced by the four liberals as a way of forging majorities with conservative swing voters in the federalism area. *Cf.* Young, *Two Federalisms*, *supra* note 63, at 4–23 (noting that in the federalism area, the Rehnquist Court's liberal "four" were more likely to embrace "soft" process-based protection for federalism, while the conservative "five" preferred the revival of hard-edged doctrinal protections). A similar pattern—decisions that reflect compensating adjustments spear-headed by liberals seeking to forge a consensus or settlement with conservatives—reoccurs in the class action cases discussed in Part III.B.

101. *See, e.g.*, Pushaw, *supra* note 12, at 301 (discussing the conservative pushback against the private attorney general model); Magill, *supra* note 12, at 1182–98 (describing the sources of conservative opposition to the private attorney general model).

The result gave each side something. Fans of public interest litigation have a chance to convince the political process to expand that model. But by insisting that Congress has to *expressly* greenlight the private attorney general enforcement model—a *reinforcement* strategy—the Court enlisted the inertia of the political process to slow evolution away from traditional conceptions of federal adjudication.

Federal procedural rules though are part of the infrastructure of private attorney general litigation.[102] This was an obvious problem for the Court's Article III institutional settlement, since federal procedure has been insulated from the political process—and committed to the Supreme Court's development by Congress through the Rules Enabling Act—leaving little opportunity for much inter-branch checking.

The problem points out what could, were one so inclined, be framed as both a separation of powers and a delegation problem with enclaves of procedural rulemaking. Nonetheless, the Rehnquist Court's impulse, as I will argue below, was not to roll back rulemaking that implemented the private attorney general concept, but instead to adjust by replacing inter-branch checks on the expansion of the concept via procedure with intra-branch ones.

How so? In the 1990s, the Court replaced the inertial checks of the political process by exploiting the inertial checks of its rulemaking bureaucracy. The decision to authorize a broader scope for private attorney general type procedures, like the class action, lay, said the Court, with the rulemakers and not with courts exercising the power of Rules interpretation.

The rulemakers thus became part of a strategy of *substitution*, or what Neal Katyal calls a system of internal separation of powers.

---

102. *See* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1382 (1973) (discussing the growth of class actions in constitutional cases, and noting "the breadth of the relief given in these cases" underscores that class actions "in fact serve as 'public' actions vindicating broad public interests"); Donald G. Gifford, *The Constitutional Bounding of Adjudication: A Fuller(ian) Explanation for the Supreme Court's Mass Tort Jurisprudence*, 44 ARIZ. STATE L.J. 1109, 1113–15 (2012) (characterizing the class action as a vehicle for converting private tort litigation into a form of "public rights" litigation); Jeremy A. Rabkin, *Government Lawyering: The Secret Life of the Private Attorney General*, 61 LAW & CONTEMP. PROBS. 179, 189 (1998) (noting the Court has treated the class action as part of the infrastructure of private attorney general litigation, and that constraints on class certification are part of a larger retrenchment of the private attorney general concept); Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 24, 30 (1996) (noting the class action is the product of the "momentum behind the concept of the private attorney general . . . during the 1960s and the Warren Court era" and characterizing it, in particular, as an effort to solve the private attorney general "funding" problem).

[103] The inertial checks of federal rulemaking substituted for the role that the political process was supposed to play in the Court's institutional settlement.

The account has the virtue of squaring the Court's deference to the rulemakers with the Court's controversial interpretations of Federal Rules that, to some scholars, looks imperialistic. Rather than amounting to contradictory impulses, the two moves—deference to the rulemakers and a constrained or narrow reading of the Rules that push broader constructions back to the rulemakers—reinforce the rulemakers' settlement function. They are mutually reinforcing components of a single *Court*-driven constitutional compromise, whose lynchpin is a complex network of compensating adjustments.

Below, I split this story into two parts. Part A introduces the role that compensating adjustments, like switching and reinforcement, played in the Court's treatment of private attorney general actions *outside* of the domain governed by civil procedure in the 1970s and 1980s.

Part B then explores how this strategy of compensating adjustments went on to shape the Court's relationship to the federal rulemaking bureaucracy in the 1990s through a substitution strategy.

A. Taming the Private Attorney General

1. The Party Limit

The private attorney general is not a unitary concept. As William Rubenstein notes, the concept encompasses at least two models of privatized litigation: (1) what might be called the pure model, in which a private litigant, who lacks his own concrete injury, sues on behalf of the general public, and (2) what might be called the impure model—representative actions in which private enforcers are empowered to "'advance[] the policy inherent in public interest legislation'" by simultaneously pursuing their own remedial interest and the interests of a "'significant class'" of third parties.[104]

---

103. *Cf.* Katyal, *supra* note 14, at 2316–17.

104. Rubenstein, *supra* note 13, at 2149 (quoting BLACK'S LAW DICTIONARY). Rubenstein subdivides the attorney general concept even further—into what he calls substitute, supplemental, and simulated private attorneys general. *Id.* at 2143–55. The substitute private attorney general corresponds to what I will call the "pure" private attorney general, while the "supplemental" and "simulated" private attorney general are species of what I call the "impure" model. For more on the distinction between supplemental and simulated private attorneys general, *see infra* notes 129–33 and accompanying text.

Until the early twentieth century, one principal restraint on either form of private attorney general had been found in the federal common law of proper parties and remedies. Owners of individual remedial interests were conceptualized as owners of their claims for relief. As right-owners, they had the classic ownership right of claim-control: the exclusive right to use, control, and alienate their claim.[105] Only claim owners could enforce their remedial interests, subject to limited exceptions in equity. The corollary of this rule was that courts can act only on the remedial interests of the parties who have voluntarily come before the court.[106]

We might call this traditional procedural limit—only owners of remedial interests can enforce those interests in court, and its corollary, that courts can act only on the "parties before the court"—the "party limit." The judicial agenda is set by, and the court's remedial power reaches no further than, the parties who have voluntarily placed their remedial interests before the court.[107]

The party limit retains a powerful claim on originalists' imagination today. Take Gary Lawson's description of the "dispute-resolution model" of federal adjudication in his article, *Stipulating the Law*.[108] He presents this as his preferred model (while remaining cautiously coy about his views of the extent to which the model is constitutionalized).[109] Under the model, litigation is "party-controlled" and "party-centered."[110] The Court decides "individual

105. *See* Moller, *Separation of Powers*, *supra* note 79, at 374–77 (discussing early twentieth century federal common law notions of standing).

106. *Id.* at 403–05; *see generally* Mark Moller, *A New Look at the Original Meaning of the Diversity Clause*, 51 WM. & MARY L. REV. 1113 (2009) (discussing exceptions in equity).

107. The term "party" here, used in relation to plaintiffs, is employed in contradistinction to persons who are not voluntarily before the court, but who are represented by one who is. Modern class action law tends to blur these categories (and with it the tension between the class action and the traditional party limit) by treating the persons represented in a certified class as, to some extent, "parties." When referring to plaintiffs, I amusing the term "party" here in its older sense. For a discussion of the ways modern class action law conceptualizes class members' party status, see generally Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459.

108. Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1218–20 (2011).

109. *Id.* at 1234 (noting that the choice between the dispute resolution and competing law declaration models is normative, although expressing a preference for the former).

110. *Id.* at 1224 (describing the dispute resolution model of adjudication as a "party-controlled" model); *id.* at 1197, 1228, 1230, 1232, 1235 (framing the dispute resolution model as "party-centered").

cases," meaning "a dispute between *A* and *B*," and it is limited to the issues presented by those parties.[111]

His article touts the benefits of this model. One is that legal norms evolve in a bottom-up, "incremental" way through "dispersed" decisionmaking of a "multiplicity" of decisions in "individual" cases.[112] Lawson analogizes this to the operation of a market. Just as market transactions between a discrete buyer and seller lead to optimal pricing, so do individual cases (between discrete parties, A and B) lead to an optimal legal development.[113] The analogy gains its force by appealing to the traditional party structure of a common law dispute.

Similarly Will Baude, in his article *The Judgment Power*, argues that federal judgments are immune from reversal by the political branches. An important limitation on this unchecked power is that it can affect only the parties properly before the Court.[114] This claim, too, implicitly appeals to a view of the reach of a litigated judgment that sounds very nineteenth century: Error or "oppression" from a given judicial judgment is not something to fear because a judgment's effects are, in the usual case, confined to the micro-scale of "individual" disputes bounded by the traditional common-law party structure.[115]

---

111. *Id.* at 1224 (describing, in the course of a discussion of precedent, the dispute resolution model as a model in which courts resolve disputes between A and B); *id.* at 1226 (noting that precedent, under the dispute resolution model, is the incremental outgrowth of resolving "individual cases").

112. *Id.* at 1226.

113. *Id.* at 1224 (characterizing law as the outgrowth of the resolution of disputes between A and B); *id.* at 1225–26 (discussing, with reference to Hayek, how the development of law through a resolution of disputes between A and B makes "contributions to legal knowledge" in a way that is analogous to the way that "money prices can reflect contributions to economic knowledge." Therefore "precedent is a *process* of considering and evaluating decisions made in concrete contexts across an entire legal system, possibly over a very long period of time. The generality and authoritativeness of a precedent may not appear until a large number of cases have accumulated reflecting and applying the norm contained in the precedent.").

114. William Baude, *The Judgment Power*, 96 GEO. L.J. 1987, 1810 (2008).

115. *Id.* at 1815 (characterizing the "'judicial'" power as "the power to make authoritative and final judgments in *individual* cases") (emphasis added). *See also* MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 88 (1971) (noting that, under the traditional common law party structure, the "cushioning effects provided by the fact that the significance of traditional constitutional cases was felt only gradually as successive individual litigants sought to vindicate their newly defined rights").

2. The Collapse of the Party Limit: Paths Not Taken

Up until the New Deal, the Court, and conservative theorists, didn't need to theorize the source of the party limit—it was a product of the general law of proper parties and remedies, which, in turn, had roots in widely accepted natural law theory.[116] But, as belief in the natural law declined in the early twentieth century and the general law crumbled, the Supreme Court was forced to decide the extent to which the old rules were entrenched by the Constitution.

One could imagine a couple of routes to hard-coding the party limit into constitutional doctrine. The first, the formalist approach, would appeal to text and history.

Article III's case and controversy requirement limits federal litigation to cases of a "judiciary nature," meaning a "form historically viewed as capable of resolution through the judicial process."[117] Because history is a touchstone for the contours of an Article III case, the fact that eighteenth century courts were, subject to narrow exceptions in equity, hedged in by a general inability to reach beyond the parties before the court marks the party limit out as a constraint that is one of the constitutive boundary-conditions of an Article III case.

Indeed, as Evan Tsen Lee writes, this seemed to be the view of Chief Justice Marshall. He viewed a judicial case as one that "revolve[d] around an individual claim of vested legal rights."[118] For Marshall, the limitation of cases to "individual" claims seeking remedies for "vested" rights implied a crucial corollary, the party limit: "A private suit instituted by an individual, asserting his claim to property, can only be controlled by that individual."[119]

---

116. For discussion of the party limit and the general law, *see generally* Moller, *Separation of Powers*, *supra* note 79, at 374–77; Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004) (discussing the "general law" of standing in the nineteenth century).

117. Flast v. Cohen, 392 U.S. 83, 95 (1968).

118. EVAN TSEN LEE, JUDICIAL RESTRAINT IN AMERICA: HOW THE AGELESS WISDOM OF THE FEDERAL COURTS WAS INVENTED 12 (2011).

119. John Marshall, Speech of the Hon. John Marshall, Delivered in the House of Representatives, of the United States, on the Resolutions of the Hon. Edward Livingston (March 7, 1800), *in* 4 THE PAPERS OF JOHN MARSHALL 82, 99 (Charles T. Cullen ed., 1984). For one modern suggestion that Article III encodes something like the party limit, which does not, however, discuss the tension between that limit and private attorney general devices like the class action, see Samuel L. Bray, *Multiple Chancellors: Reforming the Nationwide Injunction*, 131 HARV. L. REV. 417, 471 (2017) (noting the possibility that "the judicial Power" conferred by Article III does not ordinarily extend further than preventing or remedying a wrong to the

The problem with this approach today, of course, is obvious: It would jeopardize modern forms of representative standing.[120] And, at the same time, the strength of the historical evidence supporting the idea that the party limit is a boundary-condition on an Article III case is far from airtight, Chief Justice Marshall notwithstanding.[121]

The other way of constitutionalizing the party limit is a functional approach. Rather than bluntly constitutionalizing the party limit, based on an appeal to text and the ways of the ancient courts of Westminster, the Court could abstract from that history a set of core "Article III" adjudicative values that animated the historical model of adjudication, and then draw lines between private attorney general actions that offend those values and those than don't.

This is not the place to explore the values furthered by the party limit at length (they are the subject of a vast literature), but theorists have argued that the limit furthered at least three core judicial restraint values.

---

plaintiff before the court, while deferring judgment on whether this constraint should be considered constitutional or merely prudential).

120. *See* Woolhandler & Nelson, *supra* note 116, at 730–31 & n.197 (noting history may not support privatized enforcement of public or group interests beyond limited and "anomal[ous]" models known to antebellum lawyers).

As Ann Woolhandler and Caleb Nelson note, the primary examples of private attorney general-like antebellum litigation—qui tam and mandamus proceedings—were, in America, "areas of contest" that either played a limited role in early American federal litigation or, in the case of mandamus, were subject at the federal level to notable constraining doctrines meant to police the principle that public officers were the proper parties to bring suits on behalf of the public. *See* Woolhandler & Nelson, *supra* note 116, at 695 (noting that "[a]s a general matter . . . the requirements of public control over public rights and private control over private rights predominated in [early] American law," and exceptions were "areas of contest"); *id.* at 707–11 (discussing mandamus); *id.* at 724–31 (discussing qui tam); *see also id.* at 696–97 (noting that "[p]ostrevolutionary Americans" generally embraced John Locke's claim that the right to sue to obtain "reparation" for damages "belongs only to the injured party," while suits brought to impose punishment or deter wrongdoing were more properly committed to the executive power).

121. For contrasting views of the historical record, *compare* Woolhandler & Nelson, *supra* note 116, at *passim* (arguing the strength of support for the constitutionality of private attorney general model in early American law is overstated); *and* Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968) (arguing that history supports the constitutionality of private attorney general-style public interest litigation); Steven L. Winter, *The Metaphor of Standing and the Problem of Self–Governance*, 40 STAN. L. REV. 1371 (1988) (same); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988) (same).

The first is the dignitary and democratic value of party participation in judicial proceedings that affect them.[122] The party limit advanced those values in the most straightforward way imaginable: by simply requiring parties' affirmative participation in suits affecting them, subject to narrow exceptions. In theory, we can protect the value of participation without requiring persons affected by a judgment to become full parties—by appointing an adequate representative of their interests. But experience has shown that in large-scale private attorney general actions, meaningful representation of all the affected interests is elusive.[123]

The second value animating the party limit is constraining remedial discretion. The party limit was a prophylactic barrier against the rise of sprawling representative actions in which courts face "problems that are unavoidably polycentric" and in which "judicially discoverable and manageable standards often do not exist . . . for crafting and implementing a [class] remedy."[124]

The third value served by the party limit is accountability. The party limit prevented the judicial system from overriding claim owners' preference *against* (or indifference toward) asserting their own rights. Its collapse, by contrast, empowers lawyers and judges to override claim-owners and take a proactive regulatory role through structural injunctions or settlements that regulate institutional behavior prospectively—what Laurence Tribe once described, in his brief for petitioners in *Ortiz v. Fibreboard*, as a "legislative joint venture" between courts and counsel.[125] Critics thought this involved

---

122. *See, e.g.*, Gifford, *supra* note 102, at 1122 (noting, in the course of defending the traditional party limit, "that it is the participation of the parties that both informs the judge's decision and legitimizes his exercise of power within a democratic society"); *id.* at 1152–53 ("Regardless of the wisdom or fairness of substantive outcomes, adjudication, as a form of state coercion within a democracy, requires participation by both the victims and the tortfeasors whose rights, liabilities, or interests are directly affected. Participation rights protect self-determination and avoid paternalism.").

123. *See* Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1174 (2009) (noting that some misalignment of interests between class counsel, named plaintiffs, and class members is inherent in the "circumstances that Rule 23 has identified as eligible for class treatment").

124. Gifford, *supra* note 102, at 1144; Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 393–404 (1978) (arguing that polycentric problems are "inherently unsuited to adjudication"). *See also* William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 Yale L.J. 635, 642–49 (1982) (noting that external controls on remedial discretion help legitimate judicial power and discussing the problem of the absence of such controls in polycentric litigation).

125. Brief for Petitioners at 48, Ortiz v. Fibreboard (No. 97-1704) (U.S. Aug. 6, 1998).

an exercise of quasi-governmental prosecutorial and policymaking discretion that was more appropriately left to the accountable political branches.[126]

One might imagine an approach that, in effect, abstracts these putative "Article III" judicial restraint values from the historical model and then scrutinizes private attorney general suits, barring those that pose sufficiently salient accountability, remedial discretion, and representation problems. [127]

This, though, poses difficult line-drawing problems. Take the last value—accountability. William Rubenstein's taxonomy of private attorney general litigation points out that modern representative litigation exists on a continuum. He distinguishes, as already noted, between pure private attorney general actions, in which the attorney represents only the public interest, and impure private attorney general suits, in which the attorney represents a mix of public and private interests.[128]

But he also distinguishes between different types of impure private attorney general actions. Some, like shareholder derivative suits, are predominantly private—they spring from, and enforce the terms of, voluntary agreements among the represented parties. He calls these "simulated" private attorney general suits—they take the form of a private attorney general action, in that they involve the representation of third party interests, but largely serve private, rather than public, ends.[129]

---

126. *See, e.g.*, James Grimmelmann, *Future Conduct and the Limits of Class Action Settlements*, 91 N.C. L. Rev. 387, 426 (2013) (arguing that class settlements that "make prospective changes affecting large numbers of people in complex ways" intrude into the "province of legislation and rulemaking"). Other arguments might draw on Lea Brilmayer's emphasis on the value of litigant self-determination. *See generally* Lea Brilmayer, *The Jurisprudence of Article III*, 93 HARV. L. REV. 297 (1979). Another argument is Baude's concern about incrementalism and error reduction. *See supra* notes 114–115 and accompanying text. As the historian Mauro Cappelletti wrote: "By its nature the class action [a direct outgrowth of the collapse of the party limit] asks for more than *inter partes* relief; it *takes away* the cushioning effects provided by the fact that the significance of traditional constitutional cases was felt only gradually as successive individual litigants sought to vindicate their newly defined rights." M. CAPPELLETTI, *supra* note 115, at 88 (emphasis added).

127. *Cf.* Ernest A. Young, *In Praise of Judge Fletcher—And Of General Standing Principles*, 65 ALA. L. REV. 473, 483 (2013) (noting modern Article III doctrine reflects "certain general sets of values," including the "functional requisites of effective adjudication").

128. Rubenstein, *supra* note 13, at 2146–48.

129. *Id.* at 2154–55.

But other representative suits, he writes, have a "strong public/weak private" dimension.[130] They are the product of a governmental policy in favor of private litigation to "supplement" to the work of the public attorney general by "'advanc[ing] the policy inherent in public interest legislation on behalf of a significant class of persons.'"[131] He calls these "supplemental private attorn[ies] general."[132]

The latter raises greater accountability problems than the former. Yet, scholars agree to disagree about which types of representative actions are predominantly "public." As Rubenstein notes, the strong public/weak private and strong private/weak public categories have fuzzy boundaries and, in hard cases, tend to "bleed into" each other.[133]

All of this points up that the functional approach entails a difficult task of drawing lines between permissible and impermissible representative actions.

3. Compensating for the Collapse of the Party Limit: The Article III Settlement

By the 1970s, it was too late in the day to adopt the formal approach, and hard-wire the party limit, which would require invalidating a variety of private attorney general mechanisms that had grown up via statute since the New Deal. And that approach had little future, in any event, on an ideologically divided Supreme Court. And the functional approach posed difficult line-drawing problems.[134]

The Court, instead, took a different tack. It drew a constitutional line through its adoption of Article III's injury-in-fact test.[135] This killed the pure private attorney general—suits by a private litigant who acts solely on behalf of the generalized public.[136] But the cases left open room for the impure or supplemental private-attorney-

130. *Id.* at 2151.

131. *Id.* at 2149 (quoting BLACK'S LAW DICTIONARY).

132. *Id.* at 2146–54.

133. *Id.* at 2146 & n.67.

134. *See supra* notes 127–133 and accompanying text.

135. *See, e.g.*, Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Linda R.S. v. Richard D., 410 U.S. 614 (1973). This line of cases culminated in 1992's Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

136. Rubenstein, *supra* note 13, at 2145 ("[T]he Supreme Court's insistence that a private plaintiff demonstrate injury-in-fact limits Congress's ability to appoint private attorneys general whose only interest is the general one of enforcing the law.").

general action—suits in which litigants with their own individual injuries are also authorized to represent a large bundle of aggregated third-party remedial interests as a "supplement" to the government's goal of deterring violations of the underlying substantive law.[137]

One of the ways that the Burger and Rehnquist Courts dealt with residual Article III concerns with this class of suits is by seating control over them in the political process—an approach I will call the Court's Article III settlement.[138]

The result was a classic switching strategy, which, like the Court's approach to legislative federalism, turns from invalidation rules to separation of powers in order to protect constitutional values. Rather than hard-code the party limit, or draw lines between abrogations of the limit that trench on Article III values and those that don't, the Court treated the party limit as a federal enforcement default—in effect an unacknowledged rule of federal procedural common law. Because the rule is entangled with jurisdictional values, the Court left abrogation of the rule with Congress—an outgrowth, Henry Monaghan wrote at the time, of the "premise that . . . [a]ny expansion of judicial jurisdiction should come only with the *explicit* concurrence of Congress."[139] The Court treated the rule as, in effect, a

---

137. *Id.* (Because modern private attorneys general "must show their own personal interest in a matter prior to filing suit in federal courts," this "places them among *supplemental* attorneys general—those who enforce public policy by pursuing their own interests.").

138. The approach is an outgrowth of the mid-twentieth century Court's treatment of pure attorney general actions, which Elizabeth Magill details in her article *Standing for the Public: A Lost History*. *See* Magill, *supra* note 12, at 1139–50 (explaining that the Court in the 1970s, having taken pure attorney general actions offline, redirected the requirement for congressional approval to the supplemental private attorney general).

139. *See also* Monaghan, *supra* note 102, at 1376 (arguing that congressional control of the private attorney general model "rests on the premise that . . . [a]ny expansion of judicial jurisdiction should come only with the *explicit* concurrence of Congress, a political assumption inherent in the constitutional grant of power to Congress over the jurisdiction of the inferior federal courts and the appellate jurisdiction of the Supreme Court"); *see also id.* at 1377 (arguing, citing Weschler, that a "contrary view is 'antithetical to the plan of the constitution for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institutions would be used within the limits of the federal judicial power.'").

Another way to view the settlement is that it assumes the "case" requirement sets some boundary conditions by reference to subconstitutional procedural rules, including background rules of federal procedural common law. The settlement treats the party limit as one such boundary condition, but, out of a concern this underenforces Article III, leaving its abrogation to the political process. For a similar suggestion, albeit with a different focus, that some boundary conditions of an Article III case are left to subconstitutional law and, with it, the political

shadow subconstitutional jurisdictional norm—not technically jurisdictional like statutory rules of subject matter jurisdiction, but closely enough intertwined with Article III values to implicate the separation of powers framework that regulates overt or canonical jurisdictional law.[140]

The result had all the benefits of other switching strategies reviewed earlier. It employed process-based protections for Article III values that the party limit safeguards—but that the Court found itself helpless to protect through formal constitutional doctrine—by shunting the abrogation of that limit to the inertial confines of the legislative branch. (The class action was the one glaring exception to this solution, as I'll discuss below, and the Court dealt with it in a related but distinct way.)

The settlement shaped several areas relating to private attorneys general. One was the law of attorney's fees. Some "supplemental" private attorney general suits can involve, you might say, a state-mandated *cross-plaintiff subsidy*. The state subsidizes enforcement efforts by assigning representative parties' claims to an enforcer and then taxing the represented parties' recovery in order to pay the enforcer. But a different strategy toward the same end (encouraging privatized enforcement of public policy) involves a *defendant cross-subsidy*, accomplished through the so-called "private attorney general exception" to American Rule.

---

process, see Richard Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1401, 1484 (1983) (arguing that "a constitutional 'case' . . . [is] a concept [that is] keyed to a dynamic system of procedural rules").

While the focus of this article is describing the settlement, not theorizing it, it is also worth noting that this approach finds some support in early precedents, like Chief Justice Marshall's holding in *Wayman v. Southard*, 23 U.S 1 (1825), that, while the Court has inherent power to tinker through minor adjustments to federal procedure, "important" or major adjustments, which plausibly include abrogation of the jurisdictionally entangled party limit, "must be entirely regulated by the legislature itself." *Id.* at 43. *Wayman* seemed to treat this category as nondelegable. Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine* 69 U. CHI. L. REV. 1721, 1754–56 (2002) (reviewing *Wayman*'s contribution to the theory of nondelegable powers). For a short discussion of the potential implications of the Article III settlement for congressional delegations of power to alter jurisdictionally entangled rules, *see infra* notes 185–87 and accompanying text.

140. In this, it is like many rules that share some but not all of the features of fully "jurisdictional" rule. *See generally* Scott Dodson, *Hybridizing Jurisdiction*, 99 CAL. L. REV. 1439 (2011). For a discussion of "shadow rules" in a different context, *see generally* Robin Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759 (2012).

Under the American Rule, each party is responsible for its own fees; losing parties aren't required to pay, or subsidize, the winner.[141] The judge-made private attorney general exception, however, allows courts to tax losing defendants to pay a bounty (in the form of fees) to winning plaintiffs in order to subsidize the enforcement of an "important right" for the benefit of "the general public or some class thereof."[142]

Because this exception envisions litigants as private attorneys general, and litigation as a public good, it is hard to square with the Court's Article III settlement. And so, predictably, as the Court began to retrench judicial authority to appoint supplemental private attorneys general in the 1970s, it killed the private attorney general exception. Citing the problems with the rule's assumption that federal courts had "roving authority" to "generally assay[]the public benefits which particular litigation has produced" and encourage litigation they found socially beneficial through fee awards, the Court, in *Alyeska Pipeline Services Co. v. Wilderness Society*, emphasized that this exception to the American rule must get Congress's approval.[143] The *Alyeska* Court further emphasized that Congress must make that approval "explicit"—thereby supplementing switching through a classic reinforcement strategy.[144]

Alyeska followed the basic outlines of a compensating adjustment strategy: protecting Article III values (or, more precisely, values with some plausible claim to Article III protection that are imperfectly enforced in current doctrine) by relying on the safeguards of the political process, reinforced through interpretive norms.

The settlement was also evident in the Court's case law on so-called "prudential" standing. That case law retained the traditional rule against representing third-party interests (a core barrier to the supplemental private attorney general action)—treating it, though, not as a constitutional command, but as a prophylactic policy of judicial self-governance—in effect, a standing default rule of federal

---

141. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."); Arcambel v. Wiseman, 3 U.S. 306 (1796) (stating that statutory modification would be required to change the American rule).

142. *Alyeska*, 421 U.S. at 284–85 (Marshall, J., dissenting) (explaining the private attorney general exception).

143. *Id.* at 260–64, 65 n.39.

144. *Id.*; Runyon v. McCrary, 427 U.S. 160, 185 (1976) ("[T]he law of the United States, but for a few well-recognized exceptions not present in these cases, has always been that absent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation.").

procedural common law.[145] Like all such rules, it can be altered. But outside the rarified context of constitutional rights litigation, the Court generally held that only Congress can override the rule against representing third-party interests—and can only do so, the Court was careful to emphasize, "*expressly*."[146]

The Article III settlement was, admittedly, subject to problematic judge-made exceptions—including third-party standing and associational standing. Yet, the Court's impulse since the ferment of the 1970s has been to severely cabin these exceptions, while confining them to circumstances where these exceptions are least in tension with the checks and balances principles underpinning the Article III settlement.

The term "third-party standing" is sometimes used in a blanket way—to describe, generally, representation of other people's legal claims to a remedy (e.g., "representational standing.")[147] But in the

---

145. United Food & Commercial Workers Union Local 751 v. Brown Grp., 517 U.S. 544, 557 (1996) ("'[T]he general prohibition on a litigant's raising another person's legal rights' is a 'judicially self-imposed limi[t] on the exercise of federal jurisdiction.'") (quoting Allen v. Wright, 468 U.S. 737, 750–51 (1984)); Warth v. Seldin, 422 U.S. 490, 499 (1975) ("[T]he plaintiff generally must assert his own legal rights and interests."); Flast v. Cohen, 392 U.S. 83, 99 n.20 (1968) ("[A] litigant will ordinarily not be permitted to assert the rights of absent third parties.").

146. Bennett v. Spear, 520 U.S. 154, 163 (1997) ("Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated."); *Warth*, 422 U.S. at 509–10 (1975) (the rule that a litigant cannot assert third-party rights is "subject to exceptions, the most prominent of which is that Congress may remove it by statute," either "expressly or by clear implication"). In the Scalia era, the Court often portrayed the presumption against representational standing as a default presumption about legislative intent to vest standing rights—which elegantly obviated the messiness of applying jurisdictional separation of powers principles to an enforcement default that was not, technically, jurisdictional. *See United Food*, 517 U.S. at 557 (characterizing the rule against representational standing as a "background presumption (in the statutory context, about Congress's intent)"). However, as I have argued elsewhere, the idea that we can presume, in the absence of congressional say-so, a legislative intent to vest traditional claim-control rights is misplaced; the rule against representational standing is, rather, better conceived as a judge-made forum-specific enforcement default, or, in other words, a rule of procedural common law. *See generally* Moller, *Separation of Powers*, *supra* note 79, at 403–11, 427–28; *cf.* Young, *supra* note 127, at 475 ("[E]ven in statutory cases, legislative intent about which plaintiffs ought to be permitted to sue will generally be fictional. Congress will not have addressed the problem, and the courts will need to rely largely on default presumptions. Those presumptions will necessarily end up looking like, well, general standing rules."). *See generally* Sergio J. Campos, *Erie as a Choice of Enforcement Defaults*, 64 FLA. L. REV. 1573 (2012) (discussing enforcement defaults). Messiness is unavoidable.

147. *See, e.g.*, C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862, 909 (1985) ("Representational standing raises essentially the same concerns as those discussed relative to third-party standing. The

technical literature on standing it has come to mean something specific: the attempt by a party before the court to remedy a wrong done not to her, but to another person who is not before the court.[148]

The Court has permitted third-party standing, without prior congressional authorization, when several very narrow limiting conditions are satisfied.[149] Henry Monaghan argues that many purported examples of third-party standing are in fact examples of "first-party" standing, in which parties are suing to remedy an injury that is derivative of an injury to a third party.[150] Even so, not all of the Court's third-party standing cases can be explained this way.

To a degree, the exception, narrow as it is, was just the rough edge of the Article III settlement. The Court's settlement was forged in the 1970s as conservatives claimed a majority on the Court. Its third-party standing cases were by-products of that messy transition, which was marked by continuing push-pull conflict between conservatives and hold-overs, like Justice Brennan, from the more muscular judicial progressivism of the mid-century.[151] The resulting body of law, like many products of Supreme Court compromise, did not exhibit perfect theoretical coherence.[152]

However, by the aughts, the Court's conservatives had solidified their majority and the Court, in turn, increasingly applied the test for third-party standing narrowly.[153] And in *Kowalski v. Tesmer*, Justice Thomas raised questions about its continuing viability.[154]

---

question is when one person is entitled to invoke the judicial process to determine the 'rights' of others.").

148. *See, e.g.*, Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1222–23 (2014) (treating third-party standing as a sub-category of representational standing); Henry Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 282 (1984) (noting that third-party standing is conventionally understood as a claim founded on third-party rights, but contesting this view).

149. The plaintiff must have suffered her own injury-in-fact. Powers v. Ohio, 499 U.S. 400, 411 (1991). The plaintiff must have a close relationship to the third party. Kowalski v. Tesmer, 543 U.S. 125, 129–30 (2004). And the third-party must face some hindrance to protecting her own interests. *Id.* at 130.

150. Monaghan, *supra* note 148, at 282.

151. Floyd, *supra* note 147, at 892–99 (discussing evolution of third-party standing doctrine in the Burger Court).

152. *Id.* at 898–99 (noting the "uncertainty" and lack of consensus on the Burger Court about third-party standing's underpinnings).

153. Kowalski v. Tesmer, 534 U.S. 125, 130 (2004) (noting the Court had "not looked favorably" on third-party standing).

154. *Id.* at 135 (Thomas, J., concurring) ("It is doubtful whether a party who has no personal constitutional right at stake in a case should ever be allowed to litigate the constitutional rights of others.").

Even so, the Court's limited approval of third-party standing in the 1970s wasn't in as much tension with the Article III settlement as one might think. One can easily make the case, and many have, that judicial flexibility to fashion enforcement rules applicable to litigation vindicating *constitutional rights* is an essential element of the judiciary's main role in the system of checks and balances—e.g., checking unconstitutional action by the political branches. Monaghan called this argument for judicial flexibility the "special function" argument.[155]

The second Justice Harlan, who explicitly defended political branch control over the development of the private attorney general in ways that anticipated the contours of the Article III settlement, endorsed judicial departures from the traditional party limit in constitutional litigation, apparently for this reason.[156] And because most of the Court's cases approving third-party standing without prior congressional approval involve constitutional, as opposed to statutory, causes of action, these cases fell precisely in areas where the checks-and-balances logic of the Article III settlement implies more judicial latitude to define enforcement rules.[157] As a result, this exception was in less tension with the premises of the Article III settlement than it seems to be at first glance.

Associational standing—the term for membership associations' power to represent the interests of their members—was another major exception to the general rule that private attorneys general need congressional approval.[158] Like third-party standing, associational standing was cabined by several constraining rules—

---

155. Monaghan, *supra* note 102, at 1368–71 ("Today there is virtually unanimous agreement that the Court has a 'special function' with regard to the Constitution because it is the final authoritative interpreter of constitutional text."); *id.* at 1370 ("Once the Court's 'special function' and the 'unique' character of constitutional adjudications are stressed, 'the old notion that the power to decide constitutional questions is simply incident to the power to dispose of a concrete case loses much of its substance.'").

156. Monaghan took a different view, and argued, in a seminal article six years later, that public rights suits vindicating constitutional rights required congressional authorization. *Id.* at 1376–77.

157. Monaghan, *supra* note 148, at 279–80 (attributing evolution of third-party standing to a shift in the conceptualization of constitutional rights); *see also* Nancy Leong, *Improving Rights*, 100 VA. L. REV. 377, 415 (2014) ("Monaghan traces the move towards an expanded vision of third-party standing to a broader shift in our understanding of constitutional litigation and articulation of constitutional rights.").

158. *See generally* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977); Warth v. Seldin, 422 U.S. 490 (1975); NAACP v. Ala. ex rel. Patterson, 357 U.S. 499 (1958).

some constitutional in origin and some prudential.[159] But the exception nonetheless created some room for associations to act as private attorneys general for their members.

In some cases where the Court upheld associational standing, the political process has empowered a collective body to act on behalf of an interest group.[160] But in other cases, the Court recognized associations' right to represent their members without any prior legislative approval.[161]

Yet, the tension between these latter cases and the Article III settlement is, on closer examination, less than it first appears. The original party-limit bounded judicial power by individual litigants' affirmative, voluntary choice to place their own individual interests before the court. It premised judicial power on consent. Associational standing was a linear outgrowth of this premise. Absent a statutory appointment of an organizational representative, or some support in common law tradition,[162] the Court upheld associational standing only in circumstances where its members could plausibly be said to have joined the association in order to empower it to put their interests before a court.[163] As such, associational standing was less an aberration than an *outgrowth* of the premises of the traditional model of adjudication safeguarded by the Article III settlement.

---

159. United Food & Commercial Workers Union Local 751 v. Brown Grp., 517 U.S. 544, 551–53 (1996).

160. This was the case with the Washington State Apple Advertising Commission, whose associational standing was upheld by the Supreme Court in *Hunt*. *See* Hunt, 432 U.S. 333, 344–45 (1977) (discussing the mandatory nature of members' assessments).

161. *See Hunt*, 432 U.S. at 342 (noting the Court's traditional associational standing cases dealt with the associational standing of voluntary membership organizations).

162. *United Food*, 517 U.S. at 557 ("[T]he entire doctrine of 'representational standing,' of which the notion of 'associational standing' is only one strand, rests on the premise that in certain circumstances, particular relationships (recognized either by common-law tradition or by statute) are sufficient to rebut the background presumption . . . that litigants may not assert the rights of absent third parties.").

163. Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Brock, 477 U.S. 274, 275–76 (1986) ("[T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others."); Vikram David Amar, *Standing Up for Direct Democracy: Who Can Be Empowered Under Article III to Defend Initiatives in Federal Court?*, 48 U.C. DAVIS L. REV. 473, 492 (2014) ("The power these associative agents enjoy to represent the rights of third parties (the members themselves) depends upon the members having affirmatively decided and registered their decision to *join* the association in the first place.").

But even so, associational standing, too, was limited by the Article III settlement. The Court invoked prudential reasons, for example, to limit this flavor of standing to instances where an association's members seek injunctive relief against wrongdoing that targets its members as a group,[164] while insisting that associational standing to assert members' classic individual rights for divisible monetary relief must be approved by Congress.[165]

4. The Article III Settlement as a Compensating Adjustment

The Article III settlement left space for the growth of impure private attorneys general. But by taking federal courts' ability to expand the model unilaterally offline and shunting its development to the political process, it slowed the model's growth. From originalists' standpoint, this looks like a classic *compensating* adjustment that combines switching and reinforcement—a project that is not too dissimilar from the modern Court's approach to the commerce power, discussed above.[166]

Here the impetus was not the collapse of older constitutionally derived rules that have proven unworkable, but the collapse of traditional prophylactic "general law" constraints on the private attorney general (e.g., the party limit) that shaped federal courts' role in the federal system. As these crumbled, the Court switched to a feature of constitutional design—checks and balances principles that apply to overt jurisdictional law, reinforced through clear statement norms—to protect judicial restraint values encoded in the old general law that (1) have a claim to constitutional entrenchment under Article

---

164. *See, e.g.*, *Hunt*, 432 U.S. at 343 (associational standing on behalf of an association's members is generally proper when "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit"); *Warth*, 422 U.S. at 511 ("[S]o long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members . . . ."); *id.* at 515 (suggesting this requirement is satisfied where "the association seeks a declaration, injunction, or some other form of prospective relief," since, in that context, "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured"); *see also United Food*, 517 U.S. at 554 (explaining that this requirement "has been understood to preclude associational standing when an organization seeks damages on behalf of its members" and that this limitation is prudential in nature).

165. *United Food*, 517 U.S. at 558 ("[A]s we noted in *Warth*, prudential limitations are rules of 'judicial self-governance' that 'Congress may remove . . . by statute.'").

166. *See supra* notes 61–68, 82–89 and accompanying text.

III, but that (2) the Court found difficult to enforce through classic constitutional invalidation rules.[167]

From progressives' standpoint, of course, the approach here looks slightly different: It involves what I called a *compromising* adjustment.[168] In order to make progress on an increasingly conservative court and advance the ball for a progressive vision of federal adjudication, progressives compromised by agreeing to shift the development of the supplemental private attorney general model out of the courts and into the slower-moving political process.

This way of framing the Court's strategy isn't academic after-the-fact interpretation. Justice Harlan's 1968 dissent in *Flast v. Cohen*,[169] frames the approach the Court would go on to adopt exactly this way.

There can be "little doubt," Harlan wrote, that private attorney general suits "strain the judicial function" and "press to the limit judicial authority."[170] He thought it was far too late to reverse course and strike them down, particularly given a string of recent-vintage 1940s and 1950s precedents approving private attorneys general. Yet, he argued, the Court can retain some fidelity to the "character and proper functioning" of federal courts by leaving the adoption of private attorney general suits with Congress, which is the "'guardian[] of the liberties and welfare of the people in quite as great a degree as the courts'"[171]—a phrase that echoes Herbert Weschler's conception of Congress as a political safeguard of structural values.[172]

Harlan anticipated, here, the idea of compensating adjustments and constitutional second-bestism.[173] It's an approach that Harlan would have applied to *pure* private attorney general actions.[174] The

---

167. *See supra* notes 116–134 and accompanying text.

168. *See supra* Part II.B.4.

169. 392 U.S. 83 (1968).

170. *Id.* at 130 (Harlan, J., dissenting).

171. *Id.* at 120, 131 (quoting Mo., Kan., & Tex. Ry. Co. v. May, 194 U.S. 267, 270 (1904) (Holmes, J.)).

172. *See generally* Wechsler, *supra* note 81.

173. The second Justice Harlan, not surprisingly, is one of the justices who seems to be a model for Professor Young's Burkean project. *See, e.g.*, Ernest A. Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 718 (1994) (arguing that, on the Rehnquist Court, "Justice Souter seems the most clearly Burkean in terms of jurisprudential principles," because he "has taken up the mantle of [Justice Felix] Frankfurter and his disciple, [Justice John Marshall] Harlan: respect for precedent; case by case balancing; Burkean continuity with the past.").

174. *Flast*, 392 U.S. at 119, 131 (Harlan, J., dissenting) (characterizing the suit in *Flast* as a "public" action by a "non-Hohfeldian" plaintiff and arguing that while it is not constitutionally prohibited, it should be authorized by Congress). Harlan's

Burger Court took up that approach and applied it, more circumspectly, to the *supplemental* private attorney general actions that survived its 1970s standing revolution.

B. Extending the Article III Settlement to Civil Procedure

1. Reconciling Procedure and the Settlement Through a Substitution Strategy

One central mechanism for supplemental private attorney general suits, though, stood outside the political process. That was, of course, the class action procedure, a procedural vehicle for the assertion of third-party remedial interests by a representative litigant.[175]

Because the class action procedure is transubstantive, it cannot rely on the structural arguments (e.g., federal courts' constitutional checking function) that support many of the cases upholding third-party standing.[176] And the class action rule's mandatory class action provisions—which authorize federal courts to constitute class actions without class members' consent in certain circumstances—can't rely on the consent-based grounds that justify associational standing of voluntary membership organizations.[177]

Moreover, the class action rule's opt out class action provisions water down the notion of consent to representation to such a degree that they, too, are difficult to justify on a consent basis, as well. The evidence, indeed, suggests few class members are aware that opt out suits are even instituted on their behalf, much less that they have a right to exclude themselves.[178] It's hard, accordingly, to infer

---

approach was in line with the Court's mid-century treatment of the pure attorney general, as Elizabeth Magill details. *See* Magill, *supra* note 12, at 1169–71 (discussing Harlan's dissent in *Flast*).

175. For a good discussion of the class action as a mechanism for "supplemental" private attorneys general, *see* Rubenstein, *supra* note 13, at 2167–69 (discussing how class counsel perform a mix of public and private functions, and criticizing a strand of scholarship that "fully privatizes" the class action by conceptualizing the class counsel as "solely an agent serving the immediate interests of her particular clients"). *See also supra* note 102 (collecting authorities describing the class device as a private attorney general mechanism).

176. *See supra* notes 155–57 and accompanying text.

177. *See, e.g.*, FED. R. CIV. P. 23(b)(1)–(2); *see supra* notes 162–63 and accompanying text.

178. Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2086 (2008) (questioning the theory that failure to return an opt out notice meaningfully

their consent from failure to opt out under these conditions. It's fairer to say that opt out class actions, like mandatory class actions, involve what amounts to, for most class members, an involuntary government assignment of class members' claims to a private attorney general.[179]

The class action, as a result, is an even more aggressive departure from the traditional party limit than third-party standing or associational standing.[180] Yet, it is not a product of Congress in any meaningful sense, as the settlement sketched above would seem to dictate. Rather, the Rule is, thanks to the Rules Enabling Act, a creation of the Supreme Court, acting outside the ordinary constraints of the political process. And so, the very brute fact of the Rule's existence threatens to render the entire idea of an institutional settlement on representational standing—one built around situating control over privatized enforcement of third-party claims in the political process—completely otiose.

This is an historical accident. As Owen Fiss notes, much of the conservative Court's push back against private attorneys general spanned the course of the 1970s, 1980s and 1990s, after the current version of Rule 23 took shape in 1966. By then, Rule 23 was an accomplished fact—and the product of the "momentum behind the concept of the private attorney general . . . during the 1960s and the Warren Court era" that then found itself stranded in a more conservative era.[181]

It's tempting to try and square Rule 23 with that settlement by *attributing* the Rule to Congress. And, indeed, some scholars have tried to do just this. Susan Bandes, for example, suggested that Federal

---

evidences "voluntary choice to be bound"); Theodor Eisenberg & Geoffery P. Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004) (noting less than 1% of class members in all class actions actually opt out); *id.* at 1561 (raising doubts, based on these numbers, about whether class members who fail to opt out really consent to 23(b)(3) class actions instituted on their behalf).

179. *See also* Moller, *Separation of Powers*, *supra* note 79, at 409 n.154 (making a similar point).

180. *See* Monaghan, *supra* note 102, at 1383 ("[T]he mushrooming of class actions has rendered the private rights model largely unintelligible.").

181. Fiss, *supra* note 102, at 30 (noting the class action momentum of the 1960s waned in the 1970s and 1980s as "American politics and American law moved to the Right"); Stephen Burbank, Sean Farhang & Herbert Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 647 (2013) (situating the rise of the modern class action as part of a broader array of cultural changes in American law in the 1960s, during the "dominance" of political progressivism, that favored privatized enforcement of public law).

Rules like Rule 23 reflect "legislative determinations" favoring public rights model of adjudication.[182]

While this is right in one sense, Rule 23 is not the product of the type of legislative determination that the settlement demands. As the contemporary literature on rulemaking underscores, the Federal Rules have a deeply attenuated relationship with Congress, which has little real meaningful input into their development. Although Congress can veto Federal Rules adopted by the Supreme Court, it has almost never exercised that right. Its inaction isn't a signal of affirmative approval. It's the result of inertia and disinterest.[183] To the extent the Rules draw at all on congressional "approval," it comes from the Rules Enabling Act's distant, nearly eighty year old delegation of its own potent rulemaking authority to the Supreme Court.[184]

But tracing the Rules to a congressional delegation doesn't solve Rule 23's disconnect with the Article III settlement. The settlement, after all, envisions Congress as a *check* on the expansion of judicial authority—the lynchpin of the Court's switching strategy is legislative inertia's capacity to slow the growth of the supplemental private attorney general enforcement model. The Enabling Act, though, undoes Congress's checking function, by requiring nothing more than Congress's inaction to make judicially fashioned reforms procedural law—it undoes, in other words, the careful structure of checks and balances on which Article III settlement depends.

So, Rule 23, and the rulemaking process that produced it, in the end, seems harder to reconcile with the Court's Article III settlement than third-party standing and associational standing.

One bold way to resolve this tension would relentlessly push the separation of powers logic of the settlement to its natural

---

182. Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 291 & n.438 (1990) (arguing, in the course of making the case for a public rights conception of a constitutional case, that courts should be guided, in part, by "legislative determinations" of the permissible scope of a case, including the "evolution of procedural rules, such as the Federal Rules of Civil Procedure"). *See also* Floyd, *supra* note 148, at 912 (arguing that "Rule 23 itself represents a legislative recognition of appropriateness of a broader role for the courts").

183. *See, e.g.*, Martin H. Redish & Uma Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1326 (2006) ("When Rules have issued, the inertia of the legal and political systems has been placed squarely *in favor* of the standards adopted in those Rules. Congress must overcome the serious (and intended) inertia against legislative action to alter or supplant the Rules' dictates. . . . With the Rules in place, congressional inaction effectively amounts to action; with no Rules promulgated, congressional inaction is just that.") (emphasis added).

184. Floyd, *supra* note 148, at 933 ("Although the Rule was adopted by the Court, it acted pursuant to validly delegated legislative power.").

conclusion, by revisiting the constitutionality of continued judicial control over class-action rulemaking. Some intrepid scholars (most notably, Martin Redish, Uma Amaluru, and Josh Blackman) have in fact broached this issue. Redish, for example, suggests that the modern class action, among other rules, is an assertion of rulemaking authority that Congress *couldn't* properly delegate to the judiciary.[185] But, these scholars also recognize that it's far too late in the day to rollback judicial control over further development of the class action based on appeals to nondelegation principles.[186]

---

185. *See* Redish & Amuluru, *supra* note 183, at 1319–27 (distinguishing "housekeeping" procedures from procedures that "give rise to significant political or ideological controversy," like the class action, and suggesting that Congress cannot constitutionally delegate its power over the adoption of the latter to the Supreme Court). Nondelegation concerns were also raised at the time of the Act's adoption. *See* Josh Blackman, *Does the Rules Enabling Act Violate the Non-Delegation Doctrine?*, JOSH BLACKMAN'S BLOG (Jan. 28, 2015), http://joshblackman.com/blog/2015/01/28/does-the-rules-enabling-act-violate-the-non-delegation-doctrine/ (discussing Sen. Thomas Walsh's nondelegation argument against the Enabling Act).

One way to theorize nondelegation problems with the Enabling Act is to focus on jurisdictionally entangled procedures, rather than rules that raise "significant political or ideological controversy" generally, as Redish does. Whether or not Congress can shunt to the Supreme Court the power to adopt procedural rules that occasion significant "ideological controversy" as a general matter, the Article III settlement appeals to the idea that Congress, at a minimum, cannot delegate away either its power over canonical federal jurisdiction or jurisdictionally entangled enforcement defaults (enforcement defaults that intersect with core, underenforced Article III values), like the party limit. Theorizing this narrower claim—which is inconsistent with contemporary delegation doctrine, making it, were one to accept it, another example of constitutional underenforcement—is beyond the scope of this article; even so, it dovetails with claims by some nondelegation theorists that there is a small, hard core of legislative power that, in a first best world, should be conceived as nondelegable. *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 368 (2002) (noting that "[t]here may, of course, be certain 'important subjects' that cannot be addressed by any body other than the legislature, whether or not an 'intelligible principle' is provided"); *see also* Posner & Vermeule, *supra* note 139, at 1754–57 (reviewing the theory of nondelegable powers, and its roots in *Wayman v. Southard*, albeit in the course of criticizing the nondelegation doctrine).

186. *See, e.g.*, Redish & Amuluru, *supra* note 183, at 1305–07 (noting that "if one were to constitutionally analyze the [Enabling] Act's insulation of important policy choices [including the adoption of the class action rule] from any organ of government that is even remotely responsive to the electorate, at least in the first instance, it is highly likely that the Act would fail" the test of constitutionality; but noting, ruefully, that there is "absolutely no reason" to think the Court will revisit its repeated holdings that the Enabling Act is constitutional "in the foreseeable future"); Josh Blackman, *supra* note 186 (arguing that the answer is "yes"—although framing the problem with the Enabling Act as the absence of an "intelligible principle" to guide Supreme Court rulemaking).

We might, though, resolve that tension in a different way, by appealing, again, to the logic of compensating adjustments and the constitutional second-best. Rather than view Rule 23 as a departure from the Article III settlement, we can square the Rule with the settlement going forward if we assign the federal rulemaking system control over the Rule's future development—treating that system, in effect, as a second-best substitute for the checking role the settlement assigns to Congress. [187]

Here, Neal Katyal's work is helpful.[188] Katyal, recall, started with the parallel collapse of external checks and balances in the national security area. Preserving some semblance of fidelity to the framers' plan, he argued, requires branches to adopt internal substitutes for the fallen external checks of the old Madisonian system. [189] The collapse of "first-best" "'legislative v. executive'" checks, as he put it, requires substituting a "second-best" system of "'executive v. executive'" checks.[190]

In the foreign affairs field, he suggested, the "critical mechanism to promote internal separation of powers is bureaucracy."[191] The executive branch foreign affairs bureaucracy, thanks to its non-partisan "civil service" tilt and expertise, brakes rash executive action.[192] That braking capacity suits that bureaucracy to stand-in or substitute for Congress's institutional checking role in the

187. The solution sketched below functions as a kind of second best substitute for the defunct nondelegation principle to which the Article III settlement implicitly appeals. For more on this point, *see infra* notes 293–300 and accompanying text. In this, the response is of a piece with parallel second-best enforcement of nondelegation principles in the executive arena. *See* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 125–26 (1994) (arguing, in the analogous executive branch context, that "much of the Court's post-New Deal checks and balances jurisprudence can be justified as an attempt to ensure fidelity to the original understanding of checks and balances in a post-nondelegation doctrine world").

188. *See* Katyal, *supra* note 14, at 2316–17 (discussing a second-best alternative to the Founders' plan for a system of checks and balances).

189. *Id.*

190. *Id.* at 2316 ("The first-best concept of 'legislature v. executive' checks and balances must be updated to contemplate second-best 'executive v. executive' divisions." This is accomplished by leveraging the internal checking potential of the executive civil service bureaucracy on presidential adventurism.).

191. *Id.* at 2137.

192. *Id.* (noting that "bureaucracy creates a civil service not beholden to any particular administration and a cadre of experts with a long-term institutional worldview"); *id.* at 2318 (A well-designed bureaucracy could impose "modest internal checks that, while subject to presidential override, could constrain presidential adventurism on a day-to-day basis.").

foreign affairs field.[193] The key question, he argued, is how to optimize the executive bureaucracy's ability to fill that role.[194]

It's plausible to understand the Court as doing something similar with its own in-house bureaucracy in the 1990s. It replaced the role that legislative v. judicial checks play in its Article III settlement in-house with a second best system of judicial v. judicial checks by harnessing the friction of its own rulemaking bureaucracy.

In the face of Congress's diminished role in rulemaking, the Court treated its slow-moving rulemaking bureaucracy as a substitute for Congress's check against growth of supplemental private attorney general. It interpreted the class action rule narrowly, pushing broader constructions (that would work more significant departure from the historical baseline) back to the rulemakers. The result took the Court's Article III settlement and extended it into civil procedure through a system of internal separation of powers.

Some readers will object that this sounds complicated. It is. But it is complicated in exactly the same way that well-recognized compensating adjustments in other doctrinal contexts are complicated. Adjustments take different forms as they radiate into the warp and woof of subconstitutional law.[195] Compensation is "rich, fluid, and evolving."[196] So it is with the Article III settlement, which radiates through both the law of statutes and procedures in a way that combines switching, reinforcement—and, in the space governed by federal procedural rulemaking, substitution.

2. Substitution and the Rulemaking Bureaucracy

Before turning to look at the cases where the Court's use of the rulemaking bureaucracy as a substitute for Congress's role in the Article III settlement is most evident, it's worth pausing to make clear

---

193. *Id.* at 2317 ("Just as the standard separation-of-powers paradigms (legislature v. courts, executive v. courts, legislature v. executive) overlap to produce friction, so too do their internal [bureaucratic] variants.").

194. *Id.* at 2323 (addressing the "fundamental design question . . . : What should an agency system look like to foment internal checks and balances?").

195. *See* Young, *supra* note 1, at 1843 (noting how "compensating adjustments in the realm of federalism" extend beyond the Commerce Clause to many other areas— "abstention doctrines, choice of law, the dormant Commerce Clause, preemption doctrine").

196. Young, *Continuity*, *supra* note 66, at 1386 (the process of incorporating public law norms into subconstitutional law is "'rich, fluid, and evolving'") (quoting Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 965 (1994)); Young, *supra* note 1, at 1748 (compensating for "changes in the societal and political context of federalism over time require doctrine to play a . . . dynamic role").

why the judicial bureaucracy was well-suited to replicate the checking role that the settlement envisioned for Congress.

The settlement, remember, protects traditional Article III values by exploiting the tendency of the political process toward *inertia*.[197] The rulemaking system, it turns out, is a good stand-in for Congress's role in the settlement because it replicates the inertial checks of the Article I political process within the judicial branch.

This is the result of a long, and much criticized, multi-decade evolution in federal rulemaking procedure. In its early days, the rulemaking process was relatively streamlined and somewhat ad hoc. The Enabling Act did not specify a committee structure or process within the judicial branch for promulgating or amending the Federal Rules.[198] The Court instead, overwhelmed by the task of creating a new system of Federal Rules, created the Civil Rules Advisory Committee to help it accomplish this task.[199] During the initial process of drafting the Federal Rules, the Supreme Court treated it as a truly "advisory" body—feeling free to revise rules suggested by the Committee as it thought appropriate—a practice that continued into the 1950s.[200]

Over time, though, Congress, driven by concerns about the accountability and transparency of federal rulemaking, has not only ratified but added to the original Court-created committee structure in a way that has made rulemaking not only slower, but much more sensitive to interest group pressure.

First, in 1958 Congress codified a new formal rulemaking structure first adopted by Chief Justice Earl Warren, which put the Judicial Conference of the United States in charge of overseeing the rulemaking process and gave it responsibility for "mak[ing] recommendations as to additions and revisions of the [Federal Rules] to the Supreme Court."[201] The practical result of this was that the

197. *See supra* notes 72, 85–87, and accompanying text.

198. Mulligan & Staszewski, *supra* note 6, at 1198 (noting "[t]he 1934 Act did not specify the use of committees").

199. *Id.* (citing Order, Appointment of the Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1935) (creating the Civil Rules Advisory Committee)).

200. *Id.* at 1198–99 ("Although the Court often deferred to the Advisory Committee's proposals during this early period, it did on occasion exercise its authority to revise Advisory Committee proposals prior to submission to Congress" and "[a]t least once . . . bypass[ed] the Advisory Committee entirely"); *see also* Struve, *supra* note 6, at 1106 (discussing early period of federal rulemaking).

201. Mulligan & Straszweski, *supra* note 6, at 1199 (discussing Congress's ratification of the Judicial Conference's oversight role); Coleman, *supra* note 46, at 277 (discussing the Supreme Court origins of the Judicial Conference's role).

Advisory Committees no longer reported directly to the Court, but instead filtered their proposals through the Conference.

The Conference responded by establishing a layered system that mirrored Congress's subcommittee structure. There would be Advisory Committees for civil, criminal, appellate, admiralty and bankruptcy rules, and each would report to a single Standing Committee.[202] And, as Lumen Mulligan and Glenn Strazewski write, after this reorganization, the Court subsequently lapsed into increasingly passivity—with Justice Powell going so far as to suggest, in 1980, that the Court's role is simply to make a formal "certification that [amendments] are the products of proper procedures than a considered judgment on the merits of the proposals themselves."[203]

After increasing complaints about the accountability and even the constitutionality of the Court's rule in procedural lawmaking in the 1970s and early 1980s, Congress passed the Judicial Improvements and Access to Justice Act in 1988.[204] The Act did not take back the project of rulemaking from the Court—something Congress actually did do, briefly, during the promulgation of the Federal Rules of Evidence.[205] But it modified the rulemaking process in ways that further mirror the process of congressional and administrative lawmaking.

One way Congress did so is by formalizing a structure of interest group representation within the rulemaking process. Following the pattern set by the original Court-constituted 1930s advisory committee, which was composed of "government lawyers, academics, and firm lawyers,"[206] the 1988 Act mandated that the advisory committees "shall consist of members of the bench and the

---

202. Coleman, *supra* note 46, at 277 ("In response, the Judicial Conference formed a different committee structure: a Standing Committee with oversight over five advisory committees (one each for admiralty, bankruptcy, appellate, civil, and criminal rules."). *See also* JUDICIAL CONFERENCE OF THE U.S., ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. 6–7 (1958).

203. Mulligan & Straszweski, *supra* note 6, at 1199 n.53 (quoting Order of Apr. 29, 1980, 446 U.S. 997, 998 n.1 (1980) (Powell, J., dissenting)). After the rulemaking process became more "reticulated" in 1958, "the Court unfailingly promulgated Rules recommended to it by the Judicial Conference, leading Justices and commentators to describe the Court's role in rulemaking as one of being a '"mere conduit" for the work of others.'" *Id.* at 1199.

204. Bone, *supra* note 2, at 902–03; Coleman, *supra* note 46, at 278–79 (noting that the Judicial Improvements Act built on and extended a set of earlier transparency measures adopted by the Standing Committee in 1983).

205. *Id.*

206. Coleman, *supra* note 46, at 274.

professional bar."[207] The practice of chief justices since then has been to include, alongside judges (trial and appellate) and academics, representatives of both the defense and plaintiff's bar, ensuring that interest groups with a stake in rulemaking output have a say in the amendment process. The result, writes Robert Bone, is that interest-group conflict now dominates the modern rulemaking process.[208]

Several other features of the rulemaking system, Bone notes, exacerbate its vulnerability to interest group pressure. The first is the Judicial Improvements Act's requirement that advisory committees give advance notice of proposed amendments and adhere to an extended window for public comments, which together create a public vetting process that resembles the notice-and-comment procedures imposed on agency rulemaking. This has lead to surge in organized efforts by organized bar groups to influence the amendment process.[209]

The second is the layered structure of procedural rulemaking—many of the most controversial amendments are proposed by special subcommittees, and then are considered by advisory committees, and then the standing committee, before being rubber-stamped by the Supreme Court and then, ostensibly, reviewed by Congress. In an interest group dominated rulemaking system, this multiplies checkpoints at which interest groups can exert pressure.[210]

The third, perversely, is the rulemakers' own interest in freedom from legislative meddling, which counter-intuitively ends up giving interest groups even more influence over the process. When they fail to influence rulemaking at the committee level, these groups focus their efforts on lobbying Congress. And while they have not succeeded, the threat of involving Congress, says Robert Bone, has made "the Advisory Committee . . . keenly sensitive" to interest group

---

207. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (codified at 28 U.S.C. § 2073(c) (1994)). *See also* Bone, *supra* note 2, at 903 (situating the passage of the 1988 Judicial Improvements Act amid a push toward "changing the membership of the Advisory Committee to include more lawyers as well as more representatives from groups that use the federal courts").

208. *Id.* at 904 (describing the modern rulemaking system as an "interest group model" of rulemaking that represents a decisive break from earlier models premised on technocratic expertise).

209. *Id.* (noting that opening the rulemaking process to the public increased interest group involvement and played an important role in "push[ing] the process toward an interest group model that assimilates rulemaking to legislation").

210. *Id.* (noting that "[s]ince 1973, various interest groups—plaintiffs' bar, defendants' bar, civil rights groups, and corporate groups—have become more active (some would say aggressive) at all stages of rulemaking, from Advisory Committee hearings to congressional review").

wishes, a sensitivity that has given rise to an ethos favoring rulemaking by consensus and the "accommodat[ion] of interest groups" in order to minimize the risk of a congressional takeover of the rulemaking process.[211]

All of this has vastly reshaped the rulemaking into something that, Robert Bone notes, "more closely resembles a legislative process with broad public participation and interest group compromise than the process of principled deliberation it was originally conceived to be."[212] The outcome is predictable: The post-1988 rulemaking process tends to produce relatively few amendments of any significance. When rulemakers do act in areas that are the focus of intense interest group attention, they tend to produce "highly general rules" that defer hard choices to later judicial interpreters.[213]

The post-1988 rulemaking bureaucracy's built-in tendency toward inertia and compromise has been much criticized by procedural scholars.[214] Yet, for fans of the modern Court's Article III settlement, it has a signal virtue: It opens the door to an intra-branch approximation of that settlement, one in which the rulemaking bureaucracy is treated as an arm of Congress and an extension of Congress's own checking and balancing function.

3. The Substitution Strategy in Action

Although the Court has never made this intra-branch separation of powers strategy explicit, it has come close—particularly in a series of cases starting with *Martin v. Wilks*[215] in the 1990s.

Although each of these cases is overdetermined, in that it bears more than one possible interpretation, a pattern of reasoning emerges when they are viewed as a whole. That pattern, I will show below, is consistent with the impulse on full display in the Court's representative standing case law and *Alyeska*—to (1) treat surviving modes of private attorney general enforcement as a matter for the political process, and (2) enforce this allocation of responsibility by

---

211. *Id.* at 906 & n.110; *see also id.* at 924 (arguing that "[s]elf-interested rulemakers faced with the threat of congressional intervention" have an incentive "to make concessions to powerful interest groups in order to maintain some control over the rulemaking process").

212. *Id.* at 954.

213. *Id.* at 917; *id.* at 916 (noting the growth of the interest group model has reoriented rulemaking around a "search for consensus [that] can paralyze the rulemaking process").

214. *Id.* at 954 (arguing that "[t]he court rulemaking model has lost its moorings").

215. 490 U.S. 755 (1989).

interpreting statutes that alter traditional private rights model narrowly, requiring Congress, in turn, to "expressly" approve the private attorney general model. The cases below reflect that impulse with the essential difference that the Court treats the rulemaking bureaucracy as a congressional *stand-in*.[216]

I can't, of course, prove this pattern was conscious or intended—all I can do is show that the internal logic of these opinions exhibits a pattern of reasoning characteristic of the Article III settlement, making that settlement a plausible, although hardly an exclusive, way of coherently explaining aspects of the Court's decisions.[217]

a. From Martin v. Wilks to Ortiz v. Fibreboard

The pattern starts with *Martin v. Wilks*.[218] *Wilks*, although it involved a class action, is not a class action case. It nonetheless set the tone for the Rehnquist Court's later class action decisions, in no small part because *Wilks* dealt with the same genus of problem that its class action cases confronted—the extent to which the judicial system can pave the way for that bête noire of the traditional Article III dispute resolution model, structural reform litigation, by carving out exceptions from ordinary rules governing the interests-out-of-court that a federal court can bind.

Wilks, specifically, dealt with an exception to the usual rule against non-party preclusion that lower courts crafted to smooth the way for negotiated affirmative action consent decrees in employment discrimination litigation. Under the exception, called the doctrine of impermissible collateral attack, parties with interests directly adverse to the parties to a consent decree were precluded from challenging the

---

216. *Cf.* Sunstein & Vermeule, *supra* note 14, at 410–12 (distinguishing, in the course of making a case for the existence of "libertarian" administrative law, between an "internal, doctrinal" account of the law's "libertarian" premises, which looks at "patterns" of reasoning apparent on the face of a set of published opinions, from "external" quantitative evidence of the D.C. Circuit judges' actual ideological preferences, like voting studies).

217. *Cf. id.* at 413 ("[T]he nature of legal doctrine is such that most doctrines can rest on multiple rationales; they are overdetermined by arguments. Given that fact, it will rarely be possible to demonstrate that any particular doctrine is dictated, necessarily and exclusively, by the project of libertarian administrative law. In the aggregate, however, over a set or series of doctrinal questions, a convincing pattern may emerge.").

218. 490 U.S. 755 (1989).

decree's legality if they had notice and opportunity to join the litigation that produced it.[219]

That doctrine put the onus to protect absentees affected by structural remedies on the absentees themselves—if they wanted to avoid the effect of a structural injunction, they needed to take some affirmative action, by intervening to assert their rights and interests during settlement talks. In *Wilks*, for example, the City of Birmingham and the NAACP entered into a consent decree adopting race-based hiring and promotion quotas in the Birmingham fire department—and overriding white firefighters' vested seniority rights under municipal civil service laws.[220] Under the impermissible collateral attack doctrine, the consent decree extinguished the seniority of white firefights who received reasonable notice of the proposed decree, even though they had not participated in the suit in any meaningful way.[221] If white firefighters wanted to alter the consent decree, the onus was on them to intervene to protect their interests.

In some ways, this preclusion doctrine bears some comparison to the opt-out principles of non-party preclusion applicable in Rule 23(b)(3) class actions. In both contexts, inaction in the face of notice about a proceeding posing a threat to absentees' legal interests has consequences. And in each case, linking legal consequences to absentees' inaction lowers the cost of imposing a remedy with a broad impact beyond the parties to the case, largely because of the predictable human tendencies of absentees, even those with valuable interests at stake, to sit on their hands until it is too late.

Wilks, though, rejected the doctrine, effectively requiring existing parties who want to protect proposed structural remedies against collateral attacks mounted by disaffected absentees to join these absentees or their representatives.[222] The holding, by requiring representatives of all stakeholders to be brought (dragged, even) to the table, made the process of negotiating structural remedies far more costly and time-consuming. It also, arguably, made structural remedies more precarious, since civil rights lawyers fretted that it could prove hard for them to identify and secure joinder of all of the

---

219. *Id.* at 762.

220. For a good description of the background of *Wilks*, see Samuel Issacharroff, *When Substance Mandates Procedure:* Martin v. Wilks *and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189 (1992).

221. *Wilks*, 490 U.S. at 762 & n.3 (collecting cases on the impermissible collateral attack doctrine).

222. *Id.* at 761.

affected groups who might later be permitted to mount collateral attacks.[223]

Wilks was no doubt shaped in part by normative concerns about the structural remedies endemic to public-rights-style private attorney general litigation—that these sweep too broadly and too intrusively, affecting too many unrepresented or poorly represented interests.[224] Yet, *Wilks* stopped short of declaring the doctrine of impermissible collateral attack unconstitutional. The heart of its decision, instead, turned on a close textual reading of the Rule 24 and Rule 19 in light of its historical backdrop, coupled with appeals to the Court's obligation to respect the intent of the Rules' "drafters."[225] "Even if," the Court emphasized, "we were wholly persuaded" by the various arguments in favor of the doctrine of impermissible collateral attack, "acceptance of them would require a rewriting rather than an interpretation of the relevant Rules," something that would need to be done by the Court's rulemaking bureaucracy.[226]

It's tempting to interpret *Wilks* in a cynical way, as a classic ad hoc exercise in drawing cover for a controversial decision by pointing the blame at some other institution—here, the rulemakers. But the consistency with which the Court pursued this strategy in the 1990s—particularly in its two blockbuster class action cases, *Amchem Products v. Windsor*[227] and *Ortiz v. Fibreboard*,[228] involving private rights that nonetheless have a significant public law dimension[229]—point to the possibility, at least, of something deeper going on.

The "deeper" principle at stake, skeptical readers may be quick to chime in, is simply the principle of constitutional avoidance. But as

---

223. *See, e.g.*, Andrea Catania & Charles Sullivan, *Judging Judgment: The 1991 Civil Rights Act and the Lingering Ghost of* Martin v. Wilks, 57 BROOK. L. REV. 995, 996 n.4 (1992) (noting the difficulties involved in identifying and joining interested parties).

224. George M. Strickler, Jr., *Martin v. Wilks*, 64 TUL. L. REV. 1557, 1601 (1990) ("Because . . . joinder [of affected parties in institutional reform litigation] is, as a practical matter, not feasible, joinder orders could be the death knell of most institutional-reform cases. The only way that plaintiffs in such cases will be able to avoid dismissal is by scaling down or eliminating their requests for affirmative relief—exactly the avenue that the Chief Justice seems to suggest.").

225. *Wilks*, 490 U.S. at 763–65.

226. *Id.* at 767.

227. 521 U.S. 591 (1997).

228. 527 U.S. 815 (1999).

229. Gifford, *supra* note 102, at 1116 (arguing *Amchem* and *Ortiz* illustrate a "new genre of public law tort litigation that more closely resembles the public interest reform litigation described by [Abram] Chayes and [Owen] Fiss [in the 1980s] than it does traditional tort litigation").

I will discuss later, this claim does not offer a compelling explanation for *Wilks* or a complete explanation of the cases that follow, which means we need to search for other explanations to make full sense of these cases.[230]

Amchem and *Ortiz* grew out of the efforts by lawyers in MDL proceedings to fashion a quasi-regulatory solution to what the Court memorably described as the "elephantine mass" of asbestos litigation.[231] They hit on two strategies, both dependent on innovative use of the a class settlement to create the "functional equivalent of an administrative agency."[232]

The first, considered in *Amchem*, involved an attempt by a trust set up by a group of asbestos manufacturers to forge a comprehensive settlement with a gargantuan class of outstanding tort claimaints who had not yet filed suit (many of whose injuries were still latent).[233] Here, the vehicle was Rule 23(b)(3), which authorizes the certification of "opt out" class actions (in which class members are afforded a limited exit right), but only if certain conditions, including a determination that the class claims raise a set of "predominating" common issues, are satisfied.[234]

The trust reached a proposed agreement with self-appointed representatives of the outstanding claimants against the trust's assets, then the settling attorneys filed suit with the sole aim of certifying a class encompassing these outstanding claimants. Certification, in turn, would sweep all of these claims into the ambit of the settlement, excluding only those class members who mailed in opt out forms. The deal, in turn, channeled their future claims into an agreed upon administrative settlement process. And that process would divide the trust's assets among claimants pursuant to an agreed-upon schedule that assigned different values to different claimants based a complicated formula.[235]

The predominance requirement, which asks whether the claimants' theory of liability turns on a cohesive set of shared factual and legal questions, posed serious problems because the merits of the class members' claims were governed by a patchwork of different tort laws and shot through with individualized questions relating to

230. *See infra* notes 272–87 and accompanying text.

231. *Ortiz*, 527 U.S. at 821.

232. Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP CT. REV. 337, 351 (noting that "Justice Breyer's dissent in both *Amchem* and *Ortiz* . . . treats the proposed settlement class actions as the functional equivalent of an administrative agency").

233. *Amchem*, 521 U.S. at 597.

234. *See* FED. R. CIV. P. 23(b)(3); *Amchem*, 521 U.S. at 604–05.

235. *Amchem*, 521 U.S. at 603–05.

causation, among other matters.[236] To get around this problem, the settling parties noted the class action had not been proposed in order to litigate the claims. The class action was proposed solely to implement the proposed settlement deal. As a result, these individualized questions would never be litigated.[237] There was instead just one real question before the court: the fairness of the proposed settlement.[238] And that all-encompassing common question clearly "predominated"—it, along with adequacy of the class representatives, was the only question the court, as a practical matter, would actually have to decide.[239]

Amchem rejected this argument, holding, instead, that settlement classes, like litigation classes, must satisfy the basic prerequisites of Rule 23(a) and Rule 23(b).[240] It did so in part based the text of Rule 23. Rule 23(e)'s requirement that the settlement must be fair to the class members, wrote Justice Ginsburg, "was designed to function as an additional requirement, not a superseding direction," since "the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b)."[241]

The Court accordingly refused to relax the predominance requirement that applies to litigation classes in the settlement class setting, and then went on to reverse certification of the sprawling mass tort settlement based on its failure to meet that requirement.[242] In the process, Justice Ginsburg, citing the Advisory Committee's warning that mass tort claims are generally not cohesive enough to be suitable for class certification, established what has amounted to a very strong presumption against certification of mass product liability torts involving individually marketable claims and significant stakes.[243]

---

236. *Id.* at 609 ("In contrast to mass torts involving a single accident, class members in this case were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases."); *id.* at 609–10 ("'These factual differences,' the Third Circuit explained, 'translated into significant legal differences.' State law governed and varied widely on such critical issues as 'viability of [exposure-only] claims [and] availability of causes of action for medical monitoring, increased risk of cancer, and fear of future injury.'") (alteration in original).

237. *Id.* at 601 (noting the class action was "not intended to be litigated").

238. *Id.* at 607.

239. *Id.*

240. *Id.* at 619–22.

241. *Id.* at 621.

242. *Id.* at 622–25.

243. *Id.* at 625 (noting that the 1966 Advisory Committee "advised that such cases are 'ordinarily not appropriate' for class treatment"); *id.* (noting that while the "text of the Rule does not categorically exclude mass tort cases from class

In *Ortiz*, lawyers for Fibreboard tried to accomplish much the same result, by recourse to an expansive interpretation of Rule 23(b)(1)(B). This provision grants district courts authority to certify a mandatory (that is, non- opt-out) class action when individualized "adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests."[244]

The historical antecedents of this portion of Rule 23 were equitable actions like the creditors' bill—a proceeding that permitted a group of litigants with liquidated claims (that is, with claims that had been litigated to a judgment) to receive partial satisfaction by dividing a tangible res owned by an insolvent defendant amongst themselves.[245] The settling parties in *Ortiz* argued, though, that Rule 23(b)(1)(B)'s broad, flexible language cast beyond the historical model to encompass unliquidated (e.g., unlitigated) mass tort suits against defendants when there was a significant risk the defendants' financial resources would prove insufficient to meet their expected mass tort liability.[246]

The Court, however, rejected this reading of Rule 23(b)(1)(B). It held, instead, that Rule 23(b)(1)(B) creates a strong presumption against certification of mandatory classes that do not fit core features of the Rule's historical antecedents—including the existence of "a fund with a definitely ascertained limit" that preexists the settlement and is insufficient to satisfy the claims set "definitely" at their maximum value.[247] That, in turn, doomed the proposed settlement in *Ortiz* and, indeed, the use of the limited theory in most unliquidated mass torts, since placing a "definite" value on the expected liability

---

certification, and District Courts, since the late 1970s, have been certifying such cases in increasing number. The Committee's warning, however, continues to call for caution when individual stakes are high and disparities among class members great." (citation omitted)).

244. FED. R. CIV. P. 23(b)(1)(B).

245. Ortiz v. Fibreboard, 527 U.S. 815, 832–37 (1999) (reviewing historical antecedents to Rule 23(b)(1)(B)).

246. *See* Flanagan v. Ahearn, 90 F.3d 963, 982 (5th Cir. 1996) (noting that settling parties presented expert evidence "on the probable number, mix and timing of future asbestos personal injury claims against Fibreboard, the anticipated costs of defense relating to such claims, and the present value of Fibreboard's non-insurance assets. The experts agreed that Fibreboard faced enormous liability and defense costs that would likely equal or exceed the amount of damages paid out").

247. *Ortiz*, 527 U.S. at 838–41.

and the resources defendants can muster to satisfy those claims is a prohibitively difficult enterprise.[248]

Briefing in the cases squarely raised a variety of creative, and sometimes strained, constitutional objections to these suits—one punchline of these objections, according to Laurence Tribe's brief for the objectors in *Ortiz*, was that these cases amounted to a disguised "legislative joint venture" between the lower court and private attorneys general that contravened Article III's tribunals properly "judicial" role.[249]

Whatever else one may say about this characterization, it highlights the difficult line-drawing problem that led the Court to abandon meaningful efforts to police Article III values in the supplemental private attorney general context through formal constitutional doctrine. Looked at from one angle, mass tort class actions raise precisely the kind of Article-III-tinged concerns critics of private attorney general litigation leveled against public rights litigation of the 1970s. As the tort scholar Donald Gifford notes, the agreed-upon remedies in these cases resemble (and indeed were inspired by) the "structural reform models" of yesteryear—now refocused on corporate wrongdoing rather than government wrongdoing. The goal is to scale up a solution to a widespread regulatory problem by "replac[ing] the regulation of corporate conduct by the politically accountable branches, perceived to be inadequate," with institutional solutions patterned on an administrative model.[250] The result, as Tribe's brief emphasized, implicates the concerns about accountability, discretion, and participation of classic public-law litigation.[251]

Yet, the grist for these suits is the classic subject matter of Article III litigation—ordinary tort claims for compensatory relief—rather than statutory or constitutional challenges to public governance. These are thus suits that mix features of public and private law litigation into a confounding hybrid that provides one of the leading illustrations of the point made earlier: The boundary between private attorney general litigation that trenches on Article III values and

248. *See, e.g.*, Linda S. Mullenix, *Nine Lives: The Punitive Damages Class*, 58 KAN. L. REV. 845, 872–73 (2010) (noting that "proponents of limited-fund class actions continue to have difficulties proving up the existence of a limited fund pursuant to post-*Ortiz* standards," and pinpointing "[t]he core *Ortiz* requirement for proof of a limited fund" as "the chief reason for failure of post-*Ortiz* limited-fund class actions").

249. Brief for Petitioners at 48, Ortiz v. Fibreboard, 527 U.S. 815 (1998) (No. 97-1704).

250. Gifford, *supra* note 102, at 1118.

251. Brief for Petitioners, *Ortiz*, *supra* note 250.

private attorney general litigation that doesn't is difficult to draw through formal doctrine.

What's notable about both of these cases, for our purposes, is that in each, the Court dodged these issues by relying on the same deference-to-the-rulemakers arguments it had made in *Wilks*.

Justice Ginsburg explained in *Amchem* in the course of her textually focused analysis of Rule 23 that "courts must be mindful that the rule as now composed sets the requirements they are bound to enforce."[252] And she invoked the complicated rulemaking process, echoing academic arguments that the Judicial Improvements Act had mandated the use of the rulemaking bureaucracy. "Federal Rules take effect after an extensive deliberative process," she wrote, "involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress."[253] As a result, "[t]he text of a rule thus proposed and reviewed *limits judicial inventiveness*."[254] Courts "are not free to amend a rule outside the process Congress ordered."[255] She noted, moreover, that the Advisory Committee was already considering relaxing the predominance requirement for settlement classes.[256]

Justice Souter's *Ortiz* opinion continued in a similar vein. Here, though, it was not the Rule's purportedly "plain" text that compelled the court's decision, but rather what the rulemakers did *not* say. To be sure, said the *Ortiz* Court, Rule 23(b)(1)(B) employs a pragmatic-looking standard and so could be construed to delegate a fair amount of discretion to adopt innovative new variations of the limited-fund class action.[257] The problem was that the rulemakers simply "did not contemplate that the mandatory class action codified in subdivision (b)(1)(B) would be used to aggregate unliquidated tort claims on a limited fund rationale."[258]

---

252. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997).

253. *Id.*

254. *Id.* (emphasis added).

255. *Id.*

256. *Id.* at 619 ("A proposed amendment to Rule 23 would expressly authorize settlement class certification, in conjunction with a motion by the settling parties for Rule 23(b)(3) certification, 'even though the requirements of subdivision (b)(3) might not be met for purposes of trial.'").

257. *See* Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1102 (2012) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833–34 (1999)) (noting that Rule 23(b)(1)(B)'s expansive terms arguably invite broader applications than the interpleader-like limited-fund actions to which the provision has been limited).

258. *Ortiz*, 527 U.S. at 843.

The legislative history of the 1966 Civil Rules Advisory Committee, the Court emphasized, was silent on this point. That history indeed revealed the rulemakers were mostly "backward" looking—myopically focused on grandfathering in historical modes of limited-fund litigation, and not really focused in any deliberative way about new, more innovative directions latent in the text they were adopting.[259] Because the Court feared the Committee "would have thought . . . an application of the Rule [to unliquidated mass torts] surprising," it sought to "limit any surprise" by adopting a presumption against limited-fund class actions that do not fit the pattern set by the "Rule's historical antecedents."[260] In effect, *Ortiz* construed a vague Rule *against* the conferral of new judicial, discretionary powers.

While this section is focused on the Court's case law in the 1990s, portions of more recent cases, like *Wal-Mart Stores v. Dukes,* might be understood similarly. As Robert Bone explains in a recent article, the *Wal-Mart* Court's interpretation of Rule 23(a)(2) commonality was wrapped up with a larger conceptual question about the concept of a "class" reflected in Rule 23 and a related question about the degree of class cohesion that Rule 23 requires—questions not clearly answered by the Rule's text.[261]

He distinguishes what he calls "external" and "internal" models of the class.[262] The external model presumes a class must "preexist" the application of Rule 23, meaning that the certification depends on whether the class is "unified" or cohesive for reasons that antedate the Rule's application—for example, because the class members' claims rise or fall together under the preexisting substantive law given legally material intra-class similarities.[263] The internal model by contrast views the "class" in pragmatic terms as a "device" constructed by the judge to further the goals of Rule 23 (such as improving "outcome quality").[264] The degree of cohesion or unity within the class can vary depending on pragmatic judgments about whether certification will improve outcome quality and whether tools like subclassing, issue classing, trial bifurcation, novel forms of

259. *Id.*

260. *Id.* at 845.

261. *See generally* Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651 (2014)

262. *Id.* at 652–55 (discussing what he calls the "external" and "internal" concepts of the class, as well as their implications for the degree of class cohesion required, and explaining how Rule 23 does not clearly choose between these concepts).

263. *Id.* at 659–60.

264. *Id.* at 652–53, 656–59.

aggregative proof, and the like can mitigate the costs of intraclass heterogeneity.[265]

The external model of the class imposes fairly strict, rule-like constraints on a court's class-certification decision.[266] The internal model of the class, by contrast, leaves certification, to a significant degree, up to the district court's managerial judgment, informed by cost-benefit balancing.[267] Bone notes that the text and structure of the Rule do not clearly decide between these models.[268] Rather, how one interprets the Rule's requirements depends on which model of the "class" the interpreter adopts.[269]

As Bone notes, the *Wal-Mart* Court, in the course of construing Rule 23(a)(2), implicitly rejected the internal model in favor of the external model of the class.[270] In effect, as in *Ortiz*, the Court, in the face of the Rule's indeterminacy, construed the Rule *against* conferring class certification-friendly managerial discretion on district judges.[271]

---

265. *Id.* at 658–59.

266. *Id.* at 653 (noting that the external model significantly constrains the class certification decision and "might even scuttle certification when class treatment is otherwise desirable on functional grounds").

267. *See* Bone, *supra* note 262, at 658 (noting the internal approach invites judges to apply managerial judgment in a way that balances the "benefits" and "costs" of class certification); *id.* at 673 (describing the internal approach as "pragmatic" and "functional"); *id.* at 675–77 (describing the adoption of the internal model in the early class action case law of the 1970s and 1980s and its subsequent abandonment); Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1058–68, 1080–85 (2005) (describing and criticizing, with a focus on Rule 23(b)(3)'s parallel predominance requirement, what he calls a "balancing" approach to class certification); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 793–800 (2013) (arguing in favor of the case-specific balancing approach).

268. *See* Bone, *supra* note 262, at 673 (noting Rule 23 was drafted with "two conflicting views" of the class in mind, and the Rule "embodies both views in uneasy tension"); *see also* Effron, *supra* note 140, at 805–10 (discussing the vagueness of the Federal Rules's standards governing joinder, including Rule 23(a), and the implication of that vagueness for these Rules' application and interpretation).

269. Bone, *supra* note 262, at 656–60 (noting that Rule 23 is "construed differently" depending on whether one adopts an internal or external view of the class).

270. *Id.* at 689 (describing *Wal-Mart* as "the high water mark of the . . . externally defined class"); *id.* at 701 (noting that the external view of the class makes sense of the Court's construction of Rule 23(a)(2)).

271. As Bone notes, the "internal" view of the class (his preferred view, on normative grounds) can be combined with constraints on district court discretion, since the cost-benefit balancing that it entails can be operationalized through "general rules." *Id.* at 717 n.268. However, as Bone notes, it also does not *foreclose* striking the cost-benefit balance in individual cases—*see id.* (noting the "internal

b. The Continuity between Constitutional Law and Ordinary Procedural Law

There can be no doubt that a number of constraints on class actions adopted in the cases discussed above reflect real constitutional doubt under more than one constitutional clause.[272] Several aspects of the Court's application of the predominance requirement in *Amchem* responded to due process and Article III concerns with including as-yet-uninjured class members in the settlement.[273] The *Ortiz* Court cited due process concerns with the "collectivism" of mandatory class actions as part of the justification for its holding.[274] In a portion of its analysis dealing with Rule 23(b)(2), the Court in *Wal-Mart Stores* hinted that it thought that due process may require notice and opt-out in injunctive class actions seeking ancillary monetary relief.[275] And so on.

The challenge of teasing out which part of the Court's reasoning in these cases in fact responds to formal constitutional doctrine is a subject of a by-now vast literature. The key point, for our purposes, is that almost all commentators agree that the Court's limitations on class actions in cases like *Amchem*, *Ortiz*, and—more recently—*Wal-Mart* outstrip whatever limits can be extracted from canonical due process or Article III doctrinal formulas. As Robert Bone puts the modern consensus, many "of the limiting doctrines [adopted in these cases are instead] . . . based on judicial interpretations of Rule 23," lacking a solid foundation in orthodox constitutional doctrine.[276]

"This means," he notes, "that the Advisory Committee on Civil Rules can counteract the restrictive trend to some extent by amending

---

model" does not prescribe the proper "mix" of general rules and case-specific discretion)—which is why adopting the external model, which *does* foreclose that discretion, imposes the greatest constraint on future courts.

272. *See, e.g.*, Ortiz v. Fibreboard, 527 U.S. 815, 845 (1999) (noting that, given potential due process and Seventh Amendment problems, the "general doctrine of constitutional avoidance" counsels against a broad construction of Rule 23(b)(1)(B)).

273. Amchem v. Windsor, 521 U.S. 591, 625–28 (1999).

274. *Ortiz*, 527 U.S. at 845–47 (noting the tension between the day-in-court ideal and the "collectivism" of a mandatory class action, among other constitutional concerns with mandatory classing on a limited-fund basis).

275. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 363 (2011); *see also* Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1109 (2013) (suggesting the adoption of a restrictive class cohesion requirement in *Wal-Mart* was driven by due process concerns).

276. Bone, *supra* note 275, at 1098.

Rule 23."[277] Echoing Liz Porter, he points to burdens of proof—the nearly insurmountable burden to establish the existence of a limited fund in *Ortiz*, or the application of a demanding preponderance standard to facts bearing on certification under Rule 23(a) and Rule 23(b)—as elements that may be adjustable.[278] Moreover, the Court's class-cohesion requirement has taken on an excessively rule-like cast, and, again paralleling Porter, Bone argues that there is plenty of constitutional space to shift to a standard-like version that weighs a variety of factors, permitting less class cohesion under certain circumstances.[279] He also argues that there's constitutional room to apply the same balancing approach to the scope for mandatory class actions, in a way that could broaden the scope for mandatory treatment of individual damages claims.[280]

The bottom line, though, is that in each of the cases, the Court has reined in class litigation beyond the point that most observers think canonical Article III or due process doctrine require. The point deepens the comparison to *Martin v. Wilks*. No one really seems to think that the impermissible collateral attack doctrine (struck down in *Wilks* based on judicial interpretations of Rule 19 and Rule 24) is categorically unconstitutional. Indeed, Congress overruled *Wilks* in the 1991 amendments to the Civil Rights Act of 1964, and the doctrine remains viable at the state level.[281] *Wilks* thus mirrors aspects of the Court's class action cases: together, the Court, in all of the above cases, invokes constitutional avoidance norms, yet interprets federal procedure bearing on the availability of private attorney general-like actions in ways that constrain beyond the zone of meaningful constitutional uncertainty.

In this, the Court's invocation of avoidance concerns closely resembles applications of the constitutional avoidance canon observed by Phil Frickey and Ernest Young. Professor Frickey noted that the

277. *Id.*

278. *Id.* at 1118.

279. *Id.* at 1115–17.

280. *Id.* at 1117 (arguing that because the day-in-court ideal is "best viewed as contextual, defined by a balance of factors including its effect on other litigants and to some extent the judicial economy benefits achieved by limiting it," and "there is much more room for the (b)(3) class action than previously assumed. Indeed, there might even be room for a *mandatory* (b)(3) class action designed to redress major litigation imbalance, to prevent serious delay costs for some class members, or even to save litigation costs when those savings are large enough.") (emphasis added). I make a similar point in *Separation of Powers*, *supra* note 79, at 374–94, as does Sergio Campos in *Mass Torts and Due Process*, *supra* note 257.

281. *See* Civil Rights Act of 1991, 42 U.S.C. § 2000d-2(n) (Supp. V. 1993); Catania & Sullivan, *supra* note 223, at 998 n.8 (noting *Martin* involves federal preclusion law and does not affect state preclusion principles).

avoidance canon is "sometimes extend[ed] to governmental actions that the courts are unlikely to invalidate as a matter of constitutional law, but that courts may nonetheless address by provisional institutional checking."[282] This use of the avoidance canon surfaces in "circumstances in which courts, facing institutional impediments to the exercise of traditional judicial review, use the canon to protect what amount to 'underenforced' constitutional norms."[283]

Young's work, reviewed in Part II above, builds on and refines that insight—by pointing out that the idea of "avoidance" in these contexts is a misnomer. What courts should be conceptualized as doing, he argues, is a straightforward project of elaborating constitutional norms that are difficult to operationalize through formal constitutional doctrine, thanks to line-drawing problems. The elaboration is expressed not through formal constitutional doctrine, but through compensating adjustments that cut across subconstitutional applications of interpretive doctrine and institutional choice principles—resulting in a "continuity" between constitutional and statutory elaboration.[284] As others have noted, this process of compensating adjustments often proceeds implicitly, rather than explicitly, opening the Court to charges of interpretive incoherence.[285]

The Court's class action cases fit neatly into this paradigm. In *Amchem*, *Ortiz*, and *Wal-Mart*, the Court operates in much the way it would when construing a statute that derogates from the traditional rule against representation of third party interests. These are interpreted using an often implicit clear statement canon—one that bars courts from inferring statutory authority to override litigants' control of their own claims without the "express" authorization of

---

282. *See* Young, *Continuity*, *supra* note 66, at 1388 (citing and discussing Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 459 (2005)).

283. *Id.* (quoting Frickey, *supra* note 282 at 455). *See also* Young, *supra* note 9, at 1603–05 (making similar arguments); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597–600 (1992) (characterizing the use of avoidance canons as a means of enforcing underenforced features of constitutional structure).

284. Young, *Continuity*, *supra* note 66, at 1387 (arguing that this use of the avoidance canon, like clear statement rules based forthrightly on normative constitutional values, "reflect[s] the Legal Process notion that statutory and constitutional interpretation are continuous, and . . . acknowledge[s] the constitutive role that statutes and other extra-canonical legal materials play in forming our 'constitution outside the Constitution.'").

285. *See, e.g.*, Young, *supra* note 1, at 1843–44 (urging the Court to be "more explicit" about compensating adjustments than it has been to date).

Congress. *Amchem*, *Ortiz,* and *Wal-Mart* reflect a similar, if implicit, clear statement requirement for the class action, but with a twist: the Court will not infer the procedural authority to override litigants' control of their own claims without the express authorization of the rulemakers.

The schema thus employs both congressional inertia and the Article III rulemaking bureaucracy's inertia toward the same end: part of a coordinated strategy of harnessing checks and balances—external and internal—to provide process-oriented protection for Article III judicial restraint values that are imperfectly captured by canonical constitutional doctrine.

As scholars like Ernest Young, Bill Eskridge, and Phil Frickey note, the Rehnquist Court, which produced *Amchem* and *Ortiz*, was particularly famous for this type of institutional settlement. Across a variety of public-law fronts, it wove traditional constitutional values that are under profound social and political pressure into the warp and woof of subconstitutional law through interpretation, while leaving Congress free to modify these interpretations in its characteristically incremental way.[286]

Understanding the role of the Rules bureaucracy through the lens of intra-branch separation of powers allows the Court's approach to interpreting jurisdictionally entangled Federal Rules to plausibly be seen as a part of this larger project. The connection has been obscured because, in the procedural context, the compromise depends on something akin to *constitutional translation*.[287] With Congress out of the picture, the Court had to translate the basic inter-branch separation of powers framework that underpins its Article III settlement into a new intra-branch setting.

---

286. Young, *Two Federalisms*, *supra* note 61, at 4, 16, 34–37 (noting that the Rehnquist Court's more liberal wing pursued "softer," "process-oriented checks" on federal power and citing the Court's "less flashy" use of "clear statement rules" as an "important example" of this strategy's success, while additionally noting that the conservative justices on the Court also showed a preference for harder-edged federalism doctrine); Eskridge & Frickey, *supra* note 283, *passim* (discussing the development of "super-strong clear statement rules" in the late-Burger and early-Rehnquist Court to enforce underenforced constitutional values); Richard H Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 490 (2002) (noting that beneath "the [Rehnquist] Court's federalism revival lies a thickening underbrush of subconstitutional doctrines comprising clear statement rules, equitable doctrines restricting federal judicial power, statutory interpretations that shield local governments from liability, and official immunity doctrines").

287. *See also* Young, *supra* note 1, at 1754–55 (discussing the relationship between compensating adjustments and translation).

IV. IMPLICATIONS

A. The Rulemaking Debate, Revisited

Viewing the Court's relationship to the rulemaking bureaucracy as an extension of a broader constitutional settlement offers a way to rationalize the Court's pattern of procedural interpretation in at least some areas, like the class action. Cases like *Amchem*, in which the Court self-consciously defers to the rulemaking bureaucracy, and *Wal-Mart*, in which it simply imposes a restraining interpretation on the Rule's vague text, are not inconsistent. They can be rationalized as flip-sides of the same coin—part of a strategy of compensating adjustment that protects Article III judicial restraint values that are imperfectly captured in canonical constitutional law. The strategy enlists the rulemaking process to help protect these judicial-restraint values, and reinforces the rulemakers' role through explicit and implicit interpretive defaults and clear statement norms.

The account here also presents an interesting contrast with usual arguments for the Court's relationship to the rulemakers. One argument, powerfully advanced by Catherine Struve, David Marcus and Lumen Mulligan, turns at bottom on basic fidelity-to-Congress obligation as well as a cluster of institutional-choice values—the rulemakers' superior technocratic competence, for example.[288] The short, crude version of this argument is: Congress has commanded the Court to leave amendments to the Rules to the rulemaking bureaucracy; the Court must obey by treating the Rules like statutes—and it ought to do that, anyway, because the rulemakers really know best.

This article suggests deference to the rulemakers might plausibly be justified by different considerations—not fidelity to Congress, or the rulemakers' technocratic policy chops, but instead by the Rehnquist Court's own distinctive way of translating a suite of contested constitutional principles into action.

As a result, the view of the Court's approach to rulemaking offered above shares more similarities with Karen Moore's alternate

---

288. *See* Marcus, *supra* note 5, at 936 ("For procedural rules, a number of institutional considerations, such as the rulemaking committees' superior procedural expertise, dovetail with the guidance Professor Struve believes the Rules Enabling Act yields"); Mulligan & Straszewski, *supra* note 6, at 1234–35 (arguing, based on comparative institutional competence considerations, including the legitimating power of rulemaking procedures, that interpretations that reflect major policy changes or alterations of settled understandings of the Rules should be left to notice-and-comment rulemaking).

conception of the Court's rulemaking role, while inverting the payoff of her insight. She argues that the Court's central role in articulating constitutional law norms suggests it should play a dynamic, independent role in rulemaking reform—namely, by harmonizing procedural law with overarching constitutional values, which she frames in terms of adjudicative fairness.[289]

The description of the Court's interpretive project above corresponds to that account of the Court's role, but with a crucial difference: while Moore argues attentiveness to constitutional values that underpin procedural reform should lead it to embrace a flexible, dynamic approach to interpretation marked by a focus on "fairness," the Court's distinctive way of protecting some of these values has actually led it, in some contexts, to impose court-access *closing* interpretations on open-textured procedural rules and then defer overrides of those defaults to the rulemakers. Deference, here, is not *imposed* on the Court from the outside, as it is in Professor Struve's account. It is instead part of a larger Court-fashioned strategy for translating underenforced structural values into action, albeit in a second-best way.

At the same time, the account identifies a line of response to criticism leveled against the Supreme Court's approach to open-ended Federal Rules by Elizabeth Porter. As Part I described, she argues that the standard-like, pragmatic cast of open-ended Rules, like that considered in *Ortiz*, amounts to a delegation of discretion to district courts.[290]

And so, she suggests, Supreme Court decisions adopting narrowing, rule-like constructions of open-ended Rules in order to rein in district courts' discretion are fundamentally misguided.[291] The Court is arrogating to itself a kind of procedural policymaking role the text of the Rules and institutional competence considerations really suggest ought to lie with district courts. The result is a kind of double-usurpation—the Court is shortcircuiting the rulemaking process and is trampling on the legal authority conferred on district courts by that process in the bargain.

Professor Porter's model is an illuminating account of Rules interpretation. But the account here complicates that argument by offering some reasons to think that, in at least some pockets of procedure, some of the Court's imperialist interpretations might plausibly be defended as a form of constitutional fidelity. The

289. *See* Moore, *supra* note 6, at 1096 (arguing the Court's interpretation of the Rules should take into account "fairness and due process concerns" for litigants).

290. *See supra* notes 52–56 and accompanying text.

291. *Id.*

approach looks imperialist—but only because compensating adjustments inevitably involve courts in departures from ordinary interpretive practice.[292]

Nondelegation canons, discussed earlier, are a particularly useful analogy to what the Court is doing in the class context because Porter herself analogizes the Rules to administrative organic statutes—in her analogy, the district courts are like agencies exercising delegated policymaking discretion under an organic "statute," the Federal Rules.[293]

Nondelegation canons depart from ordinary interpretive practice by directing agencies to construe open-ended grants of authority *against* exercise of forms of discretion that threaten "central" normative commitments of the constitutional structure.[294] In the process, they open courts to charges they are just imposing judicial preferences on agencies.[295] But they reflect a set of overarching fidelity to the constitutionally-compelled balance of power between Congress and the executive, a fidelity that takes the form of a second-best strategy in response to the Court's abandonment of efforts to enforce nondelegation norms in the traditional way.[296]

In the account above, the Court engages in what can be understood as an *extension of or analogue to* its use of nondelegation canons. The Article III settlement appeals to the idea that the political process ought to exercise exclusive control not only over judicial jurisdiction but over the abrogation of jurisdictionally-entangled procedural default rules, like the party limit.

As with all appeals to checks and balances, the fly in the ointment in the Article III settlement is the collapse of the old constraints on congressional delegation of its authority to other branches.[297] In the wake of the collapse of the old nondelegation regime, Congress delegated away its control over abrogation of the party limit, and other jurisdictionally entangled procedural default

---

292. *Cf.* Sunstein, *supra* note 15, at 453 (noting that reliance on interpretive defaults to correct underenforced constitutional norms (or further other public values) is sometimes, wrongly, seen as "the intrusion of controversial judgments into 'ordinary' interpretation").

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

294. Sunstein, *supra* note 90, at 316; *see also supra* notes 90–92 and accompanying text.

295. Sunstein, *supra* note 15, at 453.

296. Young, *supra* note 66, at 1376 (noting that analogous interpretative moves should be understood as a "means of enforcing particular constitutional values").

297. *Cf.* Greene, *supra* note 187, at 125 (discussing the challenge of translating checks and balances into a post-nondelegation world, but with a focus on administrative law).

rules, through the Rules Enabling Act.[298] Rather than revisit the constitutionality of that delegation, the Court's second-best response directs lower courts to construe Federal Rules implementing the private attorney general model against conferral of open-ended discretion on district courts, forcing development of the class device back through the ersatz legislative confines of the rulemaking process.[299]

The result, from one angle, looks like an ersatz nondelegation canon enforced by appellate courts not against external administrative agencies, but against lower courts that have expanded their quasi-regulatory role via interpretations of open-ended portions of the class procedure. This "internal" use of the nondelegation canon doesn't reinforce *congressional* control of policymaking; it reinforces the policymaking primacy of a congressional analogue, the rulemaking bureaucracy.

By doing so, though, the Court is also mitigating the structural problems with *congressional* delegation of procedural rulemaking authority to the Supreme Court in jurisdictionally-entangled areas, through a strategy of substitution.[300] In this way, narrow constructions of the class action rule are not just ersatz nondelegation canons—they are, *in fact*, doing work that is comparable to the work performed by nondelegation canons of administrative law, just in a different and conceptually richer way.

B. Avenues for Further Investigation

Viewing the rulemakers, and the structure of the rulemaking bureaucracy, as part of a larger, constitutionally-driven institutional settlement also opens up a number of avenues for further investigation.

1. Class Actions and the Structural Constitution

Viewing rulemaking through the lens of compensating adjustments not only helps rationalize some aspects of Supreme Court Rules interpretation. It also opens up the class action field for a more

298. For discussion of the link between the passage of the Enabling Act and the collapse of nondelegation norms, *see supra* notes 185–87 and accompanying text.

299. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997) (construing Rule 23 in a way that limits "judicial inventiveness"); *see also supra* notes 234–43 and accompanying text.

300. For a discussion of the implicit nondelegation logic of the Article III settlement, *see supra* notes 185–86 and accompanying text.

sustained exploration of the way concerns about constitutional structure constrain, or ought to constrain, federal class action law.

For example, as I've explored elsewhere, litigant autonomy—the central norm abandoned by federal class action law—is jurisdictionally entangled in more than one sense. Whether or not it implicates concerns about private attorney general actions under Article III, it has also been drafted to do important work in the *statutory* scheme of limited federal jurisdiction.[301]

This fact suggests one more reason we should treat the traditional litigant autonomy norms as quasi-jurisdictional norms whose abrogation implicates the same separation of powers divisions that govern the abrogation of other jurisdictional constraints.[302] The virtue of this perspective is that it avoids difficult and contestable claims about Article III by shifting focus to ordinary jurisdictional law, lowering the stakes of the debate in the process.

This perspective, though, naturally points more or less in the same direction as the Court's private attorney general settlement—in favor of narrowing constructions of Rule 23 in deference to the political process which sets jurisdictional policy in our system.[303]

But a key barrier to this idea is the concentration of rulemaking power in the judicial branch—an outgrowth of the collapse of separation of powers constraints on rulemaking in jurisdictionally-entangled areas of procedure, thanks to the breadth of the delegation in the Rules Enabling Act.[304]

Viewing the rulemaking bureaucracy through the lens of compensating adjustment helps overcome that objection. Taking jurisdictional concerns with the class action seriously doesn't require rolling back the delegation of rulemaking to the judicial branch. The reality is that the rulemaking system has acted as a replacement for Congress's checking role, opening the door for translating the checks-and-balances framework that ought to govern, and discipline, the abrogation of jurisdictionally-entangled procedural rules into the post-Rules Enabling Act setting.

This is just one illustration of the fact that the compensating adjustment literature can open up procedure to renewed exploration of structural concerns with the class action that have long lurked in the background of class action law (and other jurisdictionally entangled corners of procedure) but yet haven't been taken seriously because the Rules Enabling Act seemed to have let the horses out of the barn.

---

301. Moller, *Separation of Powers*, *supra* note 79, at 396–405.
302. *Id.* at 405–11.
303. *Id.*
304. *Id.* at 423–25.

2. Designing the Rulemaking Bureaucracy

Another line of investigation is the bureaucracy's design. The Article III settlement turns to separation of powers principles both as a fallback source of protection for the traditional conception of Article III and as a compromise with competing, irreconcilable views of the federal judicial role. The compromise, though, depends on the prediction that remitting contested questions about federal courts' regulatory role to Congress can both legitimate and brake (or slow) change at the same time.

The rulemaking bureaucracy serves this settlement more or less well depending on its capacity to replicate both Congress's legitimating and braking functions. This puts proposals, like Brooke Coleman's argument the Court needs to be more attentive to interest-group balance when appointing members of the Civil Rules Advisory Committee, in a slightly different but no less favorable light.[305]

Coleman argues that the rulemaking process benefits from diverse perspectives offered by representatives of both the defense and the plaintiff bar.[306] She frames her prescriptive proposal as a response to what she perceives as an imbalance in Supreme Court appointments to the Civil Rules Advisory Committee that is skewed toward the corporate defense perspective.[307]

Her focus is on legitimating rulemaking in the eyes of progressives. But the argument here actually points to an even broader scope for representation of interest groups than Coleman calls for. The functional point of the Article III settlement is that certain types of procedural reform should also be subject to heightened institutional checks because they are entangled with larger, deeply contested, and therefore (from one standpoint) underenforced Article III values. Yet limiting representation to representatives of different interest groups within the bar can end up artificially slighting larger Article III-related normative concerns with procedural reform by excluding larger public-law considerations from the rulemaking reform debate.

Recent proposals by the class action subcommittee of the Civil Rules Advisory Committee are a case in point. These would expand the availability of settlement class actions in a way that would open the door for the type of sweeping class settlements rejected by

---

305. Coleman, *supra* note 46, at 294–96.

306. *Id.*

307. *Id.* at 294–95 (noting that "[o]n the current Civil Rules Committee, there is only one plaintiffs' attorney," with the result that "the Committee is inclined to support defense-side positions").

Amchem.[308] One reason this proposal generated a broad base of support may be that segments of the corporate defense and plaintiff bar have a shared interest in expanding the scope for class action settlements—the plaintiffs' bar, because expansion may dramatically widen the scope for class actions, the defense bar because these class action settlements allow mass tort defendants to buy peace at lower transaction cost than they must pay to conclude dispersed mass tort litigation in the ordinary litigation market.

District court judges, too, may support these class action settlements for much the same reason—they simplify courts' task of brining mass tort litigation to a successful resolution. The result is that the rulemaking process in which representation is limited to trial judges and practitioners may create an artificial bias *in favor* of expanding the settlement class action despite larger public-law-related concerns—concerns about, as Laurence Tribe put it, "legislative joint venture[s]" between courts and class action attorneys[309]—this expansion raises.

Optimizing the rulemakers' institutional settlement function accordingly requires injecting a larger public-law perspective into the rulemaking process in a way that will capture broader, constitutionally-inflected normative disagreement. That requires including stakeholders (e.g. Reporters) whose perspective transcends the narrow technocratic case-management focus of trial judges or the client-centered focus of practitioners, including a richer ideological mix of academics who write at the intersection of procedure, federal courts, and constitutional law, as well as appellate judges. By dint of training and interest, these stakeholders inject the missing constitutional perspective essential to ensuring rulemaking reflects a fair compromise that internalizes the rich array of public-law concerns that some types of procedural reform implicate.

3. The Fragility of Intra-Branch Settlements

The foregoing sections identified optimistic lines of inquiry, ones that assume the rulemaking bureaucracy's role in the Article III settlement has a real future. But this article also opens up a more pessimistic line of inquiry—one focused on the limits and fragility of institutional settlements in an intra-branch setting.

---

308. For discussion of *Amchem*, *see supra* notes 231–43 and accompanying text.

309. Brief for Petitioners at 48, Ortiz v. Fibreboard, No. 97-1704, (U.S. Aug. 6, 1998).

The maintenance of a purely intra-branch settlement raises, in particular, problems with intrinsic motivation. Adrian Vermuele and Eric Posner, for example, level just such a criticism about Katyal's executive-focused proposal. As they write, while a well-motivated executive might adopt his proposal, a poorly motivated executive "would not adopt or enforce the internal separation of powers to check himself."[310]

In some ways, the problem of intrinsic motivation is less problematic in the judicial branch than in the executive branch, given the legal system's adherence to stare decsis. This gives well-motivated courts an extra tool—precedent—to constrain poorly-motivated future courts.

But in some ways, maintaining an intra-branch institutional settlement in the judiciary is more problematic than in the executive branch. Even if courts are path dependent, they are also hierarchical—lawyers and judges are trained to privilege hierarchies of precedent and courts. It's not hard to imagine how that privilege would bleed into the Court's interaction with the rulemaking bureaucracy. It is one thing to defer to a decisionmaking body of coordinate constitutional authority, like Congress or the Executive. It's another thing entirely to defer to a subordinate bureaucracy that is, formally, under the Court's own superintendence. For judges professionally trained to respect—and enforce—hierarchy, that kind of deference involves some major cognitive dissonance.

That cognitive dissonance combines with major temptation where one ideological bloc gains a steady voting advantage on the Court. And, indeed, it may be that we are in the midst of witnessing exactly what can happen when courts facing the dissonance of yielding to subordinates give into temptation.

Deference to rulemakers on display in cases like *Wilks*, *Amchem*, and *Ortiz* coincided with a period of remarkably fractured Supreme Court decisionmaking, particularly in the procedural arena. One leading indicator of this is the Court's personal jurisdiction cases, which raise a set of underlying normative and policy tensions—tensions that can roughly be characterized as a clash between proponents of expanding court access and proponents of limiting access to curb litigation abuse.

These tensions manifested, in the personal jurisdiction arena, in divergent blocs, one of which seemed committed to expanding court access for plaintiffs by loosening personal jurisdiction constraints,

---

310. ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 140 (2010).

while the other seemed bent on limiting court access to ward off defendant's exposure to "lawsuit abuse" in overly plaintiff-friendly courts (by giving defendants more control over where they are subject to suit, for example).[311] Neither bloc has unable to come up with a governing majority capable of resolving this difference in vision one way or the other, leaving a host of details about the law of personal jurisdiction unsettled.

This may be an indicator that the Court faced a larger stalemate implicating other similarly charged procedural questions, questions that also happen to intersect with Rules interpretation, like the scope of the class action. If that's right, then as one voting bloc gains ascendance, there is a risk of that bloc giving into temptation, leading the norm of deference to the rulemakers to fray and collapse.

That prediction may, indeed, explain what was starting to happen in the first ten years of the Roberts Court. In the wake of the replacement of Justice O'Connor with the much more reliably conservative Justice Alito, the second Bush administration gave the Court a reasonably cohesive conservative voting bloc. As the Court began to feel its conservative muscle, this translated into an increasingly imperialistic approach to some issues, including procedural ones, that don't implicate the Court's Article III settlement. Decisions like *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, which largely rewrote federal pleading rules in a way that limited litigants' access to federal court, are cases in point.

Although pleading rules are far afield from the Court's private attorney general settlement, the Court's decision to walk back deference to rulemakers in that context may have ripple effects for the private attorney general settlement. Although the description of the Court developed above makes the Court sound very deliberative—I describe it as implementing a second-best "strategy"—the reality is probably messier. Compensating adjustments sometimes grow up organically. The Court develops practices for undertheorized reasons and those practices, over time, become enlisted in a gradual, half-conscious process of compensating adjustment that we only come to fully appreciate over time.

This is, I suspect, part of the story above—the Court gravitated toward deference to the rulemakers for a skein of reasons—the push-

311. *Compare* Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 108–16 (1987) (plurality) (adopting restrictive approach to purposeful availment that gives defendants more control over where they are subject to suit) *with id.* at 116–21 (Brennan, J., concurring) (adopting a more expansive approach to purposeful availment that gives local litigants greater access, on the margins, to suit in a local court).

pull of institutional compromise, concerns about institutional competence of the Court-as-rulemaker, and congressional signals to shunt rulemaking to an administrative process all played a role. But the custom of deferring to rulemakers that took root by the 1980s became a foundation on which the Court also built an annex to its private attorney general settlement in the procedural domain.

The result, though, may be that the possibility of an institutional settlement in the class action field is only as durable as the larger institutional norm of rulemaker deference on which it is built. As conservatives walked back attitudes of deference in some areas (pleading, for one), they may well have weakened the liberal wing's willingness to adhere to that deference norm, and the institutional compromise it makes possible, in other areas. As the liberal wing becomes ascendant, the class action may prove to be one of these areas.

If that prediction is right, then Courts of the past and present give us contrasting lessons. If the Rehnquist Court gave us a lesson in the possibility of intra-branch settlements, the Robert Court's conservative moment may be giving us a hard lesson about intra-branch settlements' fragility.

CONCLUSION

A decade ago, Neal Katyal described what he called internal separation of powers—institutional arrangements that replace Madisonian checks that have ceased to work with intra-branch substitutes.[312] All along, the one branch that has come closest to adopting something like this model is the judiciary.

In fits and starts, the Court has exploited separation of powers to achieve what this article calls an Article III settlement—a compromise between Article III traditionalists and advocates of the private attorney general that invokes separated powers to push expansions of the private attorney general enforcement model to the political process.

The Court has extended this settlement to enclaves of federal procedure—procedure, that is, entangled with contested accounts of Article III values—by adjusting its relationship to its own rulemaking bureaucracy. Through the bureaucracy's design and operation, operating in conjunction with reinforcing interpretive norms, the Court converted that bureaucracy into an unacknowledged system of intra-branch separation of powers—a system that mimics Congress's

312. Katyal, *supra* note 14, at 2316–17.

checking and balancing role under the Article III settlement *within* the judicial branch.

This way of understanding the Court's relationship to the rulemakers can be taken in a number of different directions. It connects the rulemaking process and the broader strand of Article III jurisprudence, reflected in its representative standing cases, that have never seemed to fit together comfortably. It connects rule interpretation and the design of rulemaking bureaucracy with what Ernest Young calls the "constitution outside the Constitution"[313]—the way in which our system's commitment to constitutional values is constituted through interpretation of subconstituitonal law and institutional design. It also helps connect some of the Court's decisions adopting narrow constructions of procedural rules with law, rather than pure judicial will. And it underscores that the Supreme Court has more than one option for protecting Article III values in the class context: it can do so through intra-branch institution-building, rather than just relying on blunt doctrine.

At the same time, the account here opens the door for a more sustained investigation into the way that structural values shape procedural interpretation. In particular, it helps us get beyond the sense that this inquiry has been foreclosed by the Rules Enabling Act. The reality is that the Act's delegation of rulemaking power is overbroad. Read to encompass alterations of jurisdictionally-entangled procedural enforcement defaults, like the litigant autonomy norm, it is in not-insignificant tension with basic separation of powers principles that regulate jurisdictional law. It's far too late in the day to revisit the constitutionality of the Enabling Act. But the constitutional second-best offers one way to preserve some fidelity to structural values in the face of the Act's overbroad delegation.

Viewing rulemaking through an institutional settlement prism also, incidentally, has one last virtue, and it's a good point to close on: The account here undercuts the partisan flavor of past defenses of deference to the rulemakers. As Elizabeth Porter notes, prior scholarship defending the norm of Supreme Court deference to the rulemaking system seems to be motivated by concerns about court access-limiting decisions like *Twombly* and *Iqbal*.[314] This focus has

313. *See generally* Young, *Outside*, *supra* note 62.

314. *See* Porter, *supra* note 2, at 152 ("Although not stated directly, Mulligan, Struve, and others appear to assume that the Advisory Committee's members—and therefore the rulemaking process—will be more proplaintiff than the five-Justice majority of the Court behind *Iqbal*, *Wal-Mart*, and other controversial decisions, and therefore will refrain from amending the Rules in ways similar to what the Court is doing through adjudication.").

sometimes risked making the argument for rulemakers seem like a selective tactic aimed at entrenching liberal constructions of procedural rules and fending off conservative ones.

Of course, the Article III settlement has some appeal for progressives. While it entrenches limits *on* the private attorney general in civil procedure, it also entrenches a role *for* the private attorney general. Once implemented in procedure, the procedural infrastructure of the private attorney general is, thanks to the settlement, hard to unwind.[315]

But the account here also underscores that the norm of deferring to the rulemakers has cross-cutting ideological appeal. In some enclaves—procedures entangled with larger debates about the metes and bounds of an Article III case—deferring change to the rulemakers also shows an underappreciated but real form of respect for the tradition of *limited* federal jurisdiction.

This also lends an ironic air to the Court's recent, more aggressive departures from the deference-to-rulemakers norm. As the Roberts Court unilaterally updated Federal Rules outside the ambit of the Article III settlement, like the federal pleading rules, it arguably undermined the basic rulemaking deference norm that also helped make the Court's Article III settlement possible.

One can only speculate about where this leaves the rulemaking settlement—as the last part suggested, it probably weakens it, at the margins, by undermining future liberal majorities' willingness to stick to it.[316] This also makes the Court's *Twombly* and *Iqbal* cases look short-sighted. On a fractured Court during a period of profound political instability in which continued conservative dominance remains uncertain in the medium to long-term, the Court's partisan, aggressive turn in the pleading realm may end up weakening a larger compromise, one that, in some enclaves of procedure, also offered a form of protection for intertwined checks and balances and limited jurisdiction principles that conservatives defend.

When, as they will eventually, liberal justices obtain a majority and turn their attention to past precedents reining in the class device, conservatives may come to rediscover the virtues of the federal rulemaking settlement. By then, will it be too late to save it?

The weakness of intra-branch settlements is that they are most vulnerable during unstable, partisan moments, like the one we are living through right now. That doesn't necessarily mean the settlement

315. As I will develop further in a future article, libertarians can do more to build coalitions with progressives to defend features of existing class action law that reflect the Court's "special function"—defending constitutional norms.

316. *See* Part IV.B.3.

is not worth exploring or trying to save. It does underscore that those who find the rulemaking settlement normatively attractive need to labor harder than ever to remind *both* ideological camps that they each may have a long-term stake in its preservation.

Equitable Defenses in the Age of Statutes *

T. Leigh Anenson, J.D., LL.M., Ph.D.†

ABSTRACT

The Supreme Court's decision in SGA Hygiene Products Aktiebolag v. First Quality Baby Products, *LLC, is the most recent in a series of cases struggling with the same issue: What is the scope and content of equitable defenses in federal statutes?*

Equitable defenses originated in the unwritten rules of private law. Since the twentieth century, however, the Supreme Court has been assimilating them into public law without the express approval of Congress. The fusion of equitable defenses into federal statutes is important because they operate as judicial safety valves aimed at preventing opportunism and, in this way, maintain equity's primary cleansing function in preserving the integrity of the law. But they can be misused. Without any direction from the language of the legislation, judges have discretion to define these defenses and describe the circumstances in which they apply. This means that an assortment of indeterminate defenses may stand in the way of remedying statutory

---

* I am not the first author to borrow a title from an influential book that popularized this phrase. *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

† Professor of Business Law, University of Maryland; Associate Director, Center for the Study of Business Ethics, Regulation, and Crime; Senior Fellow, Business Law & Taxation, Monash University; Of Counsel, Reminger Co., L.P.A; lanenson@rhsmith.umd.edu. Thanks to Russell Weaver and the participants in the Remedies Discussion Forums in Aix-en-Provence, France, and Louisville, Kentucky, sponsored by the University of Aix-Marseille Faculty of Law, Emory University School of Law, University of Sydney Law School, Washington & Lee University School of Law, and University of Louisville's Louis D. Brandeis School of Law. Thanks also to Cindy Schipani, Gwendolyn Gordon, David Hess, Jamie Prenkert, Lynda Oswald, and the participants in the Big Ten Research Seminars hosted by the University of Michigan and Indiana University. Thanks are also due to contributors at the ALSB Annual International Conference. These groups of scholars provided helpful comments on the manuscript at different stages. This Article also benefitted from the insights of Amy Coney Barrett, Dan Farber, Mark Gergen, Caleb Nelson, and Tracy Thomas. A substantial part of the work derives from my talk on Federal Equity at the AALS Annual Conference in New York City on January 2016. Some of the discussion will be published in JUDGING EQUITY: THE FUSION OF UNCLEAN HANDS IN U.S. LAW (Cambridge University Press 2018) (forthcoming).

violations. It is axiomatic that courts can alter the value of rights by the liberal or restrictive application of defenses that negate liability.

This Article analyzes the integration of equitable defenses in statutory law for the first time. Concentrating on Supreme Court cases, it examines these doctrines across several statutory subjects. It identifies a pattern in the decisional history of equitable defenses in order to assist in building a body of cases along principled lines. The Article also reveals that while the Court tends to accept equitable defenses according to their tradition, it likewise limits them in light of legislative objectives. An expansive attitude of inclusion corresponds with a more restrictive view of their application. What is more, the Court is supplying their substance and scope from a combination of state and federal law. In this regard, the Court is adjudicating equitable defenses to generate a general common law.

The Article additionally outlines the Court's developing supervisory role vis-a-vis the lower courts. It further explores the challenges of continuity and change in incorporating these private law principles into public law to provide direction for the future. Overall, the Article suggests a way of looking at equitable defenses to better appreciate their place in the regulatory state.

The evolution of law is to a large extent the history of its absorption of equity. — Ralph Newman[1]

INTRODUCTION

Equitable defenses are elementary conceptions of equity jurisprudence.[2] Yet seldom are they the focus of study in the modern law school curriculum.[3] Attorneys who began their legal education prior to the 1970s may recall that equitable defenses like unclean hands, estoppel, and laches are typically used to prevent opportunism.[4]

---

1. RALPH A. NEWMAN, EQUITY AND LAW: A COMPARATIVE STUDY 255 (1961).

2. *See* 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 2.10 247–48 (2d ed. 1993) (discussing unclean hands, laches, and estoppel as a basis for refusing injunctive relief).

3. *See* Jerome Frank, *Civil Law Influences on the Common Law—Some Reflections on "Comparative" and "Contrastive" Law*, 104 U. PA. L. REV. 887, 895 n.43 (1956) ("In several of our leading university law schools, there is now no course on 'equity.'"); Jack B. Weinstein & Eileen B. Hersherov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 272 (1991) (explaining that "equity was taught as a separate course until the 1950s"); Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 249–60 (2008) [hereinafter Laycock, *How Remedies Became a Field*] (discussing the law school movement away from an equity course and the new AALS section on Remedies that began in the 1970s which "undertook to help cement the modern remedies course in the curriculum"); *see also* Zechariah Chafee, Jr., *Foreword* to SELECTED ESSAYS ON EQUITY iii (Edward D. Re ed., 1955) [hereinafter Chafee, SELECTED ESSAYS ON EQUITY] ("The absence of a collection of leading articles on Equity has long been a serious lack among law books."); Doug Rendleman, *Remedies: A Guide for the Perplexed*, 57 ST. LOUIS U. L.J. 567, 572 (2013) [hereinafter Rendleman, *Remedies*] (noting that only Virginia and Delaware continue to test equity on the bar exam).

4. There are a variety of equitable defenses utilized in an almost infinite range of contexts. As such, any attempt to capture their essence is necessarily incomplete. Some simplification is useful, however, and the idea of opportunism probably best captures the spirit of the defenses discussed in this Article. For opportunism as a general theory of equity, *see* Henry E. Smith, *Why Fiduciary Law Is Equitable*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 261 (Andrew S. Gold & Paul B. Miller eds., 2014) [hereinafter Smith, *Fiduciary Law*] ("This chapter will argue that a functional theory of equity—of equity as a decision-making mode aimed at countering opportunism—captures the character of fiduciary law."). For remedies as correcting for party opportunism, see Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 237 (2012) ("A major theme in equity has been the need to correct for party opportunism and injunctions partake of this overarching purpose."). For equitable defenses aimed at the prevention of opportunism, *see* T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, 42 AM. BUS. L.J. 1, 62–63 (2005) (discussing how equitable defenses prevent gamesmanship and hypocrisy at the expense of the court, the law,

They may further remember that these maxims rest on sound moral principles that direct litigants to follow the golden rule (estoppel) or that prohibit them from taking advantage of their own wrong (unclean hands).[5] They may even recollect that the doctrines usually operate *ex post*, rather than *ex ante*, to allow judges discretion and flexibility in adjusting case outcomes.[6]

---

and other litigants); *see generally* T. Leigh Anenson & Donald O. Mayer, "*Clean Hands" and the CEO: Equity as an Antidote for Excessive Compensation*, 12 U. PA. J. BUS. L. 947 (2010) (advocating the use of unclean hands to prevent company executives' unfair advantage-taking in their employment contracts). For another explanation of equitable defenses, *see* Sheelagh McCracken, *Marshalling: A Case Study in Complexity*, at 96–111, *in* PRIVATE PROPERTY AND REMEDIES (Russell Weaver & Francois Lichere eds., 2015) (theorizing equitable defenses in commercial law as mechanisms of financial risk allocation).

5. *See* T. Leigh Anenson, *Treating Equity Like Law: A Post-Merger Justification of Unclean Hands*, 45 AM. BUS. L.J. 455, 461 (2008) [hereinafter Anenson, *Treating Equity Like Law*] (explaining rationales of unclean hands); T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377, 388 (2008) [hereinafter Anenson, *Triumph of Equity*] (explaining rationale for estoppel as doing unto others as you would have them do unto you).

6. *See* Anenson, *Treating Equity Like Law*, *supra* note 5, at 508 (discussing the role of equitable defenses as a significant safety valve); *The Cleansing Power of Equity*, 11 RESEARCH@SMITH 4, 5 (Fall 2010) https://www.rhsmith.umd.edu/news/researchsmith-fall-2010 (remarking that equitable defenses operate *ex post* rather than *ex ante*) (reviewing Anenson & Mayer, *supra* note 4); *see also* Henry Smith, *The Equitable Dimension of Contract*, 45 SUFFOLK U. L. REV. 897, 907 (2012) (explaining *ex post* operation of equitable estoppel and unclean hands).

Equitable defenses are often recognized within the realm of remedies,[7] but they originated in the unwritten rules of private law.[8] Since the beginning of the twentieth century, the Supreme Court has been assimilating them into public legislation without the express approval of Congress. The Court has yet to articulate a theory of statutory discretion to explain the reconciliation of equitable defenses within statutory schemes providing for private rights to public wrongs.

Without such guidance, the lower courts have been inconsistent in how they apply equitable defenses in statutory actions.[9] In other disputes, equitable defenses as an appropriate basis for argument have not been squarely presented to the courts.[10] Judicial

---

7. *See generally* T. Leigh Anenson & Gideon Mark, *Inequitable Conduct in Retrospective: Understanding Unclean Hands in Patent Remedies*, 62 AM. U. L. REV. 1441 (2013) (criticizing the Federal Circuit for failing to consider the clean hands doctrine as part of the Supreme Court's remedies jurisprudence); *see also* McCracken, *supra* note 4, at 100 (discussing the challenge of categorizing equitable defenses). However, the concept of a "remedy" is itself a slippery subject. *See* Peter Birks, *Three Kinds of Objections to Discretionary Remedialism*, 29 U.W. AUSTL. L. REV. 1, 3 & n. 3 (2000) (explaining the origin of the term "remedy" in medicine); Laycock, *How Remedies Became a Field, supra* note 3, at 166 ("Part of the difficulty with conceptualizing remedies as a field has been that remedies fits uneasily between the categories of substance and procedure."). Professor Douglas Laycock, a thought leader in remedies jurisprudence, traced the origins of the subject in American law schools. *See generally id.* at 216–65 (explaining how "remedies" came to be considered a separate field of law in the United States). Laycock surmises that confusion continues because practitioners do not specialize in remedies. *Id.* at 167; *accord* Rendleman, *Remedies*, *supra* note 3, at 570 (noting professional confusion on remedies), nor is there a *Restatement of Remedies* to systematize thinking on the subject. Laycock, *How Remedies Became a Field, supra* note 3, at 266.

8. *See, e.g.*, Anenson, *Triumph of Equity, supra* note 5, at 384–87 (explaining origin of estoppel); Anenson, *Treating Equity Like Law*, *supra* note 5, at 459 (examining origin of unclean hands).

9. Many of the cases reaching the Supreme Court for decision involved circuit splits on the availability and application of equitable defenses. *See, e.g.*, Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. ___, 134 S. Ct. 1962, 1972 (2014) (discussing laches). Moreover, the Supreme Court recently reversed the Federal Circuit, sitting en banc, which decided 6 to 5 that laches was available to bar damages under the Patent Act. *See* SCA Hygiene Prods. v. First Quality Baby Prods., 807 F.3d 1311, 1323–29 (Fed. Cir. 2015), *rev'd*, SCA Hygiene Products v. First Quality Baby Products, 580 U.S. ___, 137 S. Ct. 954, 959–67 (2017). For a future issue, see Steven Ferrey, *Inverting the Law: Superfund Hazardous Substance Liability And Supreme Court Reversal Of All Federal Circuits*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 633, 669 (2009) (noting conflict in the Circuits over the availability of equitable defenses under certain CERCLA provisions).

10. In *Park 'n Fly v. Dollar Park & Fly*, for example, the Supreme Court found that federal court authority did not encompass a substantive challenge to the validity of the mark, but clarified that neither the court of appeals nor counsel relied on the power to grant or deny equitable relief to support the decision. 469 U.S. 189,

opinions, as a result, neglect to provide a clear explanation of the equitable doctrines at issue because they have not properly characterized or evaluated the problem.[11] Accordingly, the treatment of these maxims is up for fuller explication in federal law.

The Article proceeds in three Parts. Part I explores an emerging equitable method in the exercise of statutory discretion. It explains the importance of history in adjudicating equitable defenses. It also shows that equity's established emphasis on the public interest and judicial discretion intersect in refining the application of these doctrines. In particular, this Part documents how the Supreme Court has been more restrained in the observance of such defenses over time. The Court is additionally reuniting a general judge-made law supplied by state and federal sources. Despite the many references to the historical tradition of equity and the appearance of antiquarianism, the Court has been a medieval modernist in its approach to equitable defenses.

Part II tracks the allocation of discretion within the federal court system. It illustrates the Court's developing supervisory role in crafting guidelines for the uniform application of equitable defenses pursuant to statutory policies. Part III identifies issues of continuity and change to better develop these statutory defenses in the future.

The Article concludes by emphasizing that often forgotten equitable defenses play an important role in statutory law. Examining how the Supreme Court applies and modifies equitable defenses in legislation should enhance understanding of these obscure and often impenetrable doctrines in a way that appreciates the law as a coherent whole.

---

203 (1985). *See also* Anenson & Mark, *supra* note 7, at 1445 n.11 (noting that Zechariah Chafee's seminal work on unclean hands was missed by counsel, and accordingly, not considered by the Federal Circuit in *Therasense, Inc. v. Becton, Dickinson & Co.*, 593 F.3d 1289 (Fed. Cir. 2010) (citing Zechariah Chafee, Jr., *Coming Into Equity With Clean Hands*, 47 MICH. L. REV. 877 (1949)) [hereinafter Chafee I]; Zechariah Chafee, Jr., *Coming Into Equity With Clean Hands*, 47 MICH. L. REV. 1065 (1949) [hereinafter Chafee II]).

11. *See generally* T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 KY. L.J. 63 (2010) [hereinafter Anenson, *Limiting Legal Remedies*] (discussing court confusion on the issue of allowing the clean hands doctrine to bar damages). *See also* Zygmunt J. B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524, 526 (1982) ("Over the years . . . the courts have demonstrated confusion and vagueness in their discussions of equity and statutory violations . . . .").

I. THE METHOD OF EQUITY

For two centuries, the Supreme Court has (almost) universally determined that equitable defenses are available in federal statutes.[12] It has identified them within federal legislation regulating taxes, patents, securities, employment discrimination, employee benefits, and copyrights. The defenses at issue included equitable estoppel,[13] unclean hands[14] (along with its derivatives, inequitable conduct, patent misuse, and employee misconduct), laches,[15] *in pari delicto*,[16] as well

---

12. *See* discussion *infra* Part IA.–C. For an analysis and justification of the Supreme Court's assumption of equitable defenses in federal statutes, see generally T. Leigh Anenson, *Statutory Interpretation, Judicial Discretion, and Equitable Defenses,* 79 UNIV. PITT. L. REV. 1 (2017) [hereinafter Anenson, *Statutory Interpretation*].

13. *See* 3 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 802 (Spencer W. Symons ed., 5th ed. 1941) (equitable estoppel is intended to promote "equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience . . . "). Lord Kenyon's definition of equitable estoppel stands the test of time. *See* Anenson, *Triumph of Equity*, *supra* note 5, at 386 (Litigants "should not be permitted to 'blow hot and cold' with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his . . . private interests.") (citing Walter S. Beck, *Estoppel Against Inconsistent Position in Judicial Proceedings*, 9 BROOKLYN L. REV. 245, 245 (1940) (quoting HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 119 (2d ed. 1850) (internal quotations omitted))).

14. The clean hands doctrine provides a rationale for refusing a remedy regardless of the merits of the claim, so long as the litigant dirtied his or her hands in relation to the litigation. Anenson, *Treating Equity Like Law*, *supra* note 5, at 461. The maxim "he [or she] who comes into equity must come with clean hands" developed to "protect the court against the odium that would follow its interference to enable a party to profit by his own wrong-doing." N. Pac. Lumber Co. v. Oliver, 596 P.2d 931, 939-40 (Or. 1979) (quoting HENRY L. MCCLINTOCK, PRINCIPLES OF EQUITY § 26, at 63 (1949)). For similar expressions of the clean hands doctrine, see 2 POMEROY'S EQUITY JURISPRUDENCE, *supra* note 13, §§ 397–99; JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 99 (W.H. Lyon ed., 14th ed. 1918) [hereinafter STORY'S COMMENTARIES].

15. Laches means "such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity." 2 POMEROY'S EQUITY JURISPRUDENCE, *supra* note 13, § 419 at 171–72; DOBBS, *supra* note 2, § 2.4(4) at 103–08.

16. The doctrine of *in pari delicto* prevents parties to a common illegal scheme from profiting from their own wrongdoing. 1 STORY'S COMMENTARIES, *supra* note 14, §421–423, at 395–400; T. Leigh Anenson, *Beyond Chafee: A Process-Based Theory of Unclean Hands,* 47 AM. BUS. L.J. 509, 566–69 (2010) [hereinafter Anenson, *Process-Based Theory*] (comparing defenses of *in pari delicto* and unclean hands and noting *in pari delicto* bars relief only to the extent that the claimant bears

as the common fund and double recovery doctrines.[17] Because none of the statutory provisions mentioned these equitable defenses, it was up to the Court to determine their scope and shape.[18] To clarify the circumstances in which these discretionary doctrines apply, this section derives a decisional model from its existing case law.

The study provides a trans-substantive approach that considers the defenses across statutes.[19] While the recognition of equitable defenses within each statutory domain has been divisive, there has been no examination of them collectively as a matter of equity jurisprudence.[20] Dean Roscoe Pound was prescient in cautioning at the

---

equal responsibility for the wrongdoing); Anenson, *Treating Equity Like Law*, *supra* note 5, at 482 (explaining the defense "preserve[s] the dignity of the courts, express[es] a moral principle, and enforc[es] public policy"); J.K. Grodecki, *In Pari Delicto Potior Est Conditio Defendentis*, 71 L.Q. REV. 254, 265–73 (1955); *see also* John W. Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 U. PA. L. REV. 261, 268–82 (1947) (tracing the history of the *in pari delicto* doctrine).

17. The common fund and the double recovery doctrines are designed to prevent unjust enrichment. The double recovery defense limits an insurer to recoup no more than an insured's double recovery—the amount the insured has collected for the same loss from a third party. 4 G. PALMER, LAW OF RESTITUTION § 23.16(b), 444 (1978) (explaining the idea that only when an injured person has received an excess of full compensation from two sources for the same loss is there unjust enrichment). The common fund defense is designed to prevent freeloading. It allows a litigant or lawyer who recovers a common fund for the benefit of others to collect reasonable attorney's fees from the fund as a whole. DOBBS, *supra* note 2, § 3.10(2) at 395 (describing the common fund rationale as those who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched).

18. The most recent example is *SCA Hygiene Products v. First Quality Baby Products*. 580 U.S. ___, 137 S. Ct. 954 (2017). The Supreme Court determined that laches did not preclude damages for patent infringement if a claim was brought within the Patent Act's six-year limitations period. *Id.* at 959–67. It did not decide whether laches was available against equitable relief. *Id.* at 959 n.2, 963; discussion *supra* note 9.

19. Anenson & Mark, *supra* note 7, at 1450–52, 1504–05, 1511–12 (endorsing a trans-substantive approach to understanding equitable remedies and defenses); *accord* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1001 (2015) [hereinafter Bray, *New Equity*] (same). A remedies-based cross-cutting framework was previously recommended by Professor David Schoenbrod. David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 631–33, 665 (1988) (calling for trans-substantive criteria for the exercise of equitable discretion to aid legitimacy by providing articulable limits).

20. We largely live in a world without equity courts. Anenson, *Treating Equity Like Law*, *supra* note 5, at 456–57 n.5 (tracing the history of equity from England to America and the subsequent merger of law and equity). The absence of a judicial tribunal devoted to equity has always been the situation in the federal courts. Unlike other countries of the common law, American academics have not conceived of

turn of the twentieth century against equity's compartmentalization into discrete subject areas.[21] As emphasized in my earlier research, a better understanding of statutory equity involves a deeper and wider frame of analysis.[22]

The benefits of a broader perspective explain (or excuse), at least to some extent, the detailed doctrinal analysis that follows. The arena of equity in federal legislation is extraordinarily large. Therefore, only a selection of cases representative of the equity integration phenomenon are discussed below.[23] More precisely, this section targets the decisional law of eight defenses across almost as many statutory subjects.[24]

The Supreme Court's decisions to assimilate equitable defenses under silent statutes illustrate special features of its equity jurisprudence. The notions were identified in my earlier work on the clean hands doctrine and remain more or less consistent in its statutory

---

equity as a separate subject for almost fifty years. T. Leigh Anenson, *Public Pensions and Fiduciary Law: A View from Equity,* 50 U. MICH. J.L. REFORM 251, 272 n.127 (2017) [hereinafter Anenson, *A View from Equity*]; *see* sources and accompanying text *supra* note 3 (discussing the absence of equity in law school curricula); *see also* Edward D. Re, *Introduction* to SELECTED ESSAYS ON EQUITY, *supra* note 3, at xiv ("[T]he elimination of a separate course in equity in many of the law schools in the United States has caused much that is truly valuable in the study of equity to be either completely lost or scattered to the point of useless dilution in various courses."). As such, scholars study equitable principles from the perspective of remedies, private law, procedure, or other areas of law.

21. NEWMAN, *supra* note 1, at 53 (citing Roscoe Pound, *The Etiquette of Justice* 3, in address before the Nebraska State Bar Association, Nov. 24, 1908).

22. Anenson & Mark, *supra* note 7, at 1452.

23. There are numerous equitable defenses and occasions for their use in federal legislation. No attempt is (or can be) made at completeness in a single article given the considerable size of the subject. The focus is on defenses that negate liability.

24. Stone v. White, 301 U.S. 542 (1937) (equitable estoppel); Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240 (1933) (unclean hands – inequitable conduct); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) (unclean hands – inequitable conduct); Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806 (1945) (unclean hands – inequitable conduct); Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942) (unclean hands – patent misuse); Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968) (*in pari delicto*); Bateman, Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985) (*in pari delicto*); Pinter v. Dahl, 486 U.S. 622 (1988) (*in pari delicto*); McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995) (unclean hands—employee misconduct); US Airways, Inc. v. McCutchen, 569 U.S. 88 (2013) (common fund and double recovery); Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. ____, 134 S. Ct. 1962 (2014) (laches and equitable estoppel).

cases involving other equitable defenses.[25] These incidents of equity, or "equityisms," to state the matter colloquially, are the following: the importance of tradition, the influence of public policy, and the relevance of discretion.[26]

One may be tempted to assume these are recent trends because the decisions were handed down in the present or even the previous century.[27] To the contrary, however, the evolving equitable method identified in the cases to come exhibits key attributes of classic equity jurisprudence.[28]

A. Tradition

The Supreme Court has consistently defined equitable defenses according to their historical descriptions and rationales as well as confined them to their customary contexts. In this way, these discretionary doctrines remain retrospective and retroactive phenomena fixed to their function.

For example, the Court relied on the classic definition of unclean hands in its patent decisions to withhold relief for infringement as a result of bribery, perjury, and the suppression of

---

25. Anenson & Mark, *supra* note 7, at 1459–61, 1502–03; *see also* Bray, *New Equity, supra* note 19, at 1036-44 (identifying themes of exceptionalism and discretion in Supreme Court cases concerning equitable remedies and defenses).

26. Anenson & Mark, *supra* note 7, at 1502–05; *see generally* T. Leigh Anenson, *From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law*, 11 LEWIS & CLARK L. REV. 633 (2007) [hereinafter Anenson, *Pluralistic Model*] (analyzing tradition, precedent, and policy as methods of interpreting equitable defenses).

27. *Compare* Bray, *New Equity*, *supra* note 19, at 1053 (asserting that the Supreme Court's "pervasive appeal to history and tradition" in recent cases is a significant departure from its previous cases) *with*, i.e., Ronald M. Levin, *"Vacation" At Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 323 (2003) ("For more than sixty years, courts have drawn upon the traditions of equity to support a broad understanding of the remedial powers of federal courts . . . even in the face of arguably contrary statutory directives.").

28. One might consider this a functional approach, but it is grounded in the heritage of equity. *See* Anenson, *A View from Equity, supra* note 20, at 273 (noting that a grasp of equity's historical context is crucial to understanding the subject). The greater part of my scholarship serves as a reminder of the tradition of equitable defenses, including their precepts and purposes. It has also attempted to trace their ongoing evolution in the present-day. Other scholars have also valued the historical design of equitable doctrines and related modes of decision-making to justify their continued vitality. *See generally* Smith, *Fiduciary Law, supra* note 4 (arguing for a functional theory of equity based on its historical development).

evidence related to the patent.[29] It similarly repeated the traditional test of *in pari delicto* in securities law in *Bateman Eichler, Hill Richards Inc. v. Berner*.[30] In *Pinter v. Dahl*,[31] the Supreme Court restated that the two prongs of *Bateman Eichler, Hill Richards, Inc. v. Berner*—equal responsibility for the underlying illegality and public policy—track the defense's traditional criteria.[32] Likewise, in *US Airways, Inc. v. McCutchen*, the Court carefully delineated the equitable defenses at issue in employee benefits law and their foundations in light of customary practice.[33]

---

29. *See* Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 816–20 (1945) (perjury and suppression of evidence); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 240 (1944) (manufacture and suppression of evidence); Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 243 (1933) (bribery and suppression of evidence); *see also* Anenson & Mark, *supra* note 7, at 1451–52 (reviewing Supreme Court decisions on unclean hands in patent law and noting that the Court relied on historical evidence, such as the original English case to recognize the defense and the treatise authored by Sir Richard Francis credited with the idea of the maxim); *id.* at 1461–71 (outlining unclean conduct and connection component of unclean hands).

30. 472 U.S. 299 (1985). The Court explained that the defense "derives from the Latin, *in pari delicto potior est conditio defendentis*: 'In a case of equal or mutual fault . . . . the position of the [defending] party . . . is the better one.'" *Id.* at 306. The doctrine stands for the idea that "courts should not lend their good offices to mediating disputes among wrongdoers" and "denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality." *Id.*

The Supreme Court found the *in pari delicto* doctrine available to bar an action arising from violations of the antifraud provisions of the Securities Exchange Act of 1934. *Id.* at 303–04, 308–11. The dispute involved a tipster-tippee situation. Investors sued for damages alleging that a broker-dealer and corporate insider had induced them to purchase stock by divulging false and materially incomplete information on the pretext that is was accurate inside information. *Id.* at 301–03. Because the investors had violated the same laws under which recovery was sought by trading on what they believed was illegal inside information, the district court dismissed the complaint on the ground that plaintiffs were *in pari delicto*. *Id.* at 304. The appellate court reversed, and the Supreme Court affirmed because it determined that the parties were not in equal fault. *Id.* at 314.

31. 486 U.S. 622 (1988). The plaintiffs in this case sought rescission under Section 12(a) of the Securities Act of 1933 for the unlawful sale of unregistered securities. *Id.* at 623. The defendant alleged the action was barred by the *in pari delicto* defense because the plaintiff promoted and otherwise participated in the sale *Id.* at 640–41. The defendant also asserted an estoppel defense that was rejected in the lower courts, but the holdings were not challenged in the Supreme Court. *Id.* at 629 n.8.

32. *Id.* at 632–33.

33. 569 U.S. 88, 98–104 (2013). The employer brought a statutory claim for equitable relief against the employee to secure reimbursement for the medical expenses it had paid as a result of the accident under the terms of its health benefits plan. The employee defended by asserting two equitable doctrines designed to

Comparably, in the recent copyright case of *Petrella v. Metro-Goldwyn-Mayer, Inc.*, the Court limited laches to its historical setting of equitable relief and refused the opportunity to fuse laches to legal relief for the first time.[34] This result is not atypical in the seventy-five years since the union of law and equity.[35] In fact, with a few exceptions, the post-merger experience of laches and unclean hands has shown that liberation is just a means of attaining freedom and not synonymous with it.[36]

---

prevent unjust enrichment: double recovery and common fund. The double recovery doctrine limits reimbursement to the amount of the insured's "double recovery." *Id.* at 91. The common fund doctrine requires the party seeking reimbursement to pay a share of the attorney's fees incurred in securing funds from the third party. *Id.* The main issue in the case concerned whether the equitable defenses could override the terms of the plan. The majority held that neither general nor specific principles of unjust enrichment (like the common fund and double recovery defenses) could contradict clear contract terms. *Id.* at 105. Because the contract was silent concerning the costs of recovery, the Court held that the common fund doctrine informs the interpretation of the reimbursement provisions of the plan and was properly read into the agreement. *Id.*

For references to the Court's use of tradition, *see* U.S. Airways, Inc. v. McCutchen, 569 U.S. 88, 98–99 (2013) (declaring that the double recovery and common fund doctrines are subject to the clear contract terms and that "[w]e have found nothing to the contrary in the historic practice of equity courts"); *id.* at 1550 (justifying the ruling that the common fund doctrine is available when the contract is ambiguous fits the rationale of the defense to prevent the insurer from free riding on the efforts of the beneficiary).

34. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. ___, 134 S. Ct. 1962, 1967 (2014).

In *Petrella*, the plaintiff filed a copyright infringement suit seeking monetary and injunctive relief for the violation of her inherited copyright to the 1963 screenplay of Raging Bull. *Id.* at 1970–71. Because the plaintiff waited eighteen years after renewing the copyright to bring the lawsuit, the defendant raised the equitable defenses of laches and estoppel. *Id.* at 1971. The Court declared that the equitable defenses of estoppel and laches are available to bar statutory relief under the Copyright Act. *Id.* at 1967, 1977. *See also* SCA Hygiene Products v. First Quality Baby Products, 580 U.S. ___, 137 S. Ct. 954, 957, 959 n.2 (2017) (extending *Petrella*'s refusal to extend laches to damages in patent law but not ruling on the defense's application to equitable relief). In prior cases, the Court had indicated that it may be reticent to extend laches to legal claims brought within a prescriptive period. *See Petrella*, 572 U.S. ___, 134 S. Ct. at 1973–74 (citing cases); *see also* Anenson, *Triumph of Equity*, *supra* note 5, at 407–08 (contrasting the Supreme Court's cautious approach to the fusion of laches versus equitable estoppel).

35. *See* Brief of T. Leigh Anenson as Amicus Curiae in Support of Respondents at 5, Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. ___, 134 S. Ct. 1962 (2014) (reminding the Supreme Court that it is addressing the fusion of laches for the first time); *see also* FED. R. CIV. P. 2; *see generally* Armistead Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261 (1939).

36. *See generally* Anenson, *Limiting Legal Remedies*, *supra* note 11 (analyzing conflicting decisions on whether unclean hands defense applies to bar damages as

History is full of live and dead things, some destined for resurrection. Because history presents an image of the continuity of mankind, its content turns up in the social sciences. Law is, after all, a past-dependent institution.[37] It is not surprising then that the Supreme Court begins constructing these defenses in statutory law out of the foundation of history in the same way as houses in medieval Rome were constructed out of stones taken from the Coliseum.[38] This ensures the continuation of equity's principal cleansing function in preserving the integrity of the law.[39]

But the historical definition of a defense is just the beginning. It is not merely learning that makes a historian, but also discernment. One studies history, like law, to acquire judgment.[40] The tradition of equity allows for such judgment through its emphasis on public policy and equitable discretion.[41] The pendulum-like dependency between law and equity cannot be overlooked. While the law without equity would have been "barbarous, unjust, absurd," equity without the law

---

well as equitable relief); Anenson, *Treating Equity Like Law, supra* note 5, at 464 (describing the traditional view limiting laches and unclean hands to equitable relief); Anenson, *Triumph of Equity, supra* note 5, at 407–08 (comparing adoptability problems of unclean hands and laches as opposed to estoppel); *see also* Bray, *New Equity*, *supra* note 19, at 1036–39 (noting the Supreme Court's continued "exceptionalism" in its equitable relief cases). For further discussion of the integration of law and equity, see *infra* Part III.

37. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881) ("The law embodies the story of a nation's development."); Richard A. Posner, *Past-Dependency, Pragmatism, & Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 573 (2000) ("Law is the most historically oriented, or if you like the most backward-looking, the most 'past-dependent,' of the professions.").

38. *See* WILSON HUHN, THE FIVE TYPES OF LEGAL ARGUMENT 49 (2002) ("Tradition often exerts a silent influence on legal reasoning. Our traditions establish 'baselines,' which are background assumptions that favor the status quo and place the burden of proof on any person who seeks to change the existing order.").

39. *See* Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 304–06 (1991) [hereinafter Sherwin, *Contract Enforcement*] (discussing acoustic separation and the flexibility it offers courts to enforce norms rather than rules); Anenson, *Cleansing Power of Equity*, *supra* note 6, at 8; Anenson, *Role of Equity*, *supra* note 4, at 63.

40. *See* O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) [hereinafter Holmes, *The Path of the Law*] (criticizing a rule that "simply persists from blind imitation of the past"). Similarly, Holmes said that "[h]istory must be part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step towards an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules." *Id.*

41. Anenson & Mark, *supra* note 7, at 1502–03.

would have been "castle in the air."[42] Equity's guiding function was to follow the law.[43] The Supreme Court's commitment to equitable defenses demonstrates that equity also follows the statute.[44] The Supreme Court is observing legislative signals as a source of policy.

The next two sections show that ancient equity practice and principle includes court consideration of the ethical ideals embodied in the defenses themselves as well as their subjugation to case and other consequences, including statutory goals.[45] Because equitable defenses are discretionary in nature, history also directs the form of the defense as open-textured with residual discretion to deny the defense remaining with the trial judge.[46]

B. Public Policy

Statutory policy plays a role in the integration of equitable defenses at both the appellate and trial level of decision-making. Even if one accepts the conventional wisdom that equitable defenses operate in a kind of legal twilight that avoids deleterious pre-litigation incentive effects,[47] adding a hurdle that plaintiffs must surmount

42. Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 67 (Summer 1993) (quoting 1 FREDERICK W. MAITLAND, EQUITY 19 (2d ed. 1936)).

43. *See, e.g.*, JAMES W. EATON, HANDBOOK OF EQUITY JURISPRUDENCE §14 at 47 (1901) ("Where *legal rights* are considered in a court of equity, the general rules and policy of the law must be obeyed.") (emphasis added); PETER W. YOUNG ET AL., ON EQUITY 3.140 – 3.170 at 166–69 (2009) (explaining that the maxim that equity follows the law has two meanings; the first is that equity supplemented the common law only when it went against conscience, and second, that it reflects the way that equity modelled some of its doctrines on analogous common law doctrines such as laches being given the same time period as the corresponding statute of limitations). Of course, Cardozo makes the point that equitable maxims are prudential rules. *See* Graf v. Hope Building Corp., 254 N.Y. 1, 9 (1920) ("Equity follows the law, but not slavishly nor always.").

44. Anenson & Mark, *supra* note 7, at 1502–05 (discussing the concept involving the defense of inequitable conduct); *see also* YOUNG ET AL., *supra* note 43, 4.680 at 255 (noting that the practice of equity "following the law" to some extent applies to statute-made law in the Commonwealth).

45. Anenson & Mark, *supra* note 7, at 1502–05; Thomas Geu, et al., *To Be or Not To Be Exclusive: Statutory Construction of the Charging Order in the Single Member LLC*, 9 DEPAUL BUS. & COMM. L.J. 83, 94 (2010) (considering codification of charging order derived from equity justified by equitable interpretation according to the policies of the statute).

46. *See, e.g.*, Anenson & Mark, *supra* note 7, at 1502–05 (explaining the discretionary nature of unclean hands); Anenson, *Triumph of Equity*, *supra* note 5, at 404–05 (describing the discretionary nature of equitable estoppel).

47. *See* Emily L. Sherwin, *Introduction: Property Rules as Remedies*, 106 YALE L.J. 2083, 2086–88 (1997) (claiming equitable defenses do not operate as conduct rules because they remain uncertain until the dispute is adjudicated (citing

makes it more difficult to sue and easier for judges to reject such lawsuits.

So how does the Supreme Court reconcile what was once solely a private relational inquiry with majoritarian sentiment? The Court has been careful to explain why the fusion of equitable defenses support statutory objectives. Consistent with its equity decisions in non-defense cases, the Court has also announced that it may modernize defenses through expansion or contraction in the public interest.[48] Classically, the Supreme Court has tied equity's public interest doctrine to legislative objectives.[49]

The Court's cases confirm that it has been conscious that its absorption of equitable defenses may adversely affect statutory goals. For example, in its patent decisions, the Court was mindful of an infringement claim's public premises in ascertaining that the application of the defense avoids public harm.[50] *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.* repeated *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*'s emphasis that patent rights are "issues of great moment to the public."[51] The Court concluded: "For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the

---

Sherwin, *Contract Enforcement*, *supra* note 39, at 300–14)); *cf.* Anenson & Mayer, *supra* note 4, at 979–83 (rejecting acoustic separation theory in public or quasi-public claims).

48. *See* Gary L. McDowell, *A Scrupulous Regard for the Rightful Independence of the States: Justice Stone and the Limits of the Federal Equity Power*, 7 HARV. J.L. & PUB. POL'Y 507, 512 (1984) (analyzing the public interest doctrine in equity cases); *see generally* Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382 (1983) (investigating the public interest doctrine for equitable remedies); *see also* Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1409, 1429 (2016) [hereinafter Rendleman, *Stages of Equitable Discretion*] (explaining that the public interest doctrine involves comparing the interests of the plaintiff and the public).

49. *See* McDowell, *supra* note 48, at 512–13 (discussing Supreme Court case law and concluding that "[t]he public interest doctrine reflected the belief of the Court that public law, legitimately enacted and fairly administered, was the closest approximation to what constituted the public interest.").

50. *See* Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945) (citing Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 492 (1942) (declaring the "vital significance" of equitable defenses in patent lawsuits which affect the public interest.).

51. *See id.* (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944)); *see also* Zorina Khan, *Innovation in Law and Technology*, *in* Vol. II, THE CAMBRIDGE HISTORY OF LAW IN AMERICA 528 (Michael Grossberg & Christopher Tomlins eds. 2008) (discussing how private inventors were considered public benefactors).

public."[52] The same reason justified the Supreme Court's allowance of the patent misuse defense. The Court explained that equity courts "may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest."[53]

Moreover, in *Perma Life Mufflers, Inc. v. International Parts Corp.*, an anti-trust case, all of the concurring opinions analyzed the availability of the *in pari delicto* defense in anti-trust law on policy grounds.[54] For instance, in responding to Justice Black's majority opinion, Justice Harlan explained why the application of *in pari delicto*, at least in its traditional form, supported the statutory objectives:

> It seems to me a bizarre way to 'further the overriding public policy in favor of competition,' . . . to pay violators three times their losses in doing what public policy seeks to deter them from doing . . . I should not think it a too 'fastidious regard for the moral worth of the parties,' . . . to decline to sanction a kind of antitrust enforcement that rests upon a principle of well-compensated dishonor among thieves.[55]

Furthermore, the Supreme Court in *Pinter v. Dahl* articulated the reasons that the *in pari delicto* doctrine's two elements fulfilled the objectives of the securities statutes.[56] With respect to the equal fault

---

52. *Precision* at 815, *quoted in* S&E Contractors v. United States, 406 U.S. 1, 15 (1972) (endorsing the application of unclean hands because "[c]ontracts with the United States—like patents—are matters concerning far more than the interest of the adverse parties; they entail the public interest."). *See also* Bevans v. United States, 80 U.S. 56, 62 (1872) (affirming recognition of unclean hands because public policy required strict accountability of receivers of public money).

53. *See, e.g.*, Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 492 (1942). The Supreme Court affirmed the trial court's dismissal of a patent infringement complaint for want of equity under the clean hands doctrine. *Id.* at 494, *abrogated by* Ill. Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 42–43 (2006) (concluding that a *per se* presumption of illegality for tying arrangements of patented products was no longer applicable given recent congressional amendments); *see also id.* (linking patent misuse defense to clean hands doctrine for the first time). For earlier patent misuse cases, *see generally* Carbice Corp. v. American Patents Corp., 283 U.S. 27 (1931) and Leitch Mfg. Co. v. Barber Col., 302 U.S. 458 (1938).

54. *See generally* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968). The majority opinion indicated that a plaintiff's own delinquency under the anti-trust laws would never defeat his or her statutory right to sue. *Id.* at 138.

55. *Id.* at 154 (Harlan, J., concurring). The concurring opinions and rationale were followed in the Supreme Court's subsequent cases in securities law.

56. Pinter v. Dahl, 486 U.S. 622, 633–36 (1988).

prong: "Refusal of relief to those less blameworthy would frustrate the purpose of the securities laws; it would not serve to discourage the actions of those most responsible for organizing forbidden schemes; and it would sacrifice protection of the general investing public in pursuit of individual punishment."[57] It further commented that the public policy prong "ensures that the broad judge-made law does not undermine the congressional policy favoring private suits as an important mode of enforcing federal securities statutes."[58] Similar attention to statutory purposes is found in *U.S. Airways, Inc. v. McCutchen*, where the Court determined that the plan terms control the availability of equitable defenses.[59]

Along with ascertaining whether traditional equitable defenses will be at odds with legislative judgment, the Supreme Court has indicated an augmented equitable authority beyond customary practices when public interests are at stake. In endorsing unclean hands in patent law, the Supreme Court declared in *Precision Instrument*: "Where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions."[60] Correspondingly, the Court has relied on the public interest criterion to constrain the employee misconduct defense, derived from unclean hands, in statutory actions. In the employment law case of *McKennon v. Nashville Banner Publishing Co.*, the Court explained that because the defense is founded on public policy, it may also be relaxed because of it.[61] The

---

57. *Id.* at 636.

58. *Id.* at 633 (explaining *Bateman*).

59. *See* U.S. Airways, Inc. v. McCutchen, 569 U.S. 88, 100–01 (2013) (declaring that allowing the contract to control the availability of equitable defenses fits the purposes of ERISA's principal function to protect contractually-defined benefits).

60. Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945); *see also* Virginian R. Co. v. System Federation, 300 U.S. 515, 552 (1937) ("Courts of equity may, and frequently do go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."); Shreve, *supra* note 48, at 382 ("The point [that equity courts may go further to give and withhold relief in the public interest] has been restated so often by federal courts that it has become an aphorism.").

61. *See* McKennon v. Nashville Banner Publ. Co., 513 U.S. 352, 360–61 (1995). A unanimous Court held that an employee discharged in violation of the Age Discrimination in Employment Act of 1967 (ADEA) is barred from certain forms of relief when, after her discharge, an employer discovers evidence of wrongdoing that would have led to her discharge on lawful grounds. *Id.* at 361–62. The plaintiff's wrongdoing at issue in *McKennon* involved copying confidential documents during her final year of employment. *Id.* at 355.

Court has equated the public interest with the purposes of the legislation.[62] Hence, as part of any statutory scheme, judicial power in equity can be paradoxically a constraining as well as a liberating force.[63]

Yet most of the Supreme Court's decisions provide limitations on equitable defenses.[64] Restraints have taken the form of restricting the defense to certain forms of relief, to groups of litigants, or to exceptional cases.[65] The securities cases show how the Supreme Court's assessment of the respective fault between investors and securities professionals affects the reach of the *in pari delicto* doctrine. The Supreme Court in *Bateman Eichler*, for example, provided guidance for the application of the defense on the issue of equal fault.[66] The Court concluded that securities professionals like insiders and

---

62. *See, e.g., id.* at 361 (balancing employer interests in freedom of contract with employee interests); *see also* Anenson & Mark, *supra* note 7, at 1503–04 (explaining that scholars support the idea that equitable defenses should be analyzed in light of the purposes and policies of the areas of law to which they intervene) (citing DOBBS, *supra* note 2, § 2.4(2) at 97–99 (suggesting that courts should consider the public policy of the legislation in determining the application of unclean hands in statutory actions)). *See generally* 30A CORPUS JURIS SECUNDUM, *Equity* § 99 (2007) (citing state and federal cases evidencing that courts applying equitable principles take notice of public policy and conform to it).

63. The Supreme Court's analysis of the public interest as an expanding and a limiting concept tracks its remedies jurisprudence. *See, e.g,* United States v. Morgan 307 U.S. 183, 194 (1939) ("It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved."); McDowell, *supra* note 48, at 511 (referencing the Supreme Court's articulation of the public interest doctrine in the early twentieth century).

64. *See* discussion *infra* notes 66–75 and accompanying text. *Accord* Bray, *New Equity*, *supra* note 19, at 1028 n.171 ("The Court usually (though certainly not always) points to the public interest as a reason for restraint, that is, as a justification for either declining to give an equitable remedy or for carefully delimiting its scope.") (citing Supreme Court cases); Note, *Application of Laches in Public Interest Litigation*, 56 B.U. L. REV. 181 (1976) (finding that plaintiffs who act as private attorney generals have at time been shown greater leniency that those acting for their own benefit); *cf.* Salas v. Sierra, 327 P.3d 797, 812 (Cal. 2014) (holding that unclean hands based on employee status as an illegal immigrant is not a complete defense to statutory claim prohibiting discrimination due to legislative policy); *see also* YOUNG ET AL., *supra* note 43, at 946–49 (explaining under Australian law that equity's contemplation of the public interest means that courts are slower to withhold equitable relief granted by statute).

65. *See* discussion *infra* notes 66–75 and accompanying text; *see also* Anenson & Mark, *supra* note 7, at 1514–15 (arguing that the Court of Appeals for the Federal Circuit in *Therasense, Inc. v. Becton, Dickinson & Co.* should have limited the inequitable conduct doctrine by requiring exceptional circumstances or a cognate for its application to be consistent with the tradition of equity and evolving doctrine).

66. 472 U.S. 299, 312 (1985).

broker-dealers usually bear more responsibility for violating the securities laws than investors for trading on inside information.[67] In *Pinter v. Dahl*, the Supreme Court further clarified that the *in pari delicto* defense is not available against plaintiffs who act primarily as investors rather than promoters in light of statutory policy.[68]

Similar to its approach under the securities laws, the Court also took the opportunity to limit the employee misconduct defense in *McKennon*, in light of the statutory policies.[69] Rather than circumscribing the defense's scope in reference to the status of the parties (as understood by their conduct) as it had in *Pinter*, the Supreme Court restricted the defense by reference to the remedy. The Court declared that the unclean hands doctrine is applicable to bar reinstatement and front pay.[70] It also held that the defense may bar backpay for the time after the employer in fact discovered the employee's misconduct.[71] The Court ruled, however, that the defense is not generally available to negate backpay from the date of the unlawful discharge to the date when the misconduct was discovered.[72] It decided that an absolute rule barring any recovery of backpay would undermine the statutory objective of requiring employers to examine their motives and penalizing them when they arise from age discrimination.[73]

Furthermore, *Petrella v. Metro-Goldwyn-Mayer, Inc.* provides a recent example where the Supreme Court narrowed the defense of laches within the statute of limitations to exceptional circumstances.[74] The Court's analysis found that laches would not be supportive of the legislative enterprise and that there were other alternatives that

---

67. *Id.* at 312-13.
68. Pinter v. Dahl, 486 U.S. 622, 638 (1988).
69. *McKennon*, 513 U.S. at 361–63.
70. *Id.* at 362.
71. *Id.*
72. *Id.*
73. *Id.*
74. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. ___, 134 S. Ct. 1962, 1977 (2014) ("In extraordinary circumstances, however, the consequences of a delay in commencing suit may be of sufficient magnitude to warrant, at the very outset of the litigation, curtailment of the relief equitably awardable."). The Court has similarly limited the equitable doctrine of tolling the limitations period to exceptional circumstances when the statute is silent on the allowance of the doctrine. *See generally* Holland v. Florida, 560 U.S. 631 (2010). There is a kind of symmetry to the Court's constriction of equitable defenses to exceptional cases. If the plaintiff must prove the exceptional nature of equitable relief in order for a court to grant it, then the defendant must prove that laches is exceptional to preclude it.

protected against prejudicial delay in filing a lawsuit.[75] As a result, the Court has increasingly limited equitable defenses according to legislative policy and thereby maintained opportunities for statutory relief. Such limitations have come by restricting application rather than by redefinition.

The next section illustrates how the Supreme Court's equitable analysis directs trial court discretion by subjecting defenses to a case-by-case application according to the public policy expressed in the statute. The history that influenced the design of equitable defenses informs their reach and purpose against a backdrop of statutory aims. Thus, there are two layers of policy analysis at the appellate and trial court levels of decision-making such that equitable defenses are being integrated in a way that does not interfere with the fulfillment of statutory goals. The Supreme Court's interpretative choice for equity at the appellate, or wholesale, level, results in returning the decision of enforcement to the trial, or retail, level.[76]

C. Discretion

While constricting equitable defenses in recent decisions, the Supreme Court has maintained their discretionary nature. Not unlike the Court's other equity decisions, an often repeated refrain in its statutory cases is that flexibility is a corollary to equitable defenses. For instance, in *Precision Instrument* the Court declared that unclean hands "necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant."[77] The original

---

75. Petrella, 572 U.S. ___, 134 S. Ct. at 1974–77 (responding to MGM's arguments in support of laches). Among other reasons, the Court ruled that laches would undermine the Congressional policy of uniformity in enacting the time-to-sue prescription and cause an unnecessary profusion of litigation. *Id.* at 1975–76. The Court also held that any evidentiary prejudice that the defense of laches protects against is minimized by the statutory registration mechanisms and that the defense of estoppel is available for misleading representations concerning abstention for suit and resulting harm. *Id.* at 1976–77.

76. Michael T. Morley, *Enforcing Equality: Statutory Injunctions, Equitable Balancing under eBay, and the Civil Rights Act of 1964*, 2014 CHI. LEGAL F. 177, 214–15 (using terms).

77. 324 U.S. 806, 815 (1945); *see* Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244–46 (1933) (declaring that the doctrine of unclean hands is "not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion," but is applied "upon considerations that make for the advancement of right and justice"); Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387 (1944) (repeating the explanation); *see also* Edward Yorio, *A Defense of Equitable Defenses*, 51 OHIO ST. L.J. 1201, 1228–29 (1990) (noting flexibility and

impetus for an equitable solution was that common law judges crafted their doctrines like glazed earthenware from a kiln.[78] Attempts to reform or remold such rules would cause them to scratch or even break. Historic equity, in response, emerged like molten glass from a furnace. Equitable doctrines could be spun, shaped, and stretched with an extraordinary degree of freedom.[79]

The defenses developed largely from the idea of equitable fraud designed to remedy the abuse of legal rights or other unfair advantage-taking where elasticity was necessary to capture conduct that is hard to predict in advance.[80] In short, "equity was aiming at a moving target."[81] Seen as a safety value, then, equitable defenses remained fuzzy around the edges.[82] Equitable doctrines provide

---

fairness benefits of equitable defenses); *cf.* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) ("Flexibility rather than rigidity has distinguished [equity].").

78. William Searle Holdsworth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1, 18–19 (1930) (discussing whether it was truly an intolerant attitude or the lack of power under existing procedures causing the injustices in the common law courts). The hardening of equity in the years before the merger received much criticism and was denounced as defeating the ultimate purpose of the legal system to provide just results. *See, e.g.*, John L. Garvey, *Some Aspects of the Merger of Law and Equity*, 10 CATH. U. AM. L. REV. 59, 63 (1961) ("[E]quity became just as legal, just as strict, as the common-law itself."); *see also* Harold Greville Hanbury, *The Field of Modern Equity*, 45 L. Q. REV. 196, 205 (1929) (commenting that despite the different epochs of flexibility and inflexibility of equity throughout history, "the stream of equity is, in reality, continuous throughout the ages"); *infra* Part III and accompanying notes (discussing equity's different traditions).

79. *See* Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339, 350 (1905) (concluding that "the rise of the court of chancery preserved [our legal system] from medieval dry rot"); Sherwin, *Contract Enforcement, supra* note 39, at 307 ("The legal model of enforcement is conduct-oriented and rule-based. The equitable model is better suited to remedial goals and particularistic [sic] decisionmaking."); Lionel Smith, *Fusion and Tradition, in* EQUITY IN COMMERCIAL LAW 25, 38 (Simone Degeling & James Edelman eds., 2005) (advising that equitable doctrines are more discretionary than common law doctrines).

80. *See* Anenson & Mark, *supra* note 7, at 1484–85; Paul Finn, *Unconscionable Conduct*, 8 J. CONTRACT L. 37, 37 (1994) [hereinafter Finn, *Unconscionable Conduct*]. For an explanation of the equitable decision-making mode, see Smith, *Fiduciary Law supra* note 4, at 264–65 (explaining that equity cannot be too predictable because opportunists will anticipate it and evade it as well as invent new ways of engaging in such behavior).

81. Smith, *Fiduciary Law supra* note 4, at 269; *see also* Anenson & Mayer, *supra* note 4, at 995 (discussing the contours of the equitable clean hands doctrine and claiming that "[w]hat is 'unclean,' like what is fraud, necessitates some ambiguity to promote deterrence.").

82. *See* Anenson, *The Triumph of Equity*, *supra* note 5, at 403–06 (describing the flexibility of equity and how estoppel has no exhaustive formula); Anenson, *Pluralistic Model, supra* note 26, at 651 (explaining the embryonic character of

"individualized justice . . . illuminated by moral principles."[83] The need for statutory discretion at the rights implementation stage dates to Aristotle.[84] Aristotle's insight was that no lawmaker could craft laws to cover every contingency and that discretion is needed to prevent the over- or under-inclusiveness of statutory rules.[85]

To continue the function of equitable defenses in combatting strategic behavior, the Court has retained their standard-like qualities and the corresponding discretion of the district court in two ways. First, the Supreme Court has allowed for escape valves that direct district judges to case-specific considerations informed by existing decisional law. Second, the Court has preserved judges' residual discretion not to apply the defense. Thus, once the Supreme Court determines whether and when equitable defenses are reserved under the statute, the decision to apply them is largely accomplished at the trial level on a case by case basis.

In *Pinter*, with respect to the equal fault criterion of *in pari delicto*, the Supreme Court acknowledged that the trial court's assessment of the relative responsibility of a plaintiff will vary depending on the facts of the case.[86] Nevertheless, to assist district courts in the exercise of their discretion, the Court pointed out that other judges had focused on the extent of cooperation between the parties in carrying out the illegal scheme.[87] To help assess the criterion of public policy, the Supreme Court provided a list of non-exclusive

---

estoppel); *see also* Gergen, Golden & Smith, *supra* note 4, at 237–38 (relating safety valve theory of equitable remedies).

83. Philip A. Ryan, *Equity: System or Process?*, 45 GEO. L.J. 213, 217 (1957) (citing Leonard J. Emmerglick, *A Century of New Equity*, 23 TEX. L. REV. 244, 250 (1944–45)); *see also* Edward D. Re, *Introduction* to SELECTED ESSAYS ON EQUITY, *supra* note 3, at xi (commenting that equity courts "mainly clothed moral values with legal sanctions").

84. *See* Anenson, *Triumph of Equity, supra* note 5, at 426 (explaining equitable defenses in relation to the Aristotelian idea of *epikeia*) (citing Anton-Hermann Chroust, *Aristotle's Conception of "Equity" (Epieikeia)*, 18 NOTRE DAME L. REV. 119, 125–26 (1942–43)); *see also* Emmerglick, *supra* note 83 at 254 (grounding equity in the *epicia* of Aristotle and in the Roman *clementia* or "clemency").

85. *Ibid.*; *see also* Anenson & Mark, *supra* note 7, at 1514 (concluding that the Federal Circuit's failure to follow Supreme Court doctrine on ensuring equitable defenses are flexible made its former law of inequitable conduct overinclusive and its new law underinclusive).

86. Pinter v. Dahl, 486 U.S. 622, 637 (1988).

87. *Id.* (citing lower federal courts). The Court suggested that if the plaintiff was found to have induced the issuer not to register he may be precluded from obtaining rescission. *Id.*

factors, derived from prior court decisions, to aid district courts in determining the plaintiff's status as a promoter or an investor.[88]

Similarly, in *McKennon*, the Court emphasized that the trial court can deviate from the general rule of employee misconduct by considering any "extraordinary equitable circumstances that affect the legitimate interests of either party."[89] When balancing the employer and employee interests in *McKennon*, the Court advised that determining the proper parameters of equitable defenses is a particularized inquiry.[90] It stated that reconciling the employer's discrimination with the employee's own wrongdoing "must be addressed by the judicial system in the ordinary course of further decisions, for the factual permutations and the equitable considerations they raise will vary from case to case."[91] Likewise, for the application of laches in *Petrella*, the Court provided examples of exceptional cases from lower court decisions of the defense's application at the outset of the litigation in situations resulting in an almost total destruction of the property right.[92] It further referenced a trial court decision to account for delay at the remedial stage in adjusting relief and provided a non-exclusive list of factors to assist district courts in making that decision.[93]

Consequently, since Congressionally endorsed values press in more than one direction, the Court's jurisprudence indicates that it finds the virtue of ancient equitable accordion-like standards more attractive than all or nothing rules to better account for the objectives

---

88. *Id.* at 639.

89. McKennon v. Nashville Banner Publ. Co., 513 U.S. 352, 362 (1995).

90. *Id.* at 362.

91. *Id.* at 361.

92. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. ___, 134 S. Ct. 1962, 1978 (2014) (describing the lower court decisions as "illustrative"). Given that only a fraction of the defendant's income was at stake due to the delay, the Supreme Court concluded that this was not such an extraordinary case. *Id.* The plaintiff in *Petrella* was seeking disgorgement of unjust gains as well as an injunction against future infringement. *Id.* The Court determined that disgorgement was equitable. *Id.* at 1967 n.1.

93. *Id.* at 1978–79 (citing Haas v. Leo Feist, Inc., 234 F. 105, 107–08 (S.D.N.Y. 1916)). The Court emphasized that the factors were to help examine detrimental reliance on the delay, but also explained that reliance or its absence is not the "*sine qua non* for adjustment of injunctive relief or profits." *Id.* at 1978 n.22. Courts sitting in equity often articulated a hard and soft version of delay-based inequity. However, to the extent the Court labels the adjustment version "laches" may be confusing. *See* MEAGHER, GUMMOW & LEHANE'S EQUITY: DOCTRINES AND REMEDIES 804–05 (2002) (explaining that the word is used in different senses in the cases and has an ambulatory connotation); *cf. id.* at 801 (commenting on the novelty of delay short of laches denying equitable relief).

of each statute. As such, in incorporating equitable defenses into statutory law, the Court begins with the defense's traditional test and rationale which may be further refined in light of statutory objectives. These goals also enter into the district court's discretion to apply equitable defenses under the case-specific facts. The public-interest criterion is inserted either as an express element of the defense like in the Supreme Court's securities decisions on *in pari delicto* or is implicit in the discretionary nature of the doctrines as shown in the Court's other cases.[94]

As a jurisprudential principle, then, tradition plays a pivotal role in determining both the existence and exercise of statutory discretion.[95] It helps the Supreme Court decide whether to include equitable defenses, provides their contours under the statutory circumstances, and influences their application. In this regard, equity paradoxically provides an entrée to the past and a gateway to the future.[96] If the common law and, increasingly, legislation marks the boundary of our duties to one another in modern civilization, then equity remains the frontier.[97]

History and moral philosophy, however, do not provide a complete picture of equitable defenses in statutory law.[98] If Holmes was right that "[t]he law embodies the story of a nation's development," then American equity would still be telling England's

---

94. Pinter v. Dahl, 486 U.S. 622, 633–36 (1988) (extending the two-part test of equal fault and public policy for the application of *in pari delicto* to all securities cases); *see also* Anenson & Mark, *supra* note 7, at 1521 n.533 (listing federal and state cases recognizing public policy exception to doctrine of unclean hands).

95. *See* Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1565–74 (2003) (classifying different kinds of discretionary decisions); Doug Rendleman, *The Trial Judge's Equitable Discretion Following* eBay v. MercExchange, 27 REV. LITIG. 63, 64 (2007) [hereinafter Rendleman, eBay] (citing articles devoted to discretion in substance, procedure, and jurisprudence).

96. Anenson & Mark, *supra* note 7, at 1505 ("The remarkable duality found in equitable principles ensures they are grounded in the past, while simultaneously looking to the future."); *see also* Sidney Post Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 179–81 (1937) (predicting that the future of equity is good and certain because it is a flexible tradition for allowing growth in the law).

97. 1 POMEROY'S EQUITY JURISPRUDENCE, *supra* note 13, at § 67 (discussing how equitable principles have "an inherent capacity of expansion, so as to keep abreast of each succeeding generation and age."); *see also* Finn, *Unconscionable Conduct*, *supra* note 80, at 39 (explaining how the equitable concept of unconscionable conduct in Australian law applies just beyond the boundaries of contract and tort).

98. Holmes, *The Path of the Law*, *supra* note 40, at 464 (speaking of the "fossil records" of history and the "majesty got from ethical associations").

story.[99] But that is clearly not the case. Over time, equity in the New World launched on its own destiny. With respect to statutory equitable defenses, we see this in the Supreme Court's accommodation of and sensitivity to legislative goals.[100]

Modernization, of course, is tricky.[101] To reiterate, the Supreme Court's current mode of modification in permitting judge-made equity to survive in the face of a silent statute is one of restraining application rather than redefinition.[102] In layering equity over legislation, the Court has also relied on lower court cases to build change-allowing criteria into the defenses.[103] In *Petrella*, the Court even sought shared ground by inserting statutory words into the relevant circumstances confining lower court discretion in evaluating the effect of delay to adjust equitable relief at the remedial stage of the litigation.[104] The Supreme Court's textualization of tradition may explain other areas of its equity jurisprudence.[105] From this vantage, equitable defenses are sticky *and* spongy.[106] They are not dislodged easily yet they also absorb the underlying values (and sometimes the actual language) of the statute at issue.

---

99. HOLMES, THE COMMON LAW, *supra* note 37, at 1, *cited in* Paul Finn, *Statutes and the Common Law*, 22 U.W. AUSTL. L. REV. 7, 9 (1992) [hereinafter Finn, *Statutes and the Common Law*] (speaking of Australia until 1963).

100. *See* discussion *supra* Part I.B.

101. *See* discussion *infra* Part III.

102. *See* Anenson & Mark, *supra* note 7, at 1515 ("Guidance in application, rather than continual re-interpretation, is more appropriate for lower court instruction [on equitable defenses].") (citing state and federal courts).

103. *See supra* Part I. Recall that *Petrella*, for example, relied on "illustrative" lower federal court copyright decisions for what constitutes "extraordinary circumstances" amounting to laches as a bar to equitable relief. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. ___, 134 S. Ct. 1962, 1978 (2014).

104. *Id.* at 1979 (listing, among other considerations, the authority "to order injunctive relief 'on such terms as it may deem reasonable . . .'").

105. Scholars have questioned whether *eBay*'s criteria that include an adequate remedy at law and irreparably injury constitute different inquiries. *Compare* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 8–9 (finding the two criterion equivalent), *with* Shreve, *supra* note 48, at 392–93 (locating differences between the doctrines). Notably, no adequate remedy at law was part of the statutory language of jurisdiction under the Judicature Act. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 548–49 (1985) (concluding that the adequate remedy requirement was jurisdictional whereas irreparable injury was a consideration for courts in exercising their discretion).

106. Samuel L. Bray, *A Little Bit of Laches Goes a Long Way: Notes on Petrella v. Metro-Goldwyn-Mayer, Inc.*, 67 VAND. L. REV. EN BANC, 1, 15 (2014) [hereinafter Bray, *Laches*] (using the term "sticky" in relation to whether courts will recognize traditional equitable principles in federal statutes).

D. The Medieval Modernist

It is questionable how far a legal scholar may philosophize. If she confines herself to reporting cases, she is no different from a practitioner. If she derives, from the few cases she has studied, principles that are to explain an entire area of law, she will no doubt find her facts in the pattern of her grand theory. But she must be ready to generalize when the evidence seems to justify it. Otherwise there can be no accumulation of legal knowledge and no science of the law. The foregoing study of the Supreme Court's treatment of equitable defenses in statutory law is comprehensive enough to warrant an attempt to generalize. What is the role of the Supreme Court concerning equity? The cases investigated show that it is a medieval modernist. Methodologically, it has taken a middle path. It has chosen reformation rather than revolution. The Court's approach to equitable defenses may even be perceived as a renaissance in the sense that the Court is searching for new learning in earlier legal traditions.

What is more, the content of that tradition is largely (although not invariably) supplied by state law. But not just any single state. The Court is seemingly harmonizing private law by searching for areas where states have reached consensus. Evidence of this approach is illustrated in the Court's rationale applying the defenses.[107] It can also be seen in its many citations to twentieth-century treatises on equity and to the *Restatements*.[108]

Professor Samuel Bray noticed a similar pattern of citation in looking largely at recent Supreme Court cases regarding equitable

---

107. *See, e.g.*, U.S. Airways, Inc. v. McCutchen, 569 U.S. 88, 100, 104 & n.8 (2013) (explaining that the common fund doctrine has "deep roots in equity" but that "the traditional practice in courts of equity" and "almost every state court has done what we do here: apply the common fund doctrine in the face of a contract giving an insurer a general right to recoup funds from an insured's third-party recovery without specifically addressing attorney fees").

108. *See* Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. ___, 134 S. Ct. 1962, 1977 (2014) (concluding that the long copyright term coupled with the right to sue occurring no more than three years back from the time of suit "leaves 'little place' for a doctrine that would further limit the timeliness of a copyright owner's suit") (quoting DOBBS, *supra* note 2, § 2.6(1), at 152); Pinter v. Dahl, 486 U.S. 622, 634 (1988) (citing the *Restatement of Contracts* to define *in pari delicto*); Anenson & Mark, *supra* note 7, at 1451–52 (reviewing the Supreme Court's inequitable conduct decisions in patent law and explaining that the Court relied in part on secondary materials like American equity treatises authored by John Norton Pomeroy and Joseph Story).

relief.[109] He surmised that the Court is smoothing over the rough edges of history because it lacks more accurate information.[110] There may be another explanation. The Court's actions in discerning equitable defenses fit Professor Caleb Nelson's description of the persistence of a general American common law.[111] Collecting cases across a wide spectrum of federal statutes, Nelson demonstrated how the Court repeatedly resorts to common-law sources to provide the substance missing from federal statutes.[112] So while Bray concluded that the Supreme Court is keeping equity and common law distinct in deciding remedies,[113] there is an alternative outlook. At least with respect to the interaction between written statutes and the content of unwritten defenses, the Court appears to be treating equity like law.

In addition to an evolving equitable method described above, the Supreme Court has been continuing the role of equity judges as dispensers of justice as well as builders of a system of law. The Court's developing responsibilities with respect to the district courts on the subject of equitable defenses is described below.

II. THE DEVELOPING SUPERVISORY ROLE

The Supreme Court has been increasingly cognizant of its supervisory role in relation to the lower courts in applying equitable defenses. For centuries, the English Court of Chancery was "in

---

109. Bray, *New Equity, supra* note 19, at 1016; *see id.* at 1018 (advising that the Court is presenting an "artificial" history with no reference to court, nation, or century and that glosses over the past).

110. Professor Bray suggests that the Court's reliance on secondary sources from the mid-twentieth century may be due to its inability to discover the more remote past. *Id.* at 1022; *see also* Arenson & Mark, *supra* note 7, at 1451–52 (listing secondary sources used by the Supreme Court in adjudicating the doctrine of unclean hands). With respect to equitable defenses, though, the Court often uses a current source to explain the doctrine's original scope. *See* Petrella, 572 U.S. ___, 134 S. Ct. at 1973 (quoting Dobbs for the proposition that courts invoked laches when there was no limitations period) (*see* DOBBS, *supra* note 2, 2.4(4) at 104 ("the laches rule may have originated in equity because no statute of limitation applied")); Pinter v. Dahl, 486 U.S. 622, 634 (1988) (citing the *Restatement of Contracts* for the background of *in pari delicto*). It also relies on these authoritative sources for the contemporary setting of equitable defenses. *See* discussion *infra* Part III.

111. *See* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505–525 (2006) [hereinafter, Nelson, *General Law*] (tracing the persistence of general federal common law built on a synthesis of state law in the purest federal enclaves and as background to federal statutes).

112. *See id.*

113. Bray's work is not necessarily focused on federal statutes. *See generally* Bray, *New Equity, supra* note 19.

practice as well as in theory a one-judge court."[114] As such, equitable discretion is usually seen as a normative principle of equity instead of an allocation of power between the trial and appellate courts.[115]

Judge Friendly clarified, however, that simply because the entire judicial system has discretion in certain areas of the law does not answer the question of the discretionary power of the district judge *vis-à-vis* the courts of appeal.[116] Discussions of equitable discretion rarely attend to the differences in these respective spheres of judicial authority.[117] This section brings the relationship between the Supreme Court and the lower courts into sharper relief by examining the choices at stake in determining equitable defenses.

The Supreme Court is delineating the respective spheres of authority in three related ways. First, it is no longer eschewing formulas. Second, it is providing more direction than resolving defenses under the case-specific facts. Third, as discussed above, its articulated parameters for equitable defenses allow for exceptions enlightened by prevailing precedent. Consequently, just as Professor Abraham Chayes' celebrated research explained (and justified) the greater role of trial judges in public law litigation,[118] maturing Supreme Court jurisprudence on equitable defenses in statutory law evinces a more involved appellate role as well. Observed broadly, the

---

114. Not until the nineteenth century were equity judges subordinate to the chancellor appointed. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 209-10 (5th ed. 1956); 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 442–44 (3d ed. 1922). Equity became institutionalized after a long period where the chancellor was lawmaker and law adjudicator. Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitations and the Doctrine of Laches*, 1992 B.Y.U. L. REV. 917, 948 (1992) (finding discretionary standards make more sense when there is a single decision-maker).

115. Henry J. Friendly, *Indiscretion about Discretion*, 31 EMORY L.J. 747, 773 n.97 (1982) (suggesting the possibility that "'the discretion of the chancellor' was intended as a normative principle of equity in general rather than an allocation of power between trial and appellate courts." (citing OWEN M. FISS, INJUNCTIONS 74–76 (1972)).

116. Friendly, *supra* note 115, at 755.

117. *See* Shapiro, *Jurisdiction and Discretion*, *supra* note 105, at 546 ("Normative discretion is discretion delegated to a rulemaking or adjudicative body by the legislature, while allocative discretion refers to delegation of decision-making authority within a particular hierarchy (here, the judiciary)."); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1971) (distinguishing primary from secondary discretion); Rendleman, *Stages of Equitable Discretion*, *supra* note 48, at 1409 ("The definition and operation of discretion will remain contested and elusive.").

118. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1283–84 (1976).

Court's developing doctrine for defenses largely aligns with its other modern equity cases.[119]

A. Expansive Phrases to Elements

The Supreme Court's initial decisions on equitable defenses in statutory law recited expansive phrases without articulating elements as it has in more recent decisions. In *Petrella*, the Court clearly delineated estoppel and laches.[120] Likewise, in *McCutchen*, the Court carefully differentiated between the equitable defenses at issue.[121] Compare these recent decisions to the Court's first opinion on unclean hands under the patent statute in *Keystone Driller Co. v. Gen. Excavator Co.* that warned against technical adherence to any formulae.[122] The Court declared that the judge is "not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion."[123] Similarly, consider the Court's

---

119. Anenson & Mark, *supra* note 7, at 1507 (explaining the Court's approach in *eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) as developing mandatory reasoning requirements for the exercise of lower court discretion); Bray, *New Equity, supra* note 19, at 1025, 1048 (discussing how state and federal courts had used very similar considerations and tests to the four-prong format outlined in *eBay*) (citing Rachel M. Janutis, *The Supreme Court's Unremarkable Decision in* eBay v. MercExchange, L.L.C., 114 LEWIS & CLARK L. REV. 597, 618–624 (2010)); *see also* Heriot, *supra* note 114, at 952, 968 (suggesting that trial judges undervalue rules in favor of standards such that appellate courts should provide a shorter discretionary leash).

120. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. ___, 134 S. Ct. 1962, 1977 (2014) (explaining that the two defenses are "differently oriented" with estoppel's focus on "misleading and consequent loss" rather than delay).

121. *See* U.S. Airways, Inc. v. McCutchen, 569 U.S. 88, 91 (2013) ("[W]e address one equitable doctrine limiting reimbursement to the amount of an insured's 'double recovery' and another requiring the party seeking reimbursement to pay a share of the attorney's fees incurred in securing funds from the third party.").

122. Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245 (1933). *Accord* DeCecco v. Beach, 381 A.2d 543, 546 (Conn. 1977) (explaining that the clean hands maxim applies in the trial court's discretion and "is not one of absolutes"). One reason the Court's unclean hands phraseology is amorphous may be because it is broader than many equitable defenses. *See* Anenson, *Treating Equity Like Law*, *supra* note 5, at 489 (comparing unclean hands to other defenses such as *in pari delicto* and estoppel).

123. Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945) (citing *Keystone* at 246). Before the advent of the Federal Circuit, lower courts followed the Supreme Court's lead and recognized the traditional understanding of unclean hands. For example, the Third Circuit Court of Appeals in *Monsanto Co. v. Rohm & Haas Co.*, declared that inequitable conduct in patent infringement cases "admits to no fixed parameters and promulgates no specific dogma." Monsanto Co. v. Rohm & Haas Co., 456 F.2d 592, 597 (3d Cir. 1972). *See*

early tax law opinions. In recognizing the availability of equitable estoppel under tax regulation in *Stone v. White*,[124] the Court relied on *R. H. Stearns Co. v. United States*.[125] In that case, it explained that the maxim is sometimes called by different names, such as estoppel or waiver, and declared that "[t]he label counts for little."[126] The Court then settled on a broader principle often associated with unclean hands. It explained that "the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong."[127]

Some of the confusion in segregating discretionary doctrines is that equitable defenses may overlap under particular fact patterns.[128] My other research has compared equitable defenses and those distinctions will not be repeated here.[129] The point is that loose talk of eschewing labels should be kept to a minimum going forward. The Supreme Court's recent decisions have taken a less cavalier attitude about naming the defenses.

Moreover, aware that equitable defenses are a powerful psychological component in equity jurisprudence, the Supreme Court cautioned lower courts against overemphasizing the moral worth of the parties in *Perma Life*.[130] The warning was repeated in

---

also Sean M. O'Connor, *The "Atomic Bomb" of Patent Litigation: Avoiding and Defending Against Allegations of Inequitable Conduct after* McKesson et *al.*, 9 J. MARSHALL REV. INTELL. PROP. L. 330, 378–79, 338 (2009) (characterizing the original inequitable conduct cases as ad hoc decisions that defy any attempt to create uniform standards).

124. 301 U.S. 532, 538–39 (1937) (ruling that the government could raise a defense based on special equities establishing its right to withhold a refund from the demanding taxpayer). *See generally* Lewis v. Reynolds, 284 U.S. 281 (1931) (recognizing equitable defenses in tax refund claims).

125. R. H. Stearns Co. v. United States, 291 U.S. 54 (1934).

126. *Id.* at 61 (describing the equitable defense as "fundamental and unquestioned").

127. *Id.* at 61–62.

128. *See* Anenson, *Process-Based Theory, supra* note 16, at 566 (noting the possibility of overlap between unclean hands, estoppel, *in pari delicto*, and fraud on the court).

129. *See, e.g.*, Anenson, *Role of Equity, supra* note 4, at 51-52 (comparing various equitable defenses); *see also* Anenson, *Treating Equity Like Law*, *supra* note 5, at 489 ("While there will be situations where *in pari delicto*, estoppel, fraud on the court, or other defenses conclude the case, the fact that there is more than one means of resolving a dispute has never been a reason to deny recognition to some of them and not others.").

130. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968), *overruled on other grounds by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984); *see also* Craig M. Boise, *Playing with Monopoly Money: Phony*

McKennon.[131] Only in its securities cases, however, did the Supreme Court expressly mandate a public policy criterion representing the residual discretion to deny the defense.[132] This centuries-old condition is implicit in the application of equitable defenses and has been acknowledged in the lower courts.[133] Nevertheless, an express determinant would likely assist district judges to consider the consequences of applying equitable defense in all cases.[134] The late Professor Zechariah Chafee's seminal research on the clean hands doctrine demonstrates that courts in the twentieth century tended to overlook this important aspect in the application of equitable defenses.[135]

B. Facts to Law

The Supreme Court's early decisions in patent, tax, and government employment law defined the equitable defenses under the particular factual scenarios at issue. The Court decided these cases in the early to middle twentieth century. Later decisions at the turn of the twenty-first century, however, provided more direction to district courts in assessing future cases.

Consider the Supreme Court's patent decisions which resolved the doctrine of unclean hands under the facts of the case. Because the Court found that patent rights are "issues of great moment to the

---

Profits, Fraud Penalties, and Equity, 90 MINN. L. REV. 144, 189–92 (2006) (asserting that the unclean hands defense is a powerful psychological component in statutory law).

131. McKennon v. Nashville Banner Publ. Co., 513 U.S. 352, 361 (1995) ("In determining appropriate remedial action, the employee's wrongdoing becomes relevant not to punish the employee or out of concern 'for the relative moral worth of the parties,' but to take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing.") (citing *Perma Life*).

132. Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 305 (1985); Pinter v. Dahl, 486 U.S. 622, 633 (1988).

133. *See* Anenson & Mark, *supra* note 7, at 1521 n.533 (listing federal and state cases).

134. If the basis for applying unclean hands or other defenses is primarily to protect the court, then the substantive policies of the statute would be irrelevant. *See* Anenson, *Process-Based Theory*, *supra* note 16, at 543–48.

135. *See* Chafee I, *supra* note 10, at 892 (advising of the great advantage of inducing a more critical exam of the various policies, ethical or otherwise, which ought to govern the case); Chafee II, *supra* note 10, at 1068–69 (concluding that the intellectual property decisions that overemphasized ethics to the exclusion of other policies yielded absurd results).

public,"[136] it declared in *Precision Instrument* that mere knowledge of the possibility of perjury in the patent application of another precluded a claim for patent infringement by the company who later acquired the patent.[137] For the same reason, the Court's decision in *Hazel-Atlas* instructed that doubt as to patentability is resolved against the patentee.[138] In the patent misuse case of *Morton Salt Co. v. G.S. Suppiger Co.*, the Court declared that the clean hands doctrine applies "regardless of whether the particular defendant has suffered from the misuse of the patent."[139]

By the time the Supreme Court considered equitable defenses under the private attorney general statutes, however, it began to take on a more managerial position. For example, in *McKennon*, the Court clarified that the misconduct amounting to unclean hands had to be of such severity that the employee in fact would have been terminated solely on those grounds if the employer had known about it.[140] The Court also extended the two-part test of equal fault and public policy for the application of *in pari delicto* to all securities cases in *Pinter v. Dahl*.[141] In *Pinter*, the Court additionally provided guidelines for the exercise of lower court discretion on the elements of the equitable defense. With respect to the condition of equal fault, the Court explained that knowledge that the securities were unregistered is not enough.[142] Quoting Justice Harlan's concurring opinion in *Perma Life*, the Court emphasized that "[p]laintiffs who are truly *in pari delicto* are those who have themselves violated the law in cooperation with the defendant."[143] Therefore, pursuant to Section 12(1) of the statute, the plaintiff must be equally culpable for the actions that render the sale of the unregistered securities illegal.[144] The Court also added that

---

136. *See* Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945) (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944)).

137. *See id.* at 815-20. *Precision Instrument* described the patentee's obligations as an "uncompromising duty [to the Patent Office] to report to it all facts concerning *possible* fraud or inequitableness underlying the applications in issue." *Id.* at 818 (emphasis added).

138. In *Hazel-Atlas*, the Court refused to consider any benefit to the defendant asserting unclean hands due to the public interest in patents. *See* Hazel–Atlas Glass Co. v. Hartford–Empire Co., 322 U.S. 238, 246–47 (1944).

139. Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 494 (1942) (affirming trial court dismissal of patent infringement complaint for want of equity under the clean hands doctrine).

140. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362–63 (1995).

141. Pinter v. Dahl, 486 U.S. 622, 635 (1988).

142. *Id.* at 636-37.

143. *Id.* at 636.

144. *Id.*

if a plaintiff induced an issuer not to register, he or she may be precluded from obtaining rescission.[145]

C. *Escape Valves and Analogies*

As already analyzed above, the Supreme Court has maintained the discretionary nature of equitable defenses by segregating spheres of authority in the judicial branch.[146] It has set forth the parameters of the defenses, but has also allowed for escape valves that direct district judges to case-specific considerations informed by existing decisions. The Court's stewardship in setting strictures on these doctrines makes it unlikely that their inclusion in federal legislation will undermine the rule of law.[147]

Accordingly, the Court's jurisprudence reflects its commitment to the accretive change characteristic of judge-made law.[148] Benjamin Cardozo used the metaphor of a glacier—an eon's worth of snow compressed to ice—to describe the incremental modification process of the common law.[149] Rather than blasting ahead in new terrain in a manner that might result in shallow and unsettled decisions, the Supreme Court is equipping the lower courts with gear, or a method, for a deep and steady backcountry experience.

---

145. *Id.* at 637.

146. *See* discussion *supra* Part I.C.

147. Lord Selden's metaphor of the Chancellor's foot forever engrained in our memories the perils of equity on the rule of law. JOHN SELDEN, TABLE TALK OF JOHN SELDEN 43 (Frederick Pollock ed., 1927). However, open-ended equitable doctrines do not necessarily result in injustice. *See, e.g.*, Camilla E. Watson, *Equitable Recoupment: Revisiting an Old and Inconsistent Remedy*, 65 FORDHAM L. REV. 691, 787–88 (1996) (demonstrating how a narrow construction of the doctrine of equitable recoupment can produce inconsistent results); Yorio, *supra* note 77, at 1225–26 (refuting economic argument that equitable defenses are inefficient). I have previously argued that equitable defenses provide appropriate "procedural bounds." *See* Anenson & Mark, *supra* note 7, at 1505–07 (discovering procedural bounds prevalent in discretionary defenses) (citing Sarah M. R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947, 983 (2010) (reviewing remedial discretion and concluding that procedural rather than substantive bounds are the most practically useful for constraining both the original discretion determinations and the appellate review of those determinations)); *see also* Anenson, *Statutory Interpretation*, *supra* note 12, at 56–58 (discussing restriction on judicial discretion imposed by procedural bounds).

148. *See, e.g.*, Birks, *supra* note 8, at 13 ("Interpretative change depends on continuity. It cannot ignore the intervening centuries.").

149. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 25 (1922) (noting the "effects must be measured by decades and even centuries."). "Thus measured," Cardozo advised, "they are seen to have behind them the power and the pressure of the moving glacier." *Id.*

Thus far, statutory equitable defenses have a unique blend of hard-shell protection and soft-shell breathability. Beneath interlocking private and public interests, there lies a slow, deep accumulation of unglamorous practice, the shared wisdom of many, which anticipates an infinite loop of new applications.

In summary, equitable defenses present a fascinating study in contradictions. They require reflection on the relationship between judicial power and legislative deference, the correlation between principle and practice, the reconciliation of private and public interests, and the connection of past to present. The next section centers on the last concern.

III. THE CHALLENGES OF CONTINUITY AND CHANGE

England and its chancellors did not just invent equity as a political, administrative, and judicial system. They invented the *idea* of equity. An idea that the Supreme Court has carried into statutory construction. The Court could have abandoned equitable defenses, not because they are wrong or deficient, but because they are old. Instead, it is using history to translate equity's meaning in the present day.

Given the Supreme Court's reliance on the historical tradition of equity in effectuating the defenses, at least as an initial matter, future disagreements will likely focus on what exactly that history is as well as how much growth is acceptable in any given case.[150] After all, history does not always produce wisdom and change is not always for the better.[151] Part I revealed that the Court is allowing for change at a gradual pace through trial court decisions and structured in light of legislative aims.[152] The Court begins with a baseline of history and

---

150. Anenson & Mark, *supra* note 7, at 1507 ("Although scholars have criticized the Supreme Court for going too far in its attempt to clarify remedial law, the Supreme Court's decision in *eBay* retained and reinforced lower court discretion to determine the facts and circumstances in light of enumerated factors."); *accord* Bray, *New Equity*, *supra* note 19, at 1025 (concluding that the criticism of *eBay* is overdrawn in that each part of the test existed in the case law).

151. Lionel Smith, *Fusion and Tradition, in* EQUITY IN COMMERCIAL LAW, *supra* note 79, at 20; *see also id.* at 20 n.9 (noting that even Oliver Wendell Holmes, one of the Supreme Court's most accomplished legal historians, never countenanced the blind adherence to history for history's sake but approached it with a balanced view (citing several of Holmes's writings)).

152. *See* discussion *supra* Part I; *see also* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1042 (1989) [hereinafter Eskridge, *Public Values*] (concluding that statutory evolution encourages the development of statutory policy through its implementation in trial courts which promotes "orderly change and measured continuity").

ends by assessing statutory objectives in a way that usually limits the scope of the defense.[153]

With the past as a key ingredient in the interpretation and application of equitable defenses, issues will include the length, breadth, and constancy of the particular equitable tradition at issue.[154] The Supreme Court has announced that a historical inquiry into equitable principles is not too difficult,[155] but that may not always be the case. Equity is hard law, in part because it has an extended legacy.[156] Many equitable defenses predate the nation.[157] Certain

---

153. *See* discussion *supra* Part I.

154. Evidence of this issue can be seen in the Supreme Court's use of a canon of construction incorporating the common law into federal statutes. Anenson, *Statutory Interpretation*, *supra* note 12, at 18–19. *Compare* B&B Hardware, Inc. v. Hargis Indus. Inc., 135 S. Ct. 1293, 1299 (2015) (majority recognizing administrative issue preclusion under the Trademark Act), *with id.* at 1311–12 (Thomas and Scalia, JJ., dissenting) (recognizing that "Congress is understood to legislate against a background of common law adjudicative principles" but finding the "tradition" of administrative preclusion "far too equivocal to constitute 'long-established and familiar' background principles of the common law of the sort on which we base our statutory inferences"). The controversy in *SCA Hygiene Products v. First Quality Baby Products*, centered on the content of the background rule of common law. 580 U.S. ___, 137 S. Ct. 954, 966 (2017). The majority found that laches does not apply at law and determined that defendant's cited cases did not overcome the presumption. *Id.* Justice Breyer, in dissent, determined that the presumption in the patent context was that laches applied to damages within the limitations period. *Id.* at 967–71. There may also be other interpretative rules at issue, such as federalism or sovereign immunity, where the Court might be particularly reluctant to displace state law.

155. *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 217 (2002) (advising that consulting current works such as *Dobbs* and the *Restatements* should make the historical answer clear (citing *id.* at 233–34 (Ginsburg, J., dissenting)).

156. Anenson, *Limiting Legal Remedies*, *supra* note 11, at 117–18 n.364 (explaining that the difficulty of equity is due to the historical content of the rules themselves as well as their foundation in philosophy (citing Edward D. Re, *Introduction* to SELECTED ESSAYS ON EQUITY, at iv, xii (Edward D. Re ed.,1955) (commenting that no other subject "offers as rich an opportunity to delve into problems of jurisprudence and the philosophy of law as does equity")); William Gummow, *Conclusion, in* EQUITY IN COMMERCIAL LAW, *supra* note 79, at 518 ("Equity is hard law, even to those who have spent much of their professional lives wrestling with it.").

157. The first case articulating the principle of estoppel in the English chancery court is unknown. *See* MELVILLE M. BIGELOW, A TREATISE ON THE LAW OF ESTOPPEL, OR OF INCONTESTABLE RIGHTS 603 (6th ed. 1913) (quoting Lord Eldon's statement in *Keate v. Phillips*, (1881) 18 Ch. D. 560, 577 (Ch.), that estoppel was "'a very old head of equity'"). Reported decisions date from the seventeenth century. *See* ROBERT MEGARRY & P.V. BAKER, SNELL'S PRINCIPLES OF EQUITY 561–62 (27th ed. 1973) (citing cases over the centuries); Beck, *supra* note 13, at 245 (citing

principles date to antiquity.[158] Like the concept of remedies, equitable maxims are old enough to be rendered in Latin.[159] While the Court has been more careful to identify particular defenses as equitable along with the conditions of their application,[160] there may be occasions when the Supreme Court is unable to turn back the clock.[161] History can be non-existent or inconclusive.[162] Reliance on the past is also a

---

early estoppel cases in equity). The clean hands doctrine entered the English common law in the eighteenth century. *See* Anenson, *Treating Equity Like Law, supra* note 5, at 459 (citing Dering v. Winchelsea, (1787) 29 Eng. Rep. 1184); *see also* ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 5 (1950) (noting that the "clean hands maxim is exactly as old as the United States Constitution"). The idea of unclean hands originated in a treatise authored by Sir Richard Francis that he derived from earlier equity cases. *See* RICHARD FRANCIS, MAXIMS OF EQUITY 5 (London, Bernard Lintot 1728) ("He that hath committed iniquity shall not have equity.") (cited in Chafee I, *supra* note 10, at 881).

158. The general principle underpinning the clean hands doctrine dates to antiquity. Anenson, *Treating Equity Like Law, supra* note 5, at 478. Commentators have traced the origins of unclean hands to Chinese customary law and to the Roman period of Justinian. NEWMAN, *supra* note 1, at 31, 250 n.19.

159. *See* Laycock, *How Remedies Became a Field, supra* note 3, at 168 ("Remedy is an ancient legal concept."). For example, the inspiration for prohibiting inconsistent conduct or conflicting allegations addressed by estoppel comes from the Latin maxim *allegans contraria non est audiendus*. Anenson, *Triumph of Equity, supra* note 5, at 384 (citing HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 139 (4th ed. 1854)) ("He is not to be heard who alleges things contradictory to each other.").

160. In *McCutchen*, for instance, the Court cited four treatises and two of its prior decisions linking the double recovery and common fund defenses to equity and unjust enrichment. U.S. Airways, Inc., v. McCutchen, 569 U.S. 88, 96 & n.4 (2013).

161. *See* Anenson, *Triumph of Equity, supra* note 5, at 419-21 (discussing uncertainty in the state courts concerning equitable estoppel due to its historical application in law and equity); Anenson, *Treating Equity Like Law, supra* note 5, at 509 (finding that divining equitable from legal remedies is to "chase ghosts and leave courts in a constant state of epistemic failure"); *see also* Bray, *New Equity, supra* note 19, at 1011 n.68 (noting that there is no overview of equity in the eighteenth century). The application of certain defenses depends on the relief being equitable as well. *See generally* Anenson, *Limiting Legal Remedies, supra* note 11 (explaining the purely remedial nature of unclean hands). To assist the modern jurist, Professor Bray has also catalogued equitable remedies and related doctrines. Samuel L. Bray, The *System of Equitable Remedies*, 63 UCLA L. REV. 530, 551–86 (2016) [hereinafter, Bray, *System*].

162. *See* Hanbury, *supra* note 78, at 217 ("Dean Pound has treated the history of the maxims of equity in a masterly fashion, but even his gigantic powers of research have failed to trace them to their exact sources."); Anenson & Mark, *supra* note 7, at 1461-68 (inquiring whether the clean hands defense historically had a state of mind requirement); *see also* John R. Kroger, *Supreme Court Equity, 1789-1835, and the History of American Judging*, 34 HOUS. L. REV. 1425, 1471 (1998) (describing different formal and traditional conceptions of equity jurisprudence in the Founding Era which may affect the extent to which federal equity power can be

factual matter,[163] which means that courts and counsel (and professors) can be wrong.[164] Scholars have already accused the Supreme Court of indulging in several historical inaccuracies associated with equitable principles in its decisions.[165] A number of these claims have merit.[166] Others stem from the Court's failure to expound on the meaning of equity or acknowledge its evolutionary process.[167] In discerning judicial discretion to award or deny statutory

---

justified by reference to the history of equity). Early English equity also experienced different periods of hard and soft principles. *See* Anenson, *Pluralistic Model*, *supra* note 26, at 643-44 (noting "the English Court of Chancery during the eighteenth and nineteenth centuries came to be called a court of 'crystallized conscience.'") (citing Hanbury).

163. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION xiii (1991) (discussing the historical form of argument in constitutional law).

164. There are a number of articles pointing out the historical inaccuracies in the Supreme Court's equity jurisprudence. Anenson & Mark, *supra* note 7, at 1525 n.554 (collecting articles); Gergen, Golden & Smith, *supra* note 4, at 207–08 (explaining how the Supreme Court departed from traditional equitable principles for injunctive relief); *see also* STEPHEN BREYER, ACTIVE LIBERTY 126 (2005) (noting that judges are not expert historians); *see generally* Matthew J. Festa, *The Useable Past*, 38 SETON HALL L. REV. 479 (2008) (proposing that historical arguments to interpret law be subject to evidentiary rules).

165. Anenson & Mark, *supra* note 7, at 1525 n.554: "In attempting to answer questions of equity, members of the Supreme Court have disagreed over the existence or relevancy of a particular custom, been mistaken as to what it is or means, and divided when traditional principles purportedly deviate from practice." (citations omitted) (collecting academic writing); Bray, *New Equity*, *supra* note 19, at 1045–47 (reviewing literature on the Supreme Court's historical blunders in equity jurisprudence). While the Court makes an easy target, there is enough blame to go around in the legal community. Practitioners lack a proper conceptual framework for equitable issues because they have not likely been educated with a holistic vision of equity and have little or no equity articles from the present generation of legal scholars outside of concerns with trusts and injunctive relief. *See, e.g.*, Anenson, *Triumph of Equity*, *supra* note 5, at 438–39 (discussing lack of contemporary American treatises on equitable defenses); Anenson & Mark, *supra* note 7, at 1525 ("Equity is not lost, for it continues in a steady stream of precedents, but it has ceased being understood."); Anenson, *Statutory Interpretation*, *supra* note 12, at 5 n.10.

166. *See, e.g.*, Gergen, Golden & Smith, *supra* note 4, at 220, 249 (discussing the Supreme Court's disregard of the traditional equitable presumptions concerning injunctions); Bray, *New Equity*, *supra* note 19, at 1039–40 (citing Supreme Court cases rejecting presumptions regarding irreparable injury, balancing of hardships, the public interest, whether an injunction should issue, and the likelihood of success on the merits).

167. *Accord* Bray, *New Equity*, *supra* note 19, at 1015 (noting that the Court has not recognized historical change in its ERISA cases). The Court has explained that federal courts have "authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."

relief, the Supreme Court has recognized an equivalency if the requested remedy "closely resembles"[168] or is "indistinguishable" from traditional equitable remedies.[169] But it is unclear whether the comparison is to origin, nature, or purpose.[170]

Some of the confusion over equitable principles no doubt arises from the erroneous belief that equity, like the pastoral scene on Keats' urn, is forever frozen in time.[171] For instance, Professor Jared Goldstein's argument that the balancing process for equitable remedies lacks historical legitimacy assumes that no modernization of

---

Atlas Life Insur. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939). The Court has since indicated that other remedies are equitable for purposes of invoking the equity canon despite originating in the King's Bench. Holland v. Florida, 560 U.S. 631, 646 (2010) (reasserting that the writ of habeas corpus is equitable to trigger the clear-statement rule of remedies). The Court has linked the writ to unclean hands, but that defense was first recognized in the English Court of Exchequer. Anenson, *Treating Equity Like Law*, *supra* note 5, at 459 (noting that Exchequer had equity powers). Historically, the departments of Exchequer and Chancery conducted the civil service of England with Exchequer as the fiscal department and Chancery as the secretarial department. FREDERIC W. MAITLAND, EQUITY: A COURSE OF LECTURES 2 (A.H. Chaytor & W.J. Whittaker, John Brunyate eds., rev. 2d ed. 1969).

168. CIGNA Corp. v. Amara, 563 U.S. 421, 440 (2011).

169. Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 368 (2006); *see* U.S. Airways Inc., v. McCutchen, 569 U.S. 88, 96 (2013) (explaining Mid Atlantic's claim to be the "modern day equivalent of an action in equity to enforce a contract-based lien—called an equitable lien by agreement").

170. *See generally* Ryan, *supra* note 83, 215–17 (1957) (describing equity from different perspectives such as functional or historical); Chafee, SELECTED ESSAYS ON EQUITY, *supra* note 3, iii ("Equity is a way of looking at the administration of justice."); *see also* Anenson, *Triumph of Equity*, *supra* note 5, at 421 (explaining how state courts classify estoppel by its nature rather than its origin to ascertain whether a judge or jury determines the defense); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 254 (2003) (criticizing Supreme Court remedies cases and its assessment of equitable principles pursuant to nature rather than purpose). The controversy over certain ancient discretionary writs is evidence of this confusion. For habeas corpus, *compare* Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 NW. U. L. REV. 139, 186 (2013) (arguing that the writ is equitable because although litigants sought the Great Writ primarily from a common law court—the Court of King's Bench—the court's exercise of power to issue the writ was built around equitable principles) *with* Bray, *System*, *supra* note 161, at 559-60 (arguing that habeas corpus is a legal remedy by origin). For mandamus, *compare CIGNA Corp.*, 563 U.S. at 440 (describing mandamus as an equitable remedy) *with In re* Skinner & Eddy Corp., 265 U.S. 86, 96 (1924) (describing mandamus as a legal remedy that is subject to equitable principles).

171. *See, e.g.*, William Gummow, *Conclusion*, *in* EQUITY IN COMMERCIAL LAW, *supra* note 79, at 516 (emphasizing that "no one seriously suggests that some Ice Age descended upon equity" with the merger).

equity is appropriate.[172] This is surely incorrect.[173] Equity, like the tradition it is built upon, is a living thing.[174] Life is short, while art and equity are long. As explained in Part I, although the Court may seem to be raising dead defenses, it is actually recalling rituals that are very much alive.[175] If the doctrine has changed in shape or substance, there is an evaluative process of analogy that should be acknowledged to discern whether something new has been created.[176] Equally important for purposes of the equitable defense default directive, and demarcation of the doctrine itself, is whether something equitable still remains.[177]

---

172. *See* Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 490–515 (2010) (questioning the historical accuracy of equitable balancing for injunctions); *cf.* David Schoenbrod, *The Immortality of Equitable Balancing*, 96 VA. L. REV. IN BRIEF 17, 18–19 (2010). The lack of clarity on this point and the Supreme Court's rote intonations of history makes Goldstein's analysis understandable. *See* Goldstein, *supra*, at 515 (arguing that "the Supreme Court has falsely presented equitable balancing as an ancient judicial practice"). *See generally id.* (investigating the origins of balancing the equities criterion and concluding that it is a post-Civil War phenomenon deriving from common law nuisance actions).

173. Anenson & Mark, *supra* note 7, at 1502–05 (positing that the tradition of equity includes policy analysis allowing for updating); *supra* Part I; Bray, *New Equity*, *supra* note 19, at 1014-15 (concluding that the Supreme Court is constructing an idealized history of equity with source materials coming from middle to late nineteenth century).

174. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) ("[T]radition is a living thing."); *see also* CARDOZO, *supra* note 149, at 26 (commenting that there is "not a received tradition which does not threaten to dissolve").

175. *See* 1 POMEROY'S EQUITY JURISPRUDENCE, *supra* note 13, at § 67 (explaining how equitable principles have an "inherent capacity of expansion" and are "essentially unlimited"); *see also* Anenson, *Process-Based Theory*, *supra* note 16, at 509–10 ("From modest beginnings in ancient equity cases involving drunken promises and debauchery, the defense [of unclean hands] now applies in both state and federal court litigation of a distinctly modern vintage. Its coverage extends to entire categories of tort and contract law, an ever broadening range of statutory disputes, and even to international human rights.").

176. *See* Anenson, *Triumph of Equity*, *supra* note 5, at 384–87 (explaining how estoppel originated in the law courts but that its adoption in chancery transformed it to equitable estoppel which was then re-adopted in the law courts). The equitable defense of unclean hands has morphed into several different doctrines, some of them used in statutory law. *See, e.g.*, Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 792 (5th Cir. 1999) (explaining that the "copyright misuse" doctrine "has its historical roots in the unclean hands defense") (citation omitted).

177. Once exclusively equitable, contract defenses like mistake or fraud have lost their equitable label after their integration into the common law. *See generally* James Barr Ames, *Specialty Contracts and Equitable Defences*, 9 HARV. L. REV. 49 (1895) (discussing how the former equitable defenses of fraud, illegality, failure of consideration, payment, accommodation, and duress were subsequently recognized

A modern issue for equitable defenses, particularly those like laches and unclean hands that operated exclusively against equitable relief, is whether they may be extended to bar actions seeking damages.[178] As outlined in Part I, *Petrella* is an example where the Court split on whether laches should be extended beyond its original use to bar legal relief.[179] The majority, however, rejected extending the defense to block damages.[180] Resistance to expanding defenses may be even more difficult to overcome when the Court is being asked to cross the boundary of law and equity.[181] In other countries of the

---

at law in specialty contracts); Anenson & Mayer, *supra* note 4, at 979–80 (discussing modern contract law doctrines derived from ancient equity); *see also* E.W. Hinton, *Equitable Defenses Under Modern Codes*, 18 MICH. L. REV. 717, 721 (1920) ("This development of an equitable cause of action into a legal cause of action, or into a defense to a legal action, has been fairly common in the later period of the common law."). Estoppel and *in pari delicto* are available in law and equity and have a complicated history of borrowing and adaption. *See* Anenson, *Triumph of Equity*, *supra* note 5, at 384–87 (explaining estoppel's development in law and equity); Wade, *supra* note 34, at 268–69 (explaining the evolution of *in pari delicto* in law and equity). Estoppel has retained its equitable designation although *in pari delicto* is often called a "common law" defense or described as unclean hands' "legal" cousin. Anenson & Mark, supra note 7, at 1521 n.530; Byron v. Clay, 867 F.2d 1049, 1052 (7th Cir. 1989) (Posner, J.) (discussing *in pari delicto* as unclean hands counterpart legal doctrine). Part of the difficulty stems from the different senses in which the phrase "common law" is used (i.e. common law as judge-made law in contradistinction to equity) and the issue addressed (i.e. relating to its use against damages rather than for interpretative purposes). The Supreme Court treated *in pari delicto* as an equitable defense in its statutory cases involving anti-trust and securities law analyzed in Part I.

178. *See* Anenson, *Treating Equity Like Law*, *supra* note 5, at 462–63 (advising that laches and unclean hands share the same adoptability issues under the merger in modern law). *See generally* Bray, *Laches*, *supra* note 107 (analyzing the federal law of laches and its potential application to legal remedies in light of the Supreme Court granting certiorari in *Petrella*).

179. Justice Ginsburg, writing for the majority, held that laches may block only equitable relief. *Petrella*, 572 U.S. ___, 134 S. Ct. at 1967. Justice Breyer, joined by the Chief Justice and Justice Kennedy in dissent, would have deemed laches effective against all relief. *Id.* at 1979–86 (Breyer, J., dissenting).

180. *Id.* at 1967. The Court recently extended *Petrella*'s holding in copyright law to patent law. SCA Hygiene Prods. v. First Quality Baby Prods., 580 U.S. ___, 137 S. Ct. 954, 959 (2017).

181. *See* Bray, *System*, *supra* note 161, at 581 (discussing the fictional law-equity line for ascertaining equitable relief, but noting that it is not necessarily difficult to cross). Some of my earlier work argued that the expansion of equitable defenses is appropriate on a doctrinal basis and offered a decision-making framework to better facilitate fusion. *See generally* Anenson, *Limiting Legal Remedies*, *supra* note 11; *see also* T. LEIGH ANENSON, JUDGING EQUITY: THE FUSION OF UNCLEAN HANDS IN U.S. LAW (Cambridge University Press 2018) (forthcoming). Professor Bray appears to take a contrary position that equity's

common law, these border wars have generated a great deal of discussion.[182] An important lesson from the merger of law and equity is that reform came too soon and interrupted the fusion of equitable principles rather than facilitated assimilation.[183]

Another message from the post-merger experience of equitable defenses is that the Supreme Court should be hesitant to ground its decision in the lack of judicial power as opposed to the exercise of equitable discretion.[184] Relying on a broader ruling regarding an absence of authority, or at least appearing to do so, would forever stymie further development of equitable defenses. As Professor Burbank has pointed out, the Court made this mistake in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*,[185] a non-statutory case about the expansion of equitable principles.[186] In *Petrella*, however, the Court fortunately did not declare that it lacked power in a merged system to extend the laches defense.[187]

Yet, once again, the Court could be more transparent about its ability to alter equitable doctrines. The transformative power of equity

---

remedial law is a system that is now closed for further expansion. Bray, *System*, *supra* note 161, at 592–93. For an earlier discussion of equity as a system, *see* Ryan, *supra* note 83, at 214.

182. Anenson, *Limiting Legal Remedies*, *supra* note 11, at 66 (summarizing law-equity "fusion wars" in the Commonwealth and placing the extension of remedial defenses within it); *accord* Bray, *System*, *supra* note 161, at 540–41 (using Commonwealth literature to define the terms of the debate).

183. *See* Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 35 (1905) (fearing the decline of equity in a unified legal system).

184. *See* Anenson, *Treating Equity Like Law*, *supra* note 5, at 466 (discussing judicial justifications indicating a lack of power under the merger meant to unify procedure rather than the substantive law to expand the doctrine of unclean hands to damages actions); *see also supra* note 96 and accompanying text.

185. 527 U.S. 308 (1999).

186. Professor Burbank and others are right that the Supreme Court's rationale took a wrong turn in *Grupo*. *See* Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1315–17 (2000) (criticizing the majority for ruling that federal courts lacked power to issue the injunction rather than ruling that the lower court abused its discretion); Resnik, *supra* note 170, at 252–53 (similarly censuring the Court's broad holding on power rather than discretion grounds). Nevertheless, the lower courts have distinguished the case on jurisdictional grounds. DOUG RENDLEMAN, COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT 603–04 (2010).

187. The Court did use the procedural unification of law and equity to inform its refusal to widen the scope of laches to bar legal relief. *Petrella*, 572 U.S. ___, 134 S. Ct. at 1974. There are state decisions suggesting the rationale. *See* Anenson, *Treating Equity Like Law*, *supra* note 5, at 467–72 (criticizing cases asserting that courts no longer had inherent power to expand equitable defenses to legal claims after the merger).

is no doubt troubling in a culture of strict legalism.[188] Concerns with equitable discretion center on an undisciplined use of judicial power in a way that may be antithetical to the theme of the statute.[189] All the same, confusion can be circumvented by candid recognition that tradition includes change, which is a corollary of the Court's statutory equitable authority.[190] The Court's freedom to choose and shape equitable defenses is implicit in its actions described in Part I, but it could (and should) be made clear.[191] Justice Ginsburg, writing for a majority that included Justices Scalia and Thomas in *Petrella,* whispered the possibility of adaption when she referenced that laches "was and remains" a bar to equitable relief and that extending the defense to legal relief goes against "past and present" understandings of the role of laches.[192] A better representation, albeit under the common law, is Justice Souter's concurring opinion in *Conrail v. Gottshall*.[193] He emphasized that the majority chose the appropriate contemporary tort theory under an "evolving common law" that was "well within the discretion" left to the federal courts under a statute enacted at the turn of the twentieth century.[194]

When private law provides the context for the statutory defense at issue, an essential aspect will be the degree of consensus in the state courts at the time the case comes up for decision. The point may be sharpened by examining the cases that the Supreme Court

---

188. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 121 (2010) (observing that "a strong vision of legislative supremacy is the dominant view" in the current legal climate).

189. *See, e.g.*, Goldstein, *supra* note 172, at 538 (equating discretion with the whim of judges); John Choon Yoo, *Who Measures The Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1162–65 (criticizing the unchecked equitable remedial powers of federal courts in governing state institutions and concerns with subjective policy-making); *see also* Mary Siegel, *The Dangers of Equitable Defenses*, 15 STAN. J.L. BUS. & FIN. 86, 88 (2009) ("[E]quitable doctrines allow courts not only to create law, but also to empower that law to supersede statutes that legislatures have created.").

190. *See* Anenson & Mark, *supra* note 7, at 1516 ("The resilience of equity . . . allows for legitimate legal change."); Anenson, *Pluralistic Model*, *supra* note 26, at 652–54 (advising that the equitable tradition includes change); discussion *supra* Part I.

191. *See* Peter L. Strauss, *On Resegrating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 442 (recognizing the potential for a court "to acknowledge cases not provided for by statutes and then use statutory material as a source of analogy to decide them").

192. *Petrella*, 572 U.S. ___, 134 S. Ct. at 1973–74. *See also* U.S. Airways, Inc. v. McCutchen, with 569 U.S. 88, 104 n.8 (2013) (noting scope of the defense is in line with current state practice).

193. 114 S. Ct. 2396, 2412 (1994) (Souter, J., concurring).

194. *Id. See* Strauss, *supra* note 191, at 429–35 (reviewing the case).

identified as precedent for its approach to equitable defenses. As discussed in Part I.D., in absorbing these doctrines into statutory law, the Court rested its analysis on private law decisions. In *U.S. Airways, Inc. v. McCutchen*, for instance, the Court relied on the consistent practice of state courts to define the applicable conditions of equitable defenses under ERISA.[195] The Court in *Bateman, Eichler, Hill Richards, Inc. v. Berner* similarly cited to state law decisions in construing securities law.[196] Correspondingly, in the early patent law decisions, the Court used its own pre-*Erie* cases involving contracts.[197]

The Court should remain committed to adopting and amalgamating lower court resolutions when appropriate.[198] Still, it should avoid becoming so reliant that it ceases making its own tests in accommodating statutory goals.[199] A too static approach can engender complaints that the common law, while no longer "up there" in the sense of a "brooding omnipresence in the sky," is still "out there" in

---

195. The Supreme Court in *McCutchen* followed a consistent and uniform state insurance practice. *See McCutchen*, 569 U.S. at 98–99 (distinguishing McCutchen's citations to state court decisions on the double recovery and common fund defenses because there was no relevant contract provision involved or because the court was interpreting the contract and relying on state court decisions in reading the common fund doctrine into the plan).

196. Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306 (1985) (citing its own precedent in addition to state and English cases).

197. *See, e.g.*, Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945) (quoting Bein v. Heath, 47 U.S. 228 (1848)). In determining the extent to which the Congressional three-year limitations period could be shortened by the judge-made defense of laches, the Supreme Court majority in *Petrella* did not look further than federal decisions under the Copyright Act. Although it cited Dobbs against expanding laches to legal relief, neither the majority nor the dissent cited to state court opinions. While this may be due to the exclusive nature of copyright protection and the lack of appropriate analogies in state cases, it is more likely that counsel did not supply this information because they failed to appreciate that it was relevant. *See* Brief of T. Leigh Anenson as Amicus Curiae in Support of Respondents at 5, Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. ___, 134 S. Ct. 1962 (2014) (advising that unclean hands and laches share a similar procedural posture and that state cases on the fusion of unclean hands at law are germane to the issue).

198. *See* discussion *supra* Part I.C (analyzing, e.g., *Petrella v. Metro-Goldwyn-Mayer, Inc.*). In comparison to its state counterparts, the Supreme Court lacks parallel authority for improving legal rules. *See* Jeffrey J. Rachlinshki, *Bottom-Up Versus Top-Down Lawmaking*, 72 U. CHI. L. REV. 933, 953 (2006) (noting an the advantage of the common law process in making rules is that courts can evaluate decisions of co-equal courts in different jurisdictions).

199. *See* discussion *supra* Part I.C (analyzing, e.g., *Pinter v. Dahl*); *see also* Strauss, *supra* note 191, at 435–36 (criticizing the Supreme Court's approach to developing federal common law in part because it relied on state resolutions and did not make its own test).

the lower courts.[200] Critics may assume the Court is externalizing responsibility rather than relying on a distinctly federal sense of justice.[201] Returning to Professor Nelson's vision of a general common law, however, connects the Court's approach in equity to other areas of judge-made law. [202]

Also influential in the adjustment to equitable defenses, if any occurs, will be the statute under review.[203] Unlike state courts that are more willing to fill holes in statutes with the common law, modern interpretative practice in the federal courts tends to place all matters within the domain of the statute.[204] Beyond the key Congressional purposes announced by the Court and how they square with the equitable defense at issue, it may be meaningful that the legislation has already been read to allow for an evolving judge-made law,[205] or

---

200. Strauss, *supra* note 191, at 436, 538 and n.114 (citing S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . .")).

201. *Id.* at 538 (criticizing the Court for not relying on its own internal sense of justice).

202. *See generally* Nelson, *General Law*, *supra* note 111 (describing how federal courts continue to draw rules of decision from general American jurisprudence); *see* Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 10–17 (2015) [hereinafter Nelson, *Federal Common Law*] (discussing the different senses in which judges make the common law).

203. *See* United States v. Jin Fuey Moy, 241 U.S. 394, 402 (1916) (Holmes, J.) ("But every question of construction is unique, and an argument that would prevail in one case may be inadequate in another.").

204. *See generally* Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and the Unwritten Law*, 80 U. CHI. L. REV. 657 (2013) [hereinafter, Nelson, *Interaction Between Statutes and the Unwritten Law*] (showing how federal courts read statutes to encompass more issues than state courts do with the result that federal courts handles those issues under the rubric of statutory interpretation while state courts resort to the unwritten general common law); *see also* Nelson, *Federal Common Law*, *supra* note 202, at 5 (relating the modern view "that every rule of decision that has the status of federal law must be traced" to a written source that "either establishes the rule itself or authorizes the judiciary to do so"). Perhaps due to the rationale of resolution in the Federal Circuit, the Supreme Court's decision in *SCA Hygiene Products v. First Quality Baby Products* is such a case. 580 U.S. ___, 137 S. Ct. 954 (2017). Both the majority and the dissent decided whether Congress intended to allow laches to preclude legal relief. *Id.* at 962-63 (analyzing whether the exception to the limitations period for "unenforceability" included the equitable defense of laches and finding the statutory language did not encompass laches as a bar to legal relief); *id.* at 970 (Justice Breyer, arguing in dissent that Congress combined the Patent Act's statute of limitations with a laches defense).

205. Eskridge, *Public Values, supra* note 152, at 1054-55 (commenting on several statutes that have had an unusual amount of common law gap-filling such as the Sherman Act of 1890 and anti-fraud provisions of the securities laws); *see also id.* at 1053 (analyzing the Supreme Court cases interpreting Section 1983 and

that it involves subject matter, such as commercial transactions, that generally have a greater need for transformation.[206] With intellectual property law, especially, there is a strong mythology that accompanies innovation and the entrepreneurial spirit.[207] Like the great American road trip, the belief is that catharsis and salvation is attainable merely by forward momentum.[208]

Finally, the controversy among the justices concerning the extent to which the Court will privilege the definition and application of judge-made doctrines known to the enacting Congress will likely influence the amount to which it will update equitable defenses.[209]

---

concluding that the Court has developed public values in a relatively principled way). The Supreme Court's anti-trust cases have incorporated the evolving common law. *See* Frank H. Easterbrook, *Statutes Domains*, 50 U. CHI. L. REV. 533, 544 (1983) (explaining that the Sherman Act is an example that "effectively authorize[s] courts to create new lines of common law"). Yet the Court has rejected the similar absorption of private law remedies. *See* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640–46 (1981) (rejecting right of contribution to antitrust coconspirators because the judicial power to use common law principles to interpret the substantive provisions of the Act does not extend to its remedial sections).

206. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 337 (1999) (Ginsburg, J., dissenting) ("A dynamic equity jurisprudence is of special importance in the commercial law context."); *see also* Union Pac. Ry. v. Chi., Rock Island & Pac. Ry., 163 U.S. 564, 600–01 (1896) ("It must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them.").

207. Professor Mark and I criticized the Federal Circuit's policy-based decision in *Therasense, Inc. v. Becton, Dickinson & Co.* as unprincipled for not equally accounting for the history of inequitable conduct. *See* Anenson & Mark, *supra* note 7, at 1502 ("Rather than synthesizing science and sociology by resorting to equitable principles, the majority in *Therasense* cemented their separation.").

208. Anenson & Mark, *supra* note 7, at 1517 (explaining that literature reviewing the American patent system in historical perspective attributes its success in part to equitable principles) (citing Zorina Khan, *Innovation in Law and Technology*, *in* Vol. II, THE CAMBRIDGE HISTORY OF LAW IN AMERICA at 484, 491 495, 525–29 (Michael Grossberg & Christopher Tomlins eds. 2008)); *see also* CARDOZO, *supra* note 149, at 62 ("[T]he great inventions that embodied the power of steam and electricity, the railroad and the steamship, the telegraph and the telephone, have built up new customs and new laws."). We previously argued that equitable defenses fit within Professors Lemley and Burk's idea of judicial "policy levers" that accommodate change in patent law. *See* Anenson & Mark, *supra* note 7, at 1517–18 (citing DAN L. BURK & MARK A. LEMLEY, THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT 18 (2009)).

209. Eskridge, *Public Values*, *supra* note 152, at 1018, 1038 (explaining interpretation according to original versus evolving statutory purposes); *see also* Mertens v. Hewitt Assocs., 508 U.S. 248, 257 n.7 (1993) (Scalia, J.) (considering equitable remedies available "when ERISA was enacted"); Strauss, *supra* note 191, at 433 (criticizing Justice Thomas' 1994 majority opinion in *Conrail v. Gottshall*,

Conflicts over an "archaeological" versus a "nautical" approach to interpretation largely depend on the justices' general philosophy of statutory interpretation rather than any particular view of equity.[210] Professor Nelson advises that disagreements over a static versus a dynamic view would be obviated if federal courts would acknowledge judge-made law as background law without the need to shoehorn these doctrines into the statutory domain.[211] In any event, it would be unfortunate if older legislation most in need of updating would be foreclosed from an equitable adjustment.

But equity does not authorize judges to use their own preferences to amend legislation that has outlived its usefulness. Part I illuminated that the Court is constrained by custom and precedent and tied to statutory policies.[212] Ultimately, whether these defenses are applied too strictly or too liberally in the statutory arena will be in the eye of beholder.[213] Both can lead to undesirable outcomes.[214] Future

---

114 S. Ct. 2396 (1994) as understanding negligence from the common law choices in 1908 when the statute was enacted).

210. T. Alexander Aleinikiff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 20–21 (1988) (contending that judges should use a nautical approach to statutory interpretation to account for current values rather than an archaeological approach); *id.* at 22–24 (explaining that textualists and intentionalists are more inclined to an "archaeological" approach where the statute is set in stone on the date of the enactment whereas dynamists, on the contrary, aspire to a "nautical" approach where the statute is seen as an ongoing process—a voyage—in which both the shipbuilder (Congress) and the navigator (Court) play a role). Reviewing the Supreme Court's cases during its 1993 term, Professor Peter Strauss accused the Court of re-segregating the worlds of common law and statute and returning to the formalist orthodoxy criticized by Dean Pound. Strauss, *supra* note 191, at 431–36, 528, 539–40.

211. Nelson, *Federal Common Law*, *supra* note 202, at 48–50.

212. Anenson, *Statutory Interpretation*, *supra* note 12, at 37–38; *see also* Nelson, *Federal Common Law*, *supra* note 202, at 45-48 (arguing in the context of the Sherman Act that reliance on general American jurisprudence to fill vacuums left by federal law gives judges less discretion than finding that the issue falls within the domain of the statute where judges may resort to unfettered policy analysis).

213. *See* Bray, *New Equity*, *supra* note 19, at 1023 (questioning whether the evolution of equity in the Supreme Court will be too slow); *see also id.* at 1000 (noting that in *eBay Inc v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) the word "tradition" or a cognate appears the same number of times "tradition" appears in the first song of *Fiddler on the Roof*). Because the availability and scope of equitable defenses depend in part on statutory policy, disagreements over the relative primacy of such goals will inevitably affect the defenses.

214. It is not surprising that during the rapid social and technological change occurring in the early twentieth century that equitable principles were celebrated rather than condemned. *See, e.g.*, James Barr Ames, *Law & Morals*, 22 HARV. L. REV. 97, 108–09 (1908) (asserting that discretion in shaping equitable remedies

controversies will likely provide more data on which to evaluate the appropriateness of equity's evolution in statutory law.[215]

Intuitively, at least, the Supreme Court has not forgotten that the background law of equity is part of the common law.[216] The responsibilities of judges, even federal ones, calls for careful continuity and measured change.[217] Equitable defenses that are not directly provided for by statute can still be said to fall within the stable expectations that state and federal decisional law has promoted about their acceptance and application.[218]

The decision-making process of equitable defenses in federal statutes is neither new nor unique.[219] It is the very foundation of

---

made English and American law more perfect than other countries); Ryan, *supra* note 83, at 215 (speaking of equity's "marvelous adaptability").

215. The continuing conflict on the Court is larger than their view of equity. The difference, at least in part, is about what the justices perceive to be persuasive proof of the historical method of reasoning along with their judgement and ordering of paramount statutory policies. For instance, Justice Scalia is not shy about specifying his preference to find evidence of tradition in specific practices over general principles. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (explaining that the tradition should be at "the most specific level at which a relevant tradition . . . can be identified"). Still, Scalia is willing to contemplate narrow traditions. The suggestion, as I read it, that the controversy among the justices between the principles and practices of equity is reaching consensus is probably too optimistic. Bray, *New Equity*, *supra* note 19, at 1014–15, 1044, 1053 (citing ERISA cases and arguing the Court is taking an idealized view of historic equity). While the Court is cleaning up its ERISA doctrine, the conflict will likely continue. As one example, the difference of opinion between the majority and dissent in *Petrella* concerning the fusion of laches at law is evidence that disagreements about when, and the extent to which, the Court will recognize and possibly modify equitable principles and practices in particular cases persists.

216. In urging that laches should be available to bar damages, the dissent in *Petrella* invoked the Court's assumption of the federal common law in federal statutory interpretation. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. ___, 134 S. Ct. 1962, 1983 (2014) (Breyer, J., dissenting) (quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) ("'Congress is understood to legislate against a background of common–law adjudicatory principles'" and to incorporate them 'except when a statutory purpose to the contrary is evident'")). For the recent controversy between the majority and dissent over the content of the common law rule in *SCA Hygiene Products v. First Quality Baby Products*, see discussion *supra* note 154.

217. *See generally* WILLIAM GUMMOW, CHANGE AND CONTINUITY: STATUTE, EQUITY, AND FEDERALISM (1999) (discussing these opposing forces in statutory interpretation); *see also* discussion *supra* Part I.D.

218. *See* Nelson, *Federal Common Law*, *supra* note 202, at 36 (discussing the idea that courts can identify coherent themes across states in recognizing an American common law).

219. Primarily examining the Supreme Court's remedies decisions, Bray contends that the appeal to history and tradition are a departure from its prior

judging.[220] Unlike the "oil and water" metaphor once used in the Commonwealth,[221] the legal community in the United States has been more receptive to a symbiotic relationship between the common law and legislation.[222] In fact, Dean Guido Calabresi challenged conventional thinking by advocating that the common law can and should update statutes.[223] While this idea remains controversial,[224] the

---

practice. Bray, *New Equity*, *supra* note 19, at 1053. He also contends that the Court is presenting an artificial view of historic equity. *Id.* at 1014–15, 1018. With respect to equitable defenses, a more accurate portrayal is that the Court is simply being a court. It is attempting to reconcile continuity and change by using and choosing between tradition and policy modes of reasoning in light of prevailing precedent. The Court should clarify its methodology to avoid confusion.

220. Karl Llewellyn's awareness of the progress of the law was acute. He observed that when we look over a line of cases, we realize that something new has been created; but he further queried: Could it have been old at the moment it was created? *See* KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 76 (Paul Gewirtz ed. & Michael Ansaldi trans., Univ. of Chicago Press 1989) (1933) ("[O]ne who works over a line of cases in retrospect recognizes that something new has been created. And can it have been old at the very moment it was created?").

221. Jack Beatson, *Has the Common Law a Future?*, 56 CAMBRIDGE L.J. 291, 300 (1997) (speaking of the relationship between common law and statute as being like "oil and water"). The relationship between common law and statute has garnered an increasing amount of scholarly attention. *See generally* Andrew Burrows, *The Relationship Between Common Law and Statute in the Law of Obligations*, 128 LAW Q. REV. 232 (2012) (discussing the relationship between common law and statute in the English law of obligations). I am grateful to Elise Bant for providing me with the literature analyzing the relationship between common law and legislation in the Commonwealth.

222. *See* Nelson, *Interaction Between Statutes and the Unwritten Law*, supra note 204, at 751–58, 766 ("The interaction between statutes and the unwritten law has been a constant subject of academic inquiry in the United States, drawing sophisticated commentary from distinguished scholars and jurists alike."); Finn, *Statutes and the Common Law*, *supra* note 99, at 10 (commenting that United States judges and scholars across this century have regularly addressed the relationship between common law and statute); *see also* Strauss, *supra* note 191, at 437 ("The judicial function is also augmented if the world in which judges act to promote coherence includes statutory as well as judge-made law.").

223. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 5, 98, 106–07, 167–68 (1982) (identifying statutory obsolescence and basing validity of modification on the judge's common law role); *cf.* R.J. Traynor, *Statutes Revolving in Common Law Orbits*, 17 CATH. L. REV. 401 (1968) (describing how statutes can update the common law); James Landis, *Statutes as Sources of Law*, HARVARD LEGAL ESSAYS (Cambridge: Harvard University Press, 1936) (same). Calabresi grounded the acceptability of statutory modification on the institutional nature of judicial lawmaking as well as the need for judges to act according to principle and to give reasons for their decisions. *See generally* CALABRESI, *supra*.

224. *See, e.g.*, Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 357, 361–62 (1989) (calling Calabresi's position a

Supreme Court's equitable defense jurisprudence shows how it has been done.[225]

CONCLUSION

There have been several contentious cases decided by the Supreme Court involving equitable principles.[226] The Court's decisions have a considerable impact on both state and federal law.[227] Yet the origins and nature of equitable precepts and their implications are habitually overlooked or underappreciated. This Article has sought to enrich our larger social understanding of what equity means in an age of federal statutes.

Using United States Supreme Court jurisprudence, it analyzed the scope of judicial discretion to define equitable doctrines raised in defense of federal statutory claims. The Article also synthesized the cases into an explicable framework. It revealed that equitable defenses continue to serve as judicial safety valves aimed at preventing opportunism and, in this way, preserve equity's corrective function in maintaining the sanctity of the law.

The Article presented the Court as a manager in providing appellate oversight to restrict equitable defenses while paradoxically preserving their discretionary character. It also illustrated the Court's role as a medieval modernist by showing how it is reuniting a general common law. This phenomenon has important implications. It highlights the need for state-based, across-the-board research on

---

"radical solution" to the problem of obsolete statutes and summarizing scholarly objections concerning authority and competence).

225. *See* discussion *supra* Part I.

226. The Supreme Court's most controversial decision on equitable relief is *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). Its divisive decision on equitable defenses involves laches in copyright law. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. ___, 134 S. Ct. 1962 (2014). For an analysis of earlier Supreme Court decisions on equitable defenses, see Chafee I, *supra* note 10, at 878 (explaining that there were four cases decided after Pearl Harbor where the unclean hands maxim was a "bone of bitter controversy" in the Supreme Court).

227. *See, e.g.*, Anenson, *Process-Based Theory, supra* note 16, at 530–32 (explaining that Supreme Court unclean hands decisions have been the basis for the development of the fraud on the court doctrine and used in extending the defense to legal remedies under state law); Gergen, Golden & Smith, *supra* note 4, at 205 (concluding that "the *eBay* opinion has had cataclysmic effect" by becoming "*the* test for whether a permanent injunction should issue, regardless of whether the dispute in question centers on patent law, another form of intellectual property, more conventional government regulation, constitutional law, or state tort or contract law").

equitable defenses which is virtually non-existent,[228] and may renew calls for a *Restatement of Remedies* (or *Equity*).[229] The Article additionally identified future issues in reconciling continuity and change.

Finding a unified framework from the muddle of opinions integrating equitable defenses into federal statutes is difficult and time-consuming.[230] But doing so provides greater predictability in this outwardly chaotic and contested case law, reduces mistakes in decisions, and makes them more understandable.[231] These outcomes should enhance judicial legitimacy.[232] Moreover, deriving a clear method allows courts to focus attention on the equally arduous task of applying equitable defenses.[233] It should further enable better observation and comparison in developing principles of judicial discretion to deny equitable relief for statutory violations and in assimilating other non-equitable judge-made (common) law.[234]

This Article advances the practice of equity and its seminal principles. It likewise influences theory by reducing the size of the

---

228. My scholarship is the exception. *See* Anenson & Mark, *supra* note 7, at 1508 (explaining that equitable defenses have not been systematically studied in the last fifty years). It has studied the operation of one or more equitable defenses across state and federal law statutory and common law. *See, e.g.*, Anenson, *Limiting Legal Remedies*, *supra* note 11 (unclean hands), Anenson, *Pluralistic Model, supra* note 26; Anenson, *Role of Equity*, *supra* note 4. Other scholars that have analyzed equitable defenses tend to focus on one subject such as contracts. Sherwin, *Contract Enforcement, supra* note 39, at 304–05; *see also* Anenson, *The Triumph of Equity*, *supra* note 7, at 382 n.14 (listing equitable estoppel literature by subject matter).

229. *See* Laycock, *How Remedies Became a Field, supra* note 3, at 266 ("In the late 1980s, the American Law Institute considered a *Restatement of Remedies*, which would have ensconced the field even more firmly in the legal establishment."); *see also id.* at 172 (explaining that there is a *Restatement of Restitution* that is considered part of the law of remedies).

230. *Cf.* Daniel A. Farber, *Taking Costs into Account: Mapping the Boundaries of Judicial and Agency Discretion,* 40 HARV. ENVTL. L. REV. 87, 90, 135-36 (2016) (emphasizing that "[i]t requires considerable work to identify the governing principles amidst the tangle of judicial opinions" about discretion).

231. *Id.* at 135–136.

232. *Id.*

233. *Id.*

234. *Id.* (explaining that scholarship in remedies and administrative law has developed separately and that scholars have neglected to see the similarities between the principles for judicial and administrative discretion). For instance, while the Supreme Court presumes it has discretion to deny statutory relief for equitable defenses and remedies under ambiguous statutes, its more contextualized approach to the development of principles governing equitable defenses seems at odds with its approach to injunctions. *See* Gergen, Golden & Smith, *supra* note 4, at 220, 227–28, 249 (discussing the Supreme Court's disregard of presumptions concerning injunctions).

substantial gap in our understanding of modern American equity. The objective is to synthesize a set of seemingly unrelated outcomes concerning equitable judge-made principles into an intelligible idea. Its Supreme Court-centric concentration helps ameliorate the imbalance in the literature on federal equity jurisprudence.[235] Studying the range of judicial choices in deciding equitable defenses at the trial and appellate level further contributes to the growing body of work on judicial discretion.[236] Finally, analyzing the relationship between unwritten equity and written statutes fosters scholarship in the law of obligations, remedies, and the federal courts.[237]

---

235. *See* Kroger, *supra* note 162, at 1427 (noting the lack of literature on Supreme Court equity jurisprudence and emphasizing that an appreciation of these equity decisions is indispensable to an understanding of the history of American judging); *see also* Levin, *supra* note 27, at 293 (pointing out an imbalance in the literature on judicial remedies in public law as opposed to constitutional law).

236. Cravens, *supra* note 147, at 950 (advising that discretion began receiving scholarly attention in the late 1960s); Farber, *supra* note 230 ("'[D]iscretion occupies an oddly neglected place in Anglo-American legal thought.'") (quoting William A. Fletcher, *The Discretionary Constitution Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 641 (1982)); *see also* Rendleman, *Remedies*, *supra* note 3, at 578-79 ("Discretion in decision-making is a fertile field for inquiry. Careful scholars have published several well-researched and well-reasoned articles calling for discretion in equity."); *id.* at 579 n.57 (citing Anenson, *Process-Based Theory*, *supra* note 16; Anenson & Mayer, *supra* note 4; Anenson, *Limiting Legal Remedies*, *supra* note 11; Anenson, *Treating Equity Like Law*, *supra* note 5).

237. Equitable defenses are often associated with remedies, but they are also part of private law. *See* discussion *supra* notes 7–8 and accompanying text. Yet the legal world divides remedies and private law into different domains where they have developed more or less independently. As such, scholars with unique outlooks and techniques of appraisal tend to study one subject or the other.

The Frivolous Litigation Narrative: Web of Deception or Cautionary Tale?

Michael Darling*

INTRODUCTION

Despite the sweeping success of second-wave tort reform advocates[1] in modifying the tort system in favor of doctors and

---

* Michael Darling is currently a first-year litigation Associate at the Houston office of Akin Gump Strauss Hauer & Feld LLP.
I dedicate this Note to my father, Steve Darling, whose Socratic-style discussions around the dinner table and encouragement of analytical thought first sparked my interest in joining my father's profession. I also extend my gratitude to Professor Charlie Silver, who encouraged peering with a critical eye at a multitude of commonly-accepted legal beliefs and provided helpful commentary on this piece.

1. For analytical purposes, this note distinguishes between first-wave tort reform, which started in the 1970s, and second-wave tort reform, which began in the 1980s and experienced its heyday in the early 2000s. Scott DeVito & Andrew Jurs, *An Overreaction to a Nonexistent Problem: Empirical Analysis of Tort Reform from the 1980s to the 2000s*, 3 STAN. J. COMPLEX LITIG. 62, 69–70 (2015).

corporations,[2] the story told by many legal reformists today continues to be that frivolous lawsuits plague the American justice system and threaten American industry.[3] For example, Lisa Rickard, president of the Institute for Legal Reform of the U.S. Chamber of Commerce,[4] commented in September 2015 after the Lawsuit Abuse Reduction Act of 2015 (LARA)[5] passed the House that, due to congressional watering down of 1993 federal legislation designed to eliminate frivolous litigation, "such claims have led to increased insurance costs, job losses, and an almost total failure of attorney accountability."[6]

By way of evaluating the narrative that frivolous suits are, in the aggregate, a scourge on the system of law in America—which this note refers to interchangeably as the "frivolous litigation narrative" or the "frivolous lawsuit narrative,"—this note will review the available empirical data on frivolous lawsuits in the United States. Although empirical studies on the frivolousness of lawsuits are relatively scarce,[7] sufficient literature exists to conclude that the myth is

---

2. *See id.* at 70 (noting that "[i]n both the 1980's and 2000's, multiple states adopted tort reform legislation intended to discourage filing of claims and limit recoveries in claims that were filed").

3. To illustrate the persistence of the belief in "frivolous lawsuits," the United States House of Representatives passed a bill in September 2015 known as the Lawsuit Abuse Reduction Act of 2015, designed to "reduce wasteful litigation by making sanctions against frivolous claims mandatory rather than discretionary under the Federal Rules of Civil Procedure, and by eliminating a 21-day 'safe harbor' window period for plaintiffs' lawyers to withdraw a lawsuit without penalty." Joan Gartlan, *U.S. Chamber Applauds House Passage of Lawsuit Abuse Reduction Act*, BUSINESSWIRE (Sep. 17, 2015, 5:37 PM EDT), http://www.businesswire.com/news/home/20150917006562/en/U.S.-Chamber-Applauds-House-Passage-Lawsuit-Abuse [hereinafter *U.S. Chamber Applauds*].

4. The U.S. Chamber of Commerce is the most massive "business organization" in the world, and "advocate[s] for pro-business policies." *About the U.S. Chamber*, U.S. CHAMBER OF COMMERCE, https://www.uschamber.com/about-us/about-the-us-chamber (last visited Jan. 19, 2017, 9:42 AM).

5. It is worth noting that the American Bar Association is opposed to the legislation; Thomas M. Susman, ABA Governmental Affairs Director, implied that enacting LARA would be a mistake in the style of the 1983 Federal Rule of Civil Procedure 11 amendment that "harmed litigants and impeded the administration of justice." *House Passes Lawsuit Abuse Reduction Act; ABA Says Legislation is Unnecessary*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/publications/governmental_affairs_periodicals/washingtonletter/2015/september/lawsuitabuse.html (last visited Jan. 19, 2017, 9:41 AM).

6. Gartlan, *supra* note 3.

7. This scarcity is understandable, given the unique difficulties implicated in the task of empirically measuring frivolousness. *See* Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 527–28 (1997) (identifying three difficulties associated with engaging in empirical analysis on frivolous litigation: (1) multiple disparate definitions of a "frivolous suit"; (2) evaluating the merits of a suit; and (3)

overblown at best[8] and outright false at worst.[9] In order to establish a logically coherent method of analysis, this note will organize the empirical analyses by type of litigation. Empirical analyses from disparate types of lawsuits will be unpacked in the following order: (1) *qui tam* litigation under the False Claims Act; (2) intellectual property (IP) litigation; and (3) medical malpractice litigation. Following the review of empirical literature on these three types of litigation, this note will discuss the implications of the literature on current issues in the practice of law and will conclude with closing remarks.

Prior to digging into the empirical literature on the existence of frivolous lawsuits in the context of these disparate types of litigation, however, it will prove useful to define the term "frivolous lawsuit" and establish some limits on the analysis undertaken throughout the rest of this note. Recognizing the difficulty in defining the term "frivolous lawsuit," which has been underscored by commentators,[10] this note adopts the definition most commonly used—at least as a matter of implication—by academics addressing the phenomenon of frivolous suits: suits completely lacking in legal merit.[11]

---

the challenge of obtaining settlement data in light of the confidentiality agreements commonly contained in settlement agreements).

8. *See, e.g.*, David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2031 (2006) (reporting that the findings of the authors' analysis of the merits of medical malpractice litigation reflect that the frivolous litigation narrative is "overblown" in the medical malpractice context).

9. *See* Lonny Hoffman, *The Case Against the Lawsuit Abuse Reduction Act of 2011*, 48 HOUS. L. REV. 545, 580 (2011) ("In sum, the claim that the federal courts are inundated with 'frivolous' lawsuits is unsubstantiated by the available empirical evidence.").

10. *See* Bone, *supra* note 7, at 529–30 (identifying the phenomenon within the academic literature on frivolous lawsuits of commentators "us[ing] the term 'frivolous suit' without defining it, as if the meaning were obvious to all," and stating that the concept of frivolous lawsuits "is quite slippery").

11. *See, e.g.*, David Farber, *Agency Costs and the False Claims Act*, 83 FORDHAM L. REV. 219, 227–30 (2014) (discussing "meritless" claims brought under the False Claims Act). Notably, this definition of frivolousness is distinct from the American Bar Association's (ABA) definition, as is explained in an article published by the organization. *Pre-suit Investigation and the Pursuit of Frivolous Claims*, AMERICAN BAR ASSOCIATION 2, http://apps.americanbar.org/abastore/products/books/abstracts/5190471_chap1_abs.pdf (last visited Jan. 19, 2016, 9:50 AM). The article states that ABA Model Rule 3.1, which governs Meritorious Claims or Contentions, allows for an action to completely lack merit without being frivolous under Rule 3.1. *Id.* (citations omitted). Model Rule 3.1 prohibits lawyers from engaging in bringing or defending

In order to limit the scope of this note, since the following sections will engage primarily in meta-analysis, the analysis in this note will necessarily be limited by some of the same constraints identified by commentators. Chief among these constraints is the limitation of using either judicial or governmental determinations of frivolousness, as reflected by the imposition of sanctions in a given case or dismissal of a particular case—on the part of either judges or the Department of Justice (DOJ) in the context of *qui tam* litigation, respectively—as one of the primary metrics for assessing the true merits of cases.[12] Two other limitations imposed by commentators are (1) the use of "win" rates[13] and (2) the use of quantity of lawsuits filed in order to determine the frequency of frivolous filings in different types of litigation.[14] The final limitation is the use of settlement value, in the *qui tam* context, as a proxy for frivolousness.[15] The explanation for authors' imposition of win rates and lawsuit quantity on empirical studies is most plausibly the fact that settlement data is unavailable due to confidentiality agreements as part and parcel of a majority of settlement agreements.[16]

In addition to the limitations outlined above, in light of the fact that many of the empirical studies available on frivolous litigation are somewhat dated, this note will supplement the available empirical evidence with current empirics on the tort system more generally, drawing conclusions therefrom as the analysis warrants. With these

---

proceedings "unless there is a basis in law and fact for doing so that is not frivolous." MODEL RULES OF PROF'L CONDUCT R. 3.1 (AM. BAR ASS'N 2015).

12. In the area of *qui tam* litigation, David Kwok, now a professor at the University of Houston, expressly identified in his analysis of False Claims Act claims that his approach to identifying frivolous whistleblower suits under the False Claims Act "relies upon the legitimacy of the DOJ's review and selection process." David Kwok, *Evidence from the False Claims Act: Does Private Enforcement Attract Excessive Litigation?*, 42 PUB. CONT. L. J. 225, 236 (2012–2013).

13. For example, one commentator addressing frivolous suits in intellectual property litigation uses the high win rate of patent infringement suits brought by nonpracticing entities as compared with the average patent infringement suit win rate in support of his ultimate conclusion that frivolous lawsuits are not a serious problem in the context of patent infringement suits. Sannu K. Shrestha, *Trolls or Market-Makers? An Empirical Analysis of Nonpracticing Entities*, 110 COLUM. L. REV. 114, 148–150 (2010).

14. Hoffman relies partially on data from the National Center for State Courts finding a decrease of 25% in tort filings "from 1999 to 2008." Hoffman, *supra* note 9, at 571, 576.

15. *See, e.g.*, Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 6 J. OF FIN. 2213, 2246 (2010) (examining settlement value as code for case merit in qui tam litigation).

16. Bone, *supra* note 7, at 528 & n.34.

limitations laid out, this note will now proceed with the meta-analysis of frivolous lawsuits by area of law, beginning with *qui tam* litigation.

I. THE TRUTH OF THE FRIVOLOUS LAWSUIT NARRATIVE IN *QUI TAM* LITIGATION

In the area of *qui tam* litigation, which involves the private prosecution of governmental

officials for fraud under the False Claims Act (FCA), David Kwok, currently a professor at the University of Houston, undertook an extensive review of False Claim Act suits to determine the prevalence of frivolous claims filed pursuant to its *qui tam* provision. First, this Section will outline the benefits of analyzing data on *qui tam* litigation to the aims of the larger project of determining whether frivolous lawsuits are an empirical reality in the American litigation landscape. Second, this Section will summarize Kwok's findings. Third, an analysis of the potential problems with, and overall merits of, Kwok's findings will be exposited.

A. Why Qui Tam Litigation?

This note analyzes *qui tam* litigation for three reasons. First, *qui tam* litigation stands out within the existing empirical research on frivolous lawsuits as a type of litigation for which comprehensive data on both verdicts and settlements is available; Kwok obtained this data through a Freedom of Information Act (FOIA) request.[17] Second, *qui tam* litigation, by its nature, ostensibly creates more incentives to file frivolous suits than other types of litigation do.[18] Third, *qui tam* litigation is perceived as having a high incidence of frivolous filings, both by popular business journals and some academics.[19]

---

17. Kwok, *supra* note 12, at 228, 238.

18. *See* Hoffman, *supra* note 9, at 578 (stating, after introducing Kwok's empirical work, that "FCA qui tam actions would seem to be a perfect breeding ground for the kind of frivolous litigation activity that [the Lawsuit Abuse Reduction Act of 2011's] proponents assert pervades the civil justice system," subsequently substantiating this claim by explaining that the FCA provisions include: (1) recovery up to 30% by private relators; (2) treble damage provisions; and (3) no standing requirement).

19. *See, e.g.*, David Brunori, *Getting Taxpayers to Rat on Each Other is Uncool*, FORBES (Oct. 14, 2015, 1:24 PM), http://www.forbes.com/sites/taxanalysts/2015/10/14/getting-taxpayers-to-rat-on-each-other-is-uncool/#3c92c94c2986 ("It should be noted that most qui tam lawsuits and IRS whistleblower actions are filed against businesses with real or perceived deep pockets. As a result, the likelihood of frivolous charges is high. And even if the charge is not completely frivolous, most are found to be baseless.").

As an example of academic literature critical of the FCA's *qui tam* provision, William Kovacic criticized the *qui tam* provision for failing to provide sufficient incentives for the DOJ to dismiss frivolous suits.[20] For another example, Christina Orsini Broderick wrote in 2007 that the FCA's *qui tam* provision directly leads to frivolous lawsuits.[21] However, both Kovacic and Broderick failed to address potential reasons, aside from lack of merit, for the DOJ declining to intervene in any particular case. This failure to address significant potential DOJ incentives aside from considerations of individual case merits, paired with empirical evidence of a very low rate of judicial sanctioning based on frivolousness, suggest that Kwok's methodology and the conclusions he draws from its application are more sound.

B. Kwok's Analysis

Kwok teed up his ultimate questions regarding frivolous *qui tam* litigation by explaining that the FCA, by means of its design, invites abusive litigation for three reasons: (1) the statute does not contain a standing requirement; (2) the DOJ's ability to effectively take control of the lawsuit brought by a private plaintiff, known as a relator in *qui tam* litigation, creates an incentive for private plaintiffs to underinvest in bringing False Claims Act suits; and (3) the statute "provides for treble damages and requires the defendant to pay attorney fees to successful private plaintiffs."[22] These predictions are consistent with other commentators' predictions regarding the incentive structures in place in the FCA's *qui tam* provision. Alexander Dyck and other researchers at the University of Chicago's Booth School of Business similarly stated that it was possible that "heightened monetary incentives" in place in the healthcare industry due to the ability to bring *qui tam* suits in the industry could potentially "create a free option for [healthcare] employees, leading to an excessive amount of false claims."[23] The findings of Dyck et al. are consistent with Kwok's findings, and will be discussed in Subsection (d) of this Section.

In response to Kwok's FOIA request, the DOJ provided him with extensive tables of FCA case information, which included statistics on successful settlements or verdicts from the perspective of

---

20. William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, LOY. L.A. L. REV., 1799, 1849 (1996).

21. Christina Orsini Broderick, Note, *Qui Tam and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 951 (2007).

22. Kwok, *supra* note 12, at 226.

23. Dyck et al., *supra* note 15, at 2246.

the United States.[24] First, Kwok noted that FCA actions in which the DOJ declined to intervene resulted in a verdict in favor of the plaintiff—the United States—only nine percent of the time, and explored the FOIA data to determine the existence of filing mills, one of his proxies for frivolousness.[25] He defined filing mills as firms that acquire "a high volume of plaintiff clients without careful analysis of each case," leading to a large number of the cases settling "due to the private attorney general's risk aversion."[26] Second, Kwok used DOJ dismissals as an additional proxy for frivolous suits, and detailed the unique procedural requirements of the FCA.[27] After the relator's private attorney prepares the complaint, he files it with both a particular court and the DOJ, which triggers a 60-day stay during which time the DOJ conducts an investigation of the complaint and decides whether to intervene.[28] The decision to intervene allows the DOJ to either take the reins in the litigation or dismiss the case.[29]

Regarding Kwok's proxy for frivolous lawsuits, Kwok determined the existence of filing mills by filtering the FOIA data for firms representing large amounts of cases with low rates of DOJ intervention overall.[30] Using 27 percent as the calculated average intervention rate, he found only two potential filing mills in terms of case filings and only "a few firms that file claims that are intervened at rates substantially below the 27% reference point," out of 2,505 firms listed in the FOIA data.[31] Kwok further compared the ratio of aggregate intervention rates to successive case filings as a metric for firms' relationships with the DOJ, as well as firms' case analysis skills, concluding that if the ratio was positive this would cut against the existence of filing mills and thus against the incidence of frivolous lawsuits in the body of *qui tam* litigation in general.[32] Kwok found that there was indeed an increase in the ratio.[33]

After determining that the amount of potential filing mills was quite low and the ratio of aggregate intervention rates to successive case filings increased over time in the FOIA data, Kwok explored the question of whether dismissal or delay could be used by the DOJ to

24. Kwok, *supra* note 12, at 228, 238.
25. *Id.* at 240.
26. *Id.* at 235.
27. *Id.* at 229.
28. *Id.* at 229–30.
29. *Id.* at 230.
30. *Id.* at 240.
31. *Id.* at 241–43.
32. *Id.* at 243.
33. *Id.* at 244.

deter the development of filing mills.[34] He concluded that the former is not widely used and, while the data does not indicate that delaying investigations by routinely requesting extensions to the statutory 60-day stay is a tactic the DOJ used to provide a disincentive to deter the filing of weak cases, this proposition is impossible to rule out.[35] As Hoffman aptly summarized, "Kwok's work suggests that in a field in which one could reasonably predict lawyers would be incentivized to file as many cases as possible without regard to their merit, the data show that lawyers do not routinely follow such a strategy."[36]

C. *Analysis of Kwok's Empirical Methodology*

The most evident weakness in Kwok's analytical methods is his implicit assumption that

the DOJ has a strong enough incentive to dismiss weak or frivolous *qui tam* cases as to make DOJ dismissal a reliable metric for the merits of any given case. This assumption in turn bolsters the unstated proposition that dismissal rate serves as a suitable proxy for frivolousness. In support of his claim that the government has the "opportunity to dismiss weak cases promptly, yet it rarely uses this power," Kwok cited an article by Jonathan T. Brollier.[37] However, Kwok failed to note that the entirety of Brollier's article is aimed at changing the incentive structure of the FCA, which Brollier argued "does not encourage the [DOJ] to exercise its statutory power to dismiss unfounded *qui tam* actions."[38] Indeed, in the article, Brollier proposed amendments to the FCA to incentivize dismissal of *qui tam* suits that lack merit.[39]

In light of the fact that only nine percent of claims resulted in verdicts for the U.S. in the absence of DOJ intervention, one could reasonably assume that a good chunk of the ninety-one percent of claims that have historically been unsuccessful from the relator's perspective are frivolous. Kwok never explicitly debunked this assumption. Although this omission was perhaps an oversight on his part, the available empirical data places suspicions that Kwok employed flawed methods to rest. The following subsection outlines

---

34. *Id.* at 245–48.
35. *Id.* at 246–48.
36. Hoffman, *supra* note 9, at 580.
37. Kwok, *supra* note 12, at 248.
38. Jonathan T. Brollier, *Mutiny of the Bounty: A Moderate Change in the Incentive Structure of Qui Tam Actions Brought Under the False Claims Act*, 67 OHIO ST. L. J., 693, 693 (2006).
39. *Id.* at 697.

this empirical support, further solidifying the proposition that the incidence of frivolous *qui tam* lawsuits is quite low.

D. Additional Empirical Support

First, in support of the proposition that the FCA does not incentivize the filing of frivolous suits, Dyck et al. at the University of Chicago's Booth School of Business found that the healthcare industry—one of the few industries in which *qui tam* actions are available due to robust government involvement as a purchaser[40]—is actually marked by a lower incidence of frivolous litigation.[41] In terms of the researchers' proxy for frivolousness, Dyck et al. selected cases settling below $3 million as a marker for frivolous suits.[42] They stated that this number is based upon previous studies suggesting a cutoff award amount at which a suit is likely to be non-frivolous;[43] however, the previous studies they cited used cutoff points below $3 million, which lends strength to the Dyck et al. findings.[44] The Grundfest study cited by the authors used $2.5 million as a cutoff for the point below which "the merits may not have mattered at all in the resolution of the litigation" due to the fact that this amount is "less than the defendants' cost" of trying the cases.[45] In terms of the same cutoff, the second study Dyck et al. cited used $2 million as its settlement amount below which claims lack merit and are thereby deemed so-called "nuisance suits."[46] Finally, the third study cited by Dyck et al. used 0.5% of companies' market capitalization with a secondary screening using $2 million, metrics which the authors stated produced "substantially similar" results in terms of the cases the metrics sorted into meritorious and non-meritorious categories.[47]

While no explanation for the blunder of Dyck et al. with respect to the merit cutoff figures is provided, the authors' mistake

---

40. Dyck et al., *supra* note 15, at 2246.

41. *Id.*

42. *Id.* at 2217–18.

43. *Id.* at 2217–18.

44. The authors cite studies by Grundfest (1995), Choi (2007), and Choi, Nelson, and Pritchard (2008) in support of the cutoff award amount above which suits become non-frivolous. *Id.* at 2218 n.4.

45. Joseph A. Grundfest, *Why Disimply?*, 108 HARV. L. REV. 727, 742–43 (1995).

46. Stephen J. Choi, *Do the Merits Matter Less after the Private Securities Litigation Reform Act?*, 23 J. L. ECON. & ORG. 598, 613 (2007).

47. Stephen Choi et al., *The Screening Effect of the Private Securities Litigation Reform Act*, 20, 23 n.18 (U. Mich. L. Sch. Law & Economics Working Papers Archive: 2003-2009, Paper No. 69, 2007).

actually works in their favor; using $3 million as the merit cutoff, Dyck et al. were screening out more claims than if they had used the figures adopted by the academics on whom they relied. It is highly unlikely that the per-defendant costs of litigating a *qui tam* suit are higher than the per-defendant costs of litigating a securities class action, which would warrant using a higher cutoff in the *qui tam* context than in the securities litigation context,[48] the latter being the context explored by all three of the studies relied upon by Dyck et al. Securities class actions are procedurally complex beasts that generally settle for much more than the average *qui tam* suit.[49] Given the stark difference in average settlement between the two types of suits, particularly comparing non-intervened *qui tam* cases to securities class actions, $3 million is probably too high of a cutoff point. Regardless, the authors' clumsiness or unstated cautiousness in selecting $3 million as the cutoff point ultimately generates error in the direction of labeling *more* lawsuits frivolous than was warranted.

Based on the Dyck et al. finding that the incidence of frivolous suits is lower in the healthcare industry than in non-healthcare industries, the authors concluded that "there is no evidence that having stronger monetary incentives to blow the whistle leads to more frivolous suits."[50] Second, unlike the DOJ, which arguably does not have sufficient incentives to dismiss frivolous suits rather than merely decline to intervene, federal courts certainly do have incentives to deem suits frivolous if they lack legal merit. Thus, out of the portion of *qui tam* suits that fail to garner DOJ intervention, if a great deal of

48. A higher cutoff would be justified by higher average litigation costs because the theoretical point at which defendants, or more likely their insurers, would be willing to buy plaintiffs' claims without respect to merits in order to avoid trial would be notched upward.

49. According to an empirical analysis of settlement values between 2006 and 2007, the average securities class action settled for $96.4 million. Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 828 (2010). In 2010, the average intervened *qui tam* case settled for just over half of that figure, at $44.1 million, while the average non-intervened case settled for $6.9 million—a small fraction of the average securities class action between 2006 and 2007. Elizabeth Wang, *Trends In Qui Tam False Claims*, LAW360 (July 26, 2011, 1:56 PM ET), http://www.law360.com/articles/258434/trends-in-qui-tam-false-claims-cases. Due to inflation, errors in this comparison likely result in a smaller discrepancy between the actual figures from the two types of cases settled in the same year, further supporting the proposition that any discrepancy between the Dyck et al. metric of $3 million for the frivolous cutoff and the actual point at which defendants are willing buy any claim without heavily accounting for its merits would be an error further supporting the validity of the researchers' findings.

50. Dyck et al., *supra* note 15, at 2246.

these suits are in fact frivolous, one would expect to find them judicially deemed as such. This is particularly so in light of the fact that the FCA provides for a sanction in the form of a requirement to pay defendant's attorneys' fees assessed against relators who bring frivolous actions.[51] However, rather than imposing sanctions upon a large percentage of unsuccessful *qui tam* litigants, the federal courts have only imposed sanctions in 11 out of nearly 10,000 *qui tam* cases filed since 1986.[52]

To further bolster the above statistic on the low ratio of sanctions to *qui tam* suits filed, of these 11 instances of sanctions, most were assessed against pro se litigants.[53] This fact alone is not a knock-down statistic debunking the frivolous litigation narrative once and for all. However, the fact that the procedural features of the FCA ostensibly invite more frivolous filings than do the standard procedural rules governing nearly all other types of litigation, but sanctions have only been assessed against litigants represented by legal counsel in five of the over 9,200 *qui tam* cases filed since the 1987 amendment,[54] is telling. The area of litigation with the most incentives to frivolously file suits fails one proxy for frivolousness used by empiricists addressing the frivolous litigation narrative: judicial determination.

---

51. 31 U.S.C.A. § 3730(d)(4) (Westlaw 2016) (providing that the court "may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails . . . and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment").

52. Stephen Kohn, *The FCA Saves the Government Costs and Does Not Encourage Frivolous Complaints*, WHISTLE BLOWERS BLOG (March 13, 2015), http://www.whistleblowersblog.org/2015/03/articles/false-claims/the-fca-saves-the-government-costs-and-does-not-encourage-frivolous-complaints. 1986 is significant in the realm of *qui tam* litigation because it marks the year of the False Claims Act's reinvigoration due to congressional amendments that provided more incentives for private attorneys to bring *qui tam* actions. *Qui Tam: A Colorful History*, WHISTLEBLOWER INFO, http://www.whistleblowingprotection.org/?q=node/12 (last visited Jan. 19, 2017, 1:19 PM). This author engaged in email correspondence with Stephen Kohn—the author of the article cited at the beginning of this footnote—regarding the source of the article's fairly shocking statistics on the use of Section 3730(d)(4) sanctions power, given the lack of constraints on the federal judiciary's ability to assess such sanctions. Mr. Kohn related that the statistic came from either a Westlaw or Lexis search for relevant cases involving (d)(4) sanctions performed by his clerks, the results of which he reviewed substantively.

53. Kohn, *supra* note 52.

54. Stephen M. Payne, *Let's Be Reasonable: Controlling Self-Help Discovery in False Claims Act Suits*, 81 U. CHI. L. REV. 1297, 1302 (2014).

Turning to scholarly works critical of *qui tam* litigation, Broderick found the majority of *qui tam* litigation to be frivolous based only upon the DOJ intervention rate in *qui tam* suits.[55] Similarly, Kovacic employed the DOJ intervention rate as a proxy for the legal merits of a given *qui tam* suit, arguing that the single instance of dismissal—at the time of the article's publication in 1996—compared with the relatively low DOJ intervention rate indicated that DOJ dismissal was a "virtually nonexistent" practice.[56] However, as Kwok aptly pointed out, Broderick failed to present any evidence in support of the accuracy of the DOJ intervention rate as a metric for frivolousness.[57] Moreover, Broderick failed to take into account the "numerous factors" that may drive the DOJ's declination of any given case, including "the harm of the offense, the precedential value of the case, the defendant's liability under other statutes, agency resources, and perhaps political sensitivities."[58] Kwok's claim that that the DOJ's decision to intervene is potentially influenced by a myriad of factors is echoed in some of the work of David Freeman Engstrom. Engstrom analyzed more than 4000 *qui tam* suits from the years spanning from 1986 to 2011 and concluded that the DOJ's decisions regarding intervention are strategic, and are distinct from a "pure" merits analysis, as the DOJ may account for "resource constraints, judicial threats to its ability to police collusive settlements, [and] the defendant's identity."[59] Engstrom's empirical analyses regarding *qui tam* litigation are explored further below.

If Broderick were correct in her claim that intervention rates were a reliable proxy for frivolousness, one would expect the rate of sanctions for filing frivolous suits in the area of *qui tam* litigation to be exponentially higher than it is. Due to the fact that the DOJ declines to intervene in roughly seventy percent of FCA cases, while the rate of sanctions imposed pursuant to U.S.C.A. § 3730(d)(4) in represented

---

55. *See* Broderick, *supra* note 21, at 971 (finding a seventy-eight-percent non-intervention rate and concluding that this number indicated that "78% of all qui tam actions are without merit," further ostensibly equating *qui tam* case merit with suits that are "in the public interest").

56. *See* Kovacic, *supra* note 20, at 1849 ("It is improbable that, even though these cases [in which the DOJ declined to intervene] were deemed insufficiently attractive to warrant DOJ prosecution, all but one of these cases deserved to go forward. One can *only* conclude that the screening function in practice is virtually nonexistent.") (emphasis added).

57. Kwok, *supra* note 12, at 235 n.108.

58. *Id.* at 236.

59. David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689, 1737 (2013).

cases is five out of more than 9,200 cases filed since 1987—low-balling the total number of filed *qui tam* actions, a sanctions rate of around 0.054 percent—Broderick's unsubstantiated use of DOJ intervention as a proxy for merit is not in accord with the available empirical evidence. For this reason, as well as the federal judiciary's lack of incentive to withhold sanctions power under the FCA when claims lack legal merit, Broderick's metric is inaccurate.

Regarding the incentives of federal judges to impose sanctions when claims are truly frivolous, it is difficult to posit any reasonable incentive the federal judiciary would have for *not* utilizing its sanctioning power under the FCA to penalize frivolous filers, in comparison to the incentives created by Federal Rule of Civil Procedure (FRCP) 11 sanctions. The FCA, unlike Rule 11, does not require the court to issue a show cause order before a judge's ability to issue sanctions under the rule kicks in,[60] and does not carry with it the stigma of a penal measure essentially equivalent to contempt.[61] In addition to concerns of dragging out litigation and imposing a draconian penalty, judges are likely reluctant to resort to Rule 11 sanctions in cases of perceived frivolousness because of a fear of being reversed on appeal, given the advisory committee's cautioning that Rule 11 should be reserved for situations similar to contempt.[62]

Assuming *arguendo* that the fear-mongers are correct, and the intervention rate of *qui tam* suits is a perfect proxy for lawsuit merit—thus rendering the vast majority of *qui tam* suits frivolous—convincing statistics exist in support of the conclusion that the non-intervened cases do not pose a serious threat to defendants. Engstrom, a professor at the Stanford Law School, wrote an amicus brief[63] on behalf of Respondents in the Supreme Court case *Universal Health Servs., Inc. v. United States*, which was argued on April 19, 2016.[64] In the brief, Engstrom implicitly used the proxy of win rates—from the perspective of the private relator or U.S. government—to evaluate the efficacy of the DOJ as a merits-screening agency in the *qui tam*

---

60. *See* FED. R. CIV. P. 11(b)–(c) advisory committee's note to 1993 amendment ("The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order.").

61. *See id.* ("[S]how cause orders will ordinarily be issued only in situations that are akin to a contempt of court . . . .").

62. *Id.*

63. Brief of David Freeman Engstrom as Amicus Curiae in Support of Respondents, Universal Health Servs., Inc. v. United States, 2016 WL 837072 (2016) [hereinafter Engstrom Brief].

64. *Universal Health Services, Inc. v. United States ex rel. Escobar*, U.S. Chamber Litigation Center, http://www.chamberlitigation.com/cases/universal-health-services-inc-v-united-states-ex-rel-escobar (last visited Jan. 21, 2018).

context.[65] Through extensive research,[66] Engstrom found that DOJ intervention is based upon "expert, merits-focused scrutiny of individual cases,"[67] but that the DOJ's decision not to intervene in a particular action leads to "the overwhelming majority of relators" dismissing claims voluntarily.[68]

In fact, as Engstrom detailed in the brief, only 22 out of 155 cases in 2010 in which the DOJ declined to intervene involved substantial post-declination litigation and resulted in no recovery for the relator, and only 11 cases involved substantial post-declination litigation and resulted in recovery for the relator.[69] The latter number represents roughly 7.1 percent declined *qui tam* cases filed in 2010, hardly a staggering figure even if one takes seriously the notion that any case in which the DOJ declines to intervene and the plaintiff ultimately prevails represents a truly meritless *qui tam* action that gets rewarded by the justice system—a doubtful proposition, for the reasons discussed above. However, Engstrom likely phrased his conclusions somewhat heavy-handedly in the brief due to its persuasive nature and the desire to provide a powerful response to the Chamber of Commerce's claim, in its brief on behalf of Petitioner, that the DOJ is "unconcerned with screening meritless cases."[70]

As noted above, however, in academic literature, Engstrom characterized the findings of his own analysis of over 4000 *qui tam* claims from the years between 1986 and 2011 as revealing that the DOJ's decision to intervene is a result of strategy, as distinct from a "pure" merits analysis, because the DOJ may take into account several factors apart from case merit: (1) "resource constraints"; (2) "judicial threats to its ability to police collusive settlements"; and (3) "the defendant's identity."[71] He in fact cautions in the Northwestern University Law Review article that the results of his analysis "suggest[] that courts should exercise great caution" in inferring that DOJ intervention speaks to the merits of particular cases.[72] Engstrom implicitly used higher recovery amounts as a proxy for more

65. Engstrom Brief, *supra* note 63, at 2 (outlining the basic argument that "the overwhelming majority of relators either fail to prosecute or else voluntarily dismiss their actions after no or only very limited litigation" in declined-intervention cases).

66. Engstrom calls his own study of *qui tam* litigation "comprehensive and rigorous," noting that it involved over "6,000 *qui tam* lawsuits" filed between the years "1986 and 2013." *Id.*

67. *Id.* at 17.

68. *Id.* at 12.

69. *Id.* at 20.

70. *Id.* at 12.

71. Engstrom, *supra* note 59, at 1737.

72. *Id.* at 1696.

meritorious actions.[73] In any event, based on the findings of his analysis, Engstrom concluded the article with an admonition to fellow commentators, and judges, writing and operating in the *qui tam* realm: "forces other than case merit contribute to DOJ intervention decisions; courts and commentators should stop assuming otherwise."[74]

Having explored the empirical reality behind the frivolous litigation myth in the context of *qui tam* litigation and found the myth to be unsubstantiated, this note will now shift to a similar analysis of the myth in the context of IP litigation.

II. THE TRUTH OF THE FRIVOLOUS LAWSUIT NARRATIVE IN INTELLECTUAL PROPERTY LITIGATION

In form with critics of *qui tam* litigation, many commentators in the realm of IP litigation

have espoused the belief that so-called "patent trolls"—entities of a class that own patents but do not "provide end products or services themselves," although they do "demand royalties as a price for authorizing the work of others"[75]—are engaging in frivolous IP litigation.[76] Before diving into empirics on point, this note will briefly

---

73. *See id.* at 1738 ("[A] DOJ with merits-screening capacity can be expected to select the higher-expected-value cases . . . ."). Later in the article, Engstrom discusses the DOJ's "political refusal" to intervene in cases against particular defense contractors due to political sensitivities as being "arbitrary from a merits (*or expected . . . value*) perspective." *Id.* at 1740 (emphasis added). Although his use of the word "or" here could imply differentiation between merits and expected-value considerations, his earlier explanation that a merits-focused DOJ would likely select cases with a higher probability of reaping more funds for the federal fisc suggests that "or" here is merely used to explain to the reader that the merits and expected-value perspectives are substantively equivalent. Moreover, he implies that case value serves as a proxy for merits in a later claim that "a DOJ without the ability to sift more and less meritorious cases . . . would generate no change in average case value in intervened cases relative to declined cases in the Ninth Circuit before versus after Killingsworth"—a Ninth Circuit decision that "held that DOJ possesses an absolute veto right over a proposed settlement only where it has previously intervened in the case." *Id.* at 1732, 1743. In fact, using a regression analysis, Engstrom found the difference in recovery between intervened and non-intervened cases pre- and post-*Killingsworth* to be "roughly $29 million smaller than the difference [pre- and post-*Killingsworth*] in district courts outside the Ninth Circuit." *Id.* at 1743.

74. *Id.* at 1749-50.

75. John M. Golden, *"Patent Trolls" and Patent Remedies*, 85 TEX. L. REV. 2111, 2112 (2007).

76. *See, e.g.*, Carrie Lukas, *It's Time for Legal Reform*, FORBES (Aug. 10, 2015, 5:05 AM), http://www.forbes.com/sites/carrielukas/2015/08/10/its-time-for-legal-reform/#14a3c30243a3 (arguing that "patent trolls . . . abuse our patent system to force businesses, big and small, to pay them off or undergo a protracted, costly legal battle"); *see also* Roger Allen Ford, *The Patent Spiral*, 164 U. PA. L. REV. 827, 845

sketch out the incentives that should theoretically make IP litigation a breeding ground for frivolous lawsuits.

The incentive structure in place in patent litigation ostensibly invites nonpracticing entities (NPEs) to bring any claim, including necessarily meritless ones. Patent litigation is high-stakes in nature, which entails expensive discovery.[77] More importantly, "*litigation* costs" are 62 percent higher in patent litigation than baseline costs in civil litigation.[78] Although discovery costs in patent cases may not vary widely from other high-stakes civil cases,[79] the fact that litigation costs are higher in IP litigation is significant. It undergirds the incentive for "patent assertion entities" to "bring weak claims, knowing that defendants will settle even nonmeritoious claims for less than the cost of defense."[80] Bearing these potentially powerful incentives in mind that ought to make patent litigation an area marked by more frivolous suits than civil litigation at large, this note now proceeds with an overview of empirical literature on the frivolous lawsuit narrative in the IP litigation context.

By way of examining whether the frivolous filing incentives elicit the phenomenon of a high incidence of frivolous litigation in the IP realm as an empirical matter, this note will outline the findings of one of the most comprehensive analyses on point. Sannu K. Shrestha obtained data on patent infringement suits from Stanford Law's "Intellectual Property Litigation Clearinghouse (IPLC)" in order to perform his analysis of the litigation behavior of NPEs, the same class of patent-holders critics have deemed patent trolls.[81] In terms of the

---

(2016) ("Since settlement allows a defendant to avoid the substantial costs of litigating even a frivolous claim, even a nakedly invalid patent can have a substantial nuisance-settlement value. Accordingly, a patent holder will bring a case . . . when it expects to receive a sufficiently large nuisance settlement.").

77. Greg Reilly, *Linking Patent Reform and Civil Litigation Reform*, 47 LOY. U. CHI. L.J. 179, 196 (2015) (citation omitted).

78. *Id.* at 197 (emphasis in original).

79. *See id.* at 199 (arguing that IP litigation is merely one area of high-stakes litigation in which "discovery is widely seen as problematic").

80. *Id.* at 200. The phenomenon of defendants essentially buying plaintiffs' claims without regard to their merits is explained by Chris Guthrie's Frivolous Framing Theory, which builds upon empirical evidence of risk preferences of decision-makers generally to posit that, in decisions regarding whether to settle or take a frivolous case to trial, "plaintiffs . . . are likely to prefer trial, while defendants, who typically choose between" settlement and a low-probability trial loss, "are likely to prefer settlement." Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 216 (2000). As "plaintiffs in *frivolous* litigation are relatively more likely than defendants to prefer trial, plaintiffs are likely to have the upper hand in bargaining . . . ." *Id.* (emphasis added).

81. Shrestha, *supra* note 13, at 115–17.

specific myths regarding patent trolls explored by Shrestha in his analysis, he focuses on three common critiques: (1) "NPEs Use Weak Patents to Engage in Frivolous Litigation"[82]; (2) "NPEs Drive Up the Cost of Products by Extracting High Licensing Fees from Manufacturers"[83]; and (3) "NPEs Exacerbate the Patent Thickets Problem."[84]

In an article that Shrestha cited in his analysis, Carl Shapiro defined the patent thicket as "a dense web of overlapping intellectual property rights that a company must hack its way through in order to actually commercialize new technology."[85] The problem commentators appear to have pointed out with regard to patent thickets is that entities interested in developing new technology must "obtain licenses on several patents from multiple sources."[86] This feature of patent thickets makes navigating them difficult due to (1) "the prevalence of several patents" and (2) "the need for compatibility between products."[87]

Returning to Shrestha's study, the IPLC data he obtained included "case histories of all patent infringement suits initiated between 2000 and 2008."[88] He focused on three variables regarding the litigation data: (1) NPE yearly infringement suits; (2) NPE suit outcomes; and (3) NPE suit numbers by jurisdiction.[89] The data included 287 patents owned by 51 NPEs.[90] Incidentally, most of the patents related to technology, ranging from "consumer electronics" and "computing" to "telecommunications" patents.[91]

Addressing the NPE patent value measurements in Shrestha's analysis, Shrestha compared the NPE-owned patents to 731 patents from 500 infringement suits selected at random from a set of 300 peer patents drawn from the 731.[92] He found that averages of all variables for NPE patents "greatly exceed" the other two patent groups he used

---

82. *Id.* at 119.
83. *Id.* at 121.
84. *Id.* at 124.
85. Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, *in* 1 INNOVATION POL'Y & THE ECON. 119, 120 (Adam B. Jaffe et al., eds., 2001).
86. Srividhya Ragavan et al., *Frand v. Compulsory Licensing: The Lesser of the Two Evils*, 14 DUKE L. & TECH. REV. 83, 86 (2015) (citation omitted).
87. *Id.*
88. Shrestha, *supra* note 13, at 144.
89. *Id.*
90. *Id.* at 145.
91. *Id.* Most of the patents in the study "were granted in the late 1990s," but some "date back to the early 1980s." *Id.*
92. *Id.*

to compare the NPE patents.[93] In fact, the average value of the NPE patents was nearly double the other two groups' averages.[94] Ultimately, Shrestha found that, not only was the average patent value higher for the NPE patent group, but also the NPE patent group exhibited a higher mean and range than the other two groups of patents.[95]

With respect to the merit proxy of win rates, Shrestha found that NPEs prevailed in 24 percent of cases where there was a judgment on the merits if Jerome Lemelson barcode patents[96] were included in the sample.[97] Excluding these patents, an exclusion that seems fair given their widespread unenforceability, Shrestha found that the win rate for NPE-held patents was 39 percent.[98] Either way, the NPE win rate is higher than the 22 percent win rate he found for the "500 randomly selected infringement suits."[99]

Incidentally, Shrestha also found that NPEs do not predominantly file suit in "allegedly plaintiff-friendly jurisdictions like the Eastern District of Texas."[100] Rather, forty percent of NPE suits in Shtrestha's study were filed in the tech-focused "Central and Northern Districts of California."[101] In short, Shrestha's analysis led him to conclude that NPE litigation is not frivolous, and that many NPE patents are in fact of a "high value" nature.[102]

To the extent that win rate serves as an important and accurate metric in the IP litigation context, the results of Shrestha's analysis with regard to NPE patent value have been disputed by other commentators.[103] The Allison et al. study is interesting in that it

93. *Id.*
94. *Id.*
95. *Id.* at 146.
96. Evidently, Jerome Lemelson held fourteen patents that were declared "valid but unenforceable due to prosecution laches" by the Federal Circuit. *Id.* at 147.
97. *Id.*
98. *Id.* at 148.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 150.
103. *See, e.g.*, John R. Allison et al., *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 708 (2011) (outlining findings of an empirical analysis of the relatively low NPE win rates in patent infringement suits compared to win rates in infringement suits for patents held by product owners and product-producers). With respect to actual figures, the study found that "product owners win 40% of their cases across both the most-litigated and once-litigated data sets, while NPEs win only 8%." *Id.* In terms of the comparison of NPE infringement

included a broader swath of NPE patents than did Shrestha's study, as Shrestha's study addressed only NPE patents held by entities known as NPEs in the media.[104] Allison et al. selected cases for their analysis by honing in on the "most-litigated patents"—the class of "106 patents that have been the subject of eight or more lawsuits since the year 2000"[105]—as well as the self-explanatory "once-litigated" class, which was comprised of 343 cases.[106] Aside from the Shrestha and Allison et al. studies, Michael Risch conducted a significant study that examined patent infringement suits brought by the top 10 NPEs, ranked by litigiousness, as of 2012.[107] Risch's selection is noteworthy because it involved data from the IPLC, "PACER dockets, Lexis and Westlaw docket reports, and the U.S. Patent and Trademark Office's . . . and Lexis's databases of patent litigation notices."[108]

In terms of win rates, Risch's findings bolster Shrestha's analysis; he found that, of the 43 patents in his study that were resolved by a judgment on the merits, "four were found completely valid," 23, or 53.5 percent, "were found completely invalid," and 19, or 44.2 percent, "were found partially invalid."[109] Risch concluded that "NPEs choose to litigate patents that look like the patents that productive entities enforce," noting that "a finding of average patent quality refutes" the myth that NPEs extort money out of solvent defendants using "weak patents"—the frivolous litigation myth.[110]

To the extent that win rate serves as an accurate marker for case merit, the bulk of the empirical data on the merits of IP litigation points to the conclusion that NPE-initiated suits fare about as well as

---

suit win rates to product-producing company infringement suit win rates, members of the latter group "win 50% of their cases, whereas NPEs win only 9.2%." *Id.*

104. *Id.* at 694 n.95; Shrestha, *supra* note 13, at app. B (detailing the author's process of sifting through popular media using the Lexis database to compile a list of "ninety-nine NPEs of which fifty-one had initiated lawsuits between 2000 and 2008" and acknowledging that these firms "have borne the brunt of the criticism of troll-like behavior.") To the latter contention, Allison et al. responded that Shrestha's selection method was fraught with bias, arguing that NPEs are known in the press as such due to their more robust success at litigation in comparison to other, less-covered NPEs. Allison et al., *supra* note 103, at 694 n.95.

105. Allison et al., *supra* note 103, at 680.

106. *Id.*

107. Michael Risch, *Patent Troll Myths*, 42 SETON HALL L. REV. 457, 469 & n.55 (2012).

108. *Id.* at 470. As noted before, Shrestha sampled exclusively from the IPLC. Allison et al. did as well. Allison et al., *supra* note 103, at 682.

109. Risch, *supra* note 107, at 481. While this invalidation rate varies from Shrestha's calculated rate of sixteen percent, the difference is not significant enough from the twenty-percent rate Risch found for non-NPE patents to warrant labeling the NPE patents as of a poor quality. *Id.* at 482–83.

110. *Id.* at 498.

other infringement suits from the plaintiffs' perspective. With respect to the other proxies for merit Shrestha used—patent value and jurisdiction of filing—no comprehensive studies appear to refute his findings. Moreover, were any such evidence to come to light, it would have to be extremely conclusive to justify the targeted attack waged upon the patent system by certain U.S. congresspersons.[111] Thus, on balance, similarly to the *qui tam* context, the frivolous lawsuit narrative is unsupported empirically in the universe of IP litigation. Having examined both *qui tam* and IP litigation and found neither to be plagued with the endemic frivolous lawsuits that tort reformers and pro-business groups allege, this note will now dive into the sea of medical malpractice litigation to test the empirical reality of the frivolous lawsuit narrative in this context.

III. THE TRUTH OF THE FRIVOLOUS LAWSUIT NARRATIVE IN MEDICAL MALPRACTICE LITIGATION

Medical malpractice litigation is significant with respect to examining the empirical

reality behind the frivolous lawsuit narrative, as the darlings of second-wave tort reformers in particular have been legislative measures targeted at reducing medical malpractice litigation across the board.[112] This section will begin by canvassing the most

111. *See, e.g.*, *Bipartisan Bill Reduces Frivolous Patent Lawsuits*, CONGRESSMAN LAMAR SMITH (Oct. 23, 2013), https://lamarsmith.house.gov/media-center/press-releases/bipartisan-bill-reduces-frivolous-patent-lawsuits (detailing U.S. Congressman Lamar Smith's statement on a bill to address "the problem of patent trolls," namely that these entities "engage in legalized extortion by using weak patents and frivolous lawsuits to demand settlements from companies and businesses across the U.S."). Similarly, Chairman Bob Goodlatte stated that "[a]busive patent litigation is a drag on our economy," subsequently implying that patent trolls pose a "constant threat" to everyone involved in the U.S. patent system. *Id.*; *see also* Lamar Smith, Representative, U.S. House of Representatives, Opening Statement on the America Invents Act (formerly the Patent Reform Act of 2011) (Mar. 2011), *available at* https://www.youtube.com/watch?v=LoCXGenHI5E ("The current patent system is outdated and dragged down by frivolous lawsuits and uncertainty regarding patent ownership. Unwarranted lawsuits that typically cost $5 million to defend prevent legitimate inventors and industrious companies from creating products and generating jobs.").

112. *See* DeVito & Jurs, *supra* note 1, at 70 (explaining that "[o]ne of the most common statutory changes" in terms of tort reform is placing damage caps on recoveries in medical malpractice suits). *See also* Scott DeVito & Andrew W. Jurs, *"Doubling-Down" for Defendants: The Pernicious Effects of Tort Reform*, 118 PENN ST. L. REV. 543, 596 (2014) (stating that the original purpose of tort reform was a "cure-all for problems with medical malpractice litigation"). Additionally, a recent Wall Street Journal article on Donald Trump's litigious past notes that a major

comprehensive empirical study conducted on the merits of medical malpractice filings, the study that focuses most explicitly on the actual merits of cases—rather than proxies for merit—available in the universe of empirical data on the frivolous litigation narrative writ large. David M. Studdert, Professor of Medicine and Law at Stanford University, spearheaded the study in conjunction with seven other medical professionals and researchers.[113] Before stepping further into the pool of research on frivolousness in medical malpractice litigation, however, it is worth exploring the two features of medical malpractice suits that could, in theory, make medical malpractice litigation the hotbed of frivolous suits that critics continue to allege it is.[114]

First, plaintiffs in medical malpractice cases typically seek noneconomic damages, which tort reformers and the like assert results in "arbitrary and unpredictable" awards;[115] since noneconomic damages typically include things like loss of consortium and emotional distress,[116] the "injuries" with respect to these damage categories would be fairly easy to fudge.[117] Second, medical malpractice liability insurance is ubiquitously carried by practicing physicians, which tort reformers allege serves as a hanging carrot for frivolous filers seeking out the next big settlement.[118]

---

weapon of Republican leaders pushing for litigation reform has been "medical-malpractice changes" designed to cut down on asbestos claims fraud and frivolous lawsuits generally. Brody Mullins & Jim Oberman, *Trump's Long Trail of Litigation*, WALL STREET JOURNAL (Mar. 13, 2016, 1:46 PM ET), http://www.wsj.com/articles/trumps-long-trail-of-litigation-1457891191.

113. Studdert et al., *supra* note 8, at 2024.

114. *See The Doctor Shortage is Coming: Whom Should We Blame?*, INVESTOR'S BUSINESS DAILY (Apr. 5, 2016), http://www.investors.com/politics/editorials/the-doctor-shortage-is-coming-whom-should-we-blame/ (arguing that the "threat of abusive, frivolous and costly malpractice lawsuits" is very real for doctors, who need to be protected "from patients seeking jackpot justice").

115. Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 67 VAND. L. REV. 151, 168–69 (2014).

116. *Id.*

117. *See* Brian Bornstein & Samantha Schwartz, *Injured Body, Injured Mind: Dealing with Damages for Psychological Harm*, THE JURY EXPERT (Mar. 1, 2009), http://www.thejuryexpert.com/2009/03/injured-body-injured-mind-dealing-with-damages-for-psychological-harm/ (submitting that faking "mental anguish" is easier than faking "physical injuries"). The relevant point is that many of the compensable injuries in medical malpractice suits would be easier to fake than damages in many other types of litigation, save for personal injury suits. However, it is likely that the middling personal injury case is not worth close to what the middling medical malpractice case is worth, although settlement data in either context is not widely available.

118. *See, e.g.*, Lorens A. Helmchen, *Medical Malpractice Liability Reform in Illinois: First, Do No Harm*, 20 IGPA UNIVERSITY OF ILLINOIS INSTITUTE OF

Returning to the Studdert et al. study, the aspect of its methodology that sets it apart from all other empirical studies on litigation merit in the medical malpractice realm and, indeed, all other such studies across the various litigation contexts explored in this note, is the means which the researchers used to determine case merit. The review process involved "[t]rained physicians" reviewing 1452 randomly selected "closed malpractice claims" obtained from five medical malpractice liability insurers to determine two related things: (1) whether the claims involved a true medical injury and, (2) if so, whether the injury was caused by "medical error."[119] Additionally, in order to determine the impact of any meritless medical malpractice litigation, the researchers examined the "prevalence, characteristics, litigation outcomes, and costs of claims" they determined to have involved no medical error—frivolous claims by another name.[120]

Prior to presenting the findings of the study, an overview of the researchers' definition of frivolousness is pertinent. Studdert et al. lifted their definition of the term from the Sixth Edition of *Black's Law Dictionary*, which defines a frivolous claim as a claim "present[ing] no rational argument based upon the evidence or law in support of the claim."[121] The researchers' stated background myth—which implicitly informed their purpose—was that "frivolous [medical malpractice] litigation . . . is common and costly."[122]

Drilling down into the researchers' methodology, the researchers drew their sample of closed medical malpractice claims from a broad base; the claims implicated roughly "33,000 physicians, 61 acute care hospitals (35 of them academic and 26 nonacademic), and 428 outpatient facilities."[123] The claim files were reviewed by doctors, fellows, or surgery residents in their final year of residency.[124]

GOVERNMENT & PUBLIC AFFAIRS POLICY FORUM (Apr. 4, 2008), https://igpa.uillinois.edu/sites/igpa.uillinois.edu/files/reports/PF-Medical-Malpractice-IGPA-2008.pdf (claiming that attorneys for patients who experienced negative treatment-related outcomes threaten lawsuits "even if there is only weak evidence of negligent care, because they expect that the provider or his or her insurer will settle to avoid the lawsuit from being decided in court," which feeds into a cycle of increased coverage and correlatively increased payments).

119. Studdert et al., *supra* note 8, at 2024.

120. *Id.*

121. *Id.* at 2025, 2025 n.7. It should be noted that the current Tenth Edition of BLACK'S LAW DICTIONARY defines a "frivolous claim" within the definition of "claim" as "[a] claim that has no legal basis or merit, esp. one brought for an unreasonable purpose such as harassment." *Claim*, BLACK'S LAW DICTIONARY (10th ed. 2014).

122. Studdert et al., *supra* note 8, at 2024.

123. *Id.* at 2025.

124. *Id.*

The review process was quite comprehensive and the merits of particular cases were determined by arguably the most qualified individuals to determine whether particular cases involved medical error. Moreover, the researchers ensured that the environment in which the claims were reviewed did not skew the findings, as all reviews took place at medical malpractice insurer "office[s] or insured facilities . . . ."[125]

Addressing the findings of the Studdert et al. study, the researchers found that 3 percent of claims involved no adverse care-related outcome.[126] 80 percent of claims involved injuries causing "significant or major disability . . . or death . . . ."[127] Further, the researchers found that 73 percent of claims for error-caused injuries resulted in compensation.[128] Finally, 72 percent of claims not involving error—and 74 percent of claims not involving injury—resulted in no compensation.[129]

Unlike in the *qui tam* and IP litigation contexts, virtually no genuine empirical research exists on medical malpractice litigation even attempting to refute any of the findings of the Studdert et al. study. This dearth is fascinating, given that medical malpractice suits have ostensibly been the most sought-after trophies in the tort reformers' lawsuit hunting adventure. In any event, the frivolous litigation narrative has been shown by strong empirics resulting from a careful and meticulous methodological process to be unsupported in the context of medical malpractice litigation.

Having determined that the frivolous lawsuit narrative is unsupported by available empirical evidence in all three litigation contexts explored in this article—each of which has features that in theory ought to invite more litigation than other types of civil litigation—this note now takes up the following question: why does this lack of empirical support matter?

IV. SIGNIFICANCE OF THE EMPIRICAL FINDINGS

This note's finding that the frivolous litigation narrative lacks empirical support is significant for three reasons. First, the frivolous litigation narrative strengthens and likely generates anti-plaintiff

125. *Id.*

126. *Id.* at 2026.

127. *Id.* The authors divide this figure into significant disability claims at thirty-nine percent, major disability claims at fifteen percent, and death claims at twenty-six percent. *Id.*

128. *Id.* at 2027–28.

129. *Id.* at 2028.

rhetoric. Second, and relatedly, the frivolous litigation narrative is used by judges to buttress case holdings that are hostile to plaintiffs' attorneys and prohibit practices, such as litigation funding, that are beneficial to the practice of law, a prohibition which carries with it important implications for the balance of wealth between deserving plaintiffs and tortfeasors. Third, the proliferation of the frivolous litigation narrative has brought with it a reduction in jury awards that has presumably disenfranchised deserving plaintiffs and is continuing to do so. Each of these products of the widespread belief that the American court system is infected with the pestilence of frivolous lawsuits will be addressed in turn.

A. Anti-Plaintiff Rhetoric

In the aggregate, the frivolous lawsuit narrative has generated an environment in which plaintiffs' attorneys are assumed to be frivolous filers, which ultimately produces both rhetoric and legislation that work in tandem to burden plaintiffs' attorneys. For example, the September, 2015, House passage of LARA mentioned in this note's introduction provides for mandatory sanctions against attorneys who file frivolous suits.[130] The legislation would eliminate the "safe harbor" provision contained in Federal Rule of Civil Procedure 11,[131] a 21-day period during which plaintiffs' attorneys can withdraw allegedly frivolous claims free from fear of sanctions.[132] Regarding the House's passing of the bill, U.S. Chamber of Commerce President Lisa Rickard stated, in the unwavering style of a diehard tort-reform fanatic, that frivolous claims—since the amendment of the FRCP in 1993—"have led to increased insurance costs, job losses, and an *almost total failure of attorney accountability*."[133] Rickard further remarked that LARA "would hold plaintiffs' lawyers accountable for filing frivolous claims."[134]

Another shining example of the frivolous lawsuit narrative's use to bolster anti-plaintiff rhetoric in the media is found in a Fox News Opinion piece written in late April 2016.[135] The author, in lurid

130. *U.S. Chamber Applauds*, *supra* note 3.
131. FED. R. CIV. P. 11(c)(2).
132. *U.S. Chamber Applauds*, *supra* note 3.
133. *Id.* (emphasis added).
134. *Id.*
135. Richard Grenell, *25 years after Anita Hill our courts are flooded with political vendettas. Here's why*, FOX NEWS (Apr. 19, 2016), http://www.foxnews.com/opinion/2016/04/19/25-years-after-anita-hill-our-courts-are-flooded-with-political-vendettas-heres-why.html.

detail, described the fantastical process by which "lawyers and activists fil[e] nuisance lawsuits."[136] Espousing beliefs deeply aligned with devout reverence for the frivolous lawsuit narrative, the author argued that nonprofits are created by activists exclusively to cash out via settlements and fund attorneys' searches for "the next frivolous lawsuit."[137] Turning to judicial adherence to the ideology of the frivolous lawsuit, this note now examines holdings hostile to plaintiffs' attorneys undergirded by the narrative.

B. Holdings Hostile to Plaintiffs' Attorneys and Some Impacts of Same

In addition to remaining prevalent in legislative maneuvers and commentary on so-called lawsuit abuse, the frivolous litigation narrative surfaces as a support mechanism in cases for holdings that unnecessarily burden the practice of plaintiffs' attorneys. A paradigmatic example of the narrative's presence in judicial opinions is the Supreme Court of Ohio's *Rancman* opinion.[138] In *Rancman*, the state court of last resort held that the doctrines of champerty and maintenance prohibit litigation funding in Ohio, as litigation funding "promotes speculation in lawsuits."[139] The *Rancman* court relied heavily on the frivolous litigation narrative, stating that the twin doctrines "were developed at common law to prevent officious intermeddlers from stirring up strife and contention by vexatious and speculative litigation."[140] The court goes on to state that the frivolous litigation generated by allowing litigation funding would lead to disturbances of the peace and "corrupt practices," and that it would further "prevent the remedial process of the law."[141] Notably, the Ohio Supreme Court's position on litigation funding is echoed by the U.S. Chamber of Commerce, which published an article arguing that litigation funding "[e]ncourages [f]rivolous and [a]busive

136. *Id.*

137. *Id.*

138. Rancman v. Interim Settlement Funding Corp., 99 Ohio St.3d 121, 125, 2003-Ohio-2721 (2003).

139. *Id.*

140. *Id.* at 123.

141. *Id.* at 123 (quotation omitted). These excerpts are only the most overt examples of the *Rancman* court's vehement attack on litigation funding. The court later cites one of its earlier decisions, in which it held that the practice of maintenance offends the "public justice," by "pervert[ing] the remedial process of the law into an engine of oppression." *Id.* (quotation omitted). Ultimately, the *Rancman* holding rests on the court's staunch prohibition of any "lien" that it believes "in its tendencies, encourages, promotes, or extends litigation." *Id.*

[l]itigation," in which the authors seemingly equate frivolous suits with litigation volume in a given jurisdiction.[142]

The heavy-handed *Rancman* holding is problematic because the practice it prohibits—litigation funding[143]—is highly beneficial to plaintiffs' attorneys.[144] In addition to loans that front the massive costs of litigation to attorneys working primarily on a contingent fee basis, loans to individual plaintiffs level the playing field with respect to incentives at play during the settlement period in a given case.[145] Since funded plaintiffs have the luxury to play the long game by eschewing concerns of immediate financial needs during the settlement period, the incentive to obtain fast cash to cover necessary expenses diminishes; funding thus allows plaintiffs to leverage their bargaining power and obtain settlement on better terms.[146] Thus, a legal system without litigation funding generates a wealth transfer from unfunded plaintiffs to defendants, who can leverage the plaintiffs' incentives to

---

142. John Beisner et al., *Selling Lawsuits, Buying Trouble*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM 5 (Oct. 28, 2009), http://www.instituteforlegalreform.com/uploads/sites/1/thirdpartylitigationfinancing.pdf.

143. Litigation funding is known by many monikers, including "alternative litigation finance," and is the practice by which litigation costs are paid "by entities other than the parties" to the litigation "themselves, their counsel, or other entities with a preexisting contractual relationship with one of the parties, such as an indemnitor or a liability insurer." Mathew Andrews, *The Growth of Litigation Finance in DOJ Whistleblower Suits: Implications and Recommendations*, 123 YALE L.J. 2422, 2427 (2014). The practice involves loans to both plaintiffs and plaintiffs' attorneys. *Id.* at 2428.

144. *See* Nora Freeman Engstrom, *Re-Re-Financing Civil Litigation: How Lawyer Lending Might Remake the American Litigation Landscape, Again*, 61 UCLA L. REV. DISC. 110, 119 (2013) (arguing that lawyer lending "will inject more resources into PI litigation on the plaintiffs' side," which will likely, "in the short run, help to 'level[] the playing field between plaintiffs and their traditionally better-financed foes.") (quotation omitted).

145. *See* Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1300–01 (2011) (submitting that one-shot litigants—those "who have only occasional recourse to the courts"— tend to "overweigh the potential for extreme, but unlikely events (like a catastrophic judgment)," and that therefore the "risk-transfer mechanism" of funding the litigants allows them to "pursue . . . a more rational bargaining stance and . . . avoid unnecessary discounts" in making settlement decisions).

146. *See* Seth Simons, *10 Things Policymakers Should Know About Consumer Legal Funding*, MIGHTY (Sep. 23, 2014), https://mighty.com/blog/new/10-things-policymakers-know-legal-funding/ (stating that litigation funding of the variety involving loans to injured plaintiffs has "helped millions of plaintiffs remain patient while they await a fairer [settlement] offer," thus moving society beyond the days where plaintiffs who were unable to work "had one choice: accept a low-ball settlement from insurance companies").

cover their immediate and pressing financial needs in order to induce settlement on worse terms than would be possible in a legal system where funding is allowed.

This wealth transfer from litigants to tortfeasor defendants between legal systems without and with litigation funding, respectively, ultimately disenfranchises the most vulnerable members of society—indigent individuals who have been the victims of legal wrongs—and, by reducing the ultimate recovery for plaintiffs, reduces the amount recovered by their attorneys. Further, by decreasing the amount of ultimate recovery for plaintiffs and their attorneys, preventing litigation funding reduces incentives for top law students to pursue careers as plaintiffs' attorneys, save for true believers in the justice that can be achieved through the deterrent and compensatory functions of the tort system. This in turn reduces the quality of representation for low-income tort victims, further disenfranchising these vulnerable individuals.

To further outline the potential benefits of the litigation funding practice banned by judges who pray at the altar of the Church of Frivolous Litigation—such as the justices of the Ohio Supreme Court that decided *Rancman*—commentators have surmised that litigation funding could help reduce fraud on the government.[147] Circling back briefly to *qui tam* litigation as discussed in the first section of this note, it bears mentioning that, in 2014, Andrews detailed the benefits of litigation funding for both relators[148] and their counsel.[149] According to Andrews, litigation funding in *qui tam* suits would improve the quality of investigation, which would increase the likelihood of DOJ intervention.[150] He notes that funding a declined case is not indicative of the case's frivolousness, since the decision to intervene depends on multiple factors aside from case merit, and funders "have an incentive to screen out frivolous cases."[151] Thus, the draconian prohibition on litigation funding imposed by the *Rancman* court may be harming the federal government by limiting the ability of relators' counsel to properly investigate and present cases to the DOJ that involve genuine fraud on the government. The lack of resources needed to vet and present *qui tam* cases in a way that displays their legitimate strengths to the DOJ leads to the DOJ declining cases involving genuine fraud, which—due to the low win

147. Andrews, *supra* note 143, at 2426.

148. *Id.* at 2431.

149. *Id.* at 2435.

150. *Id.* at 2475.

151. *Id.* Earlier in the article, Andrews cites Kwok in support of this proposition. *Id.* at 2436 & n.82.

rate for declined *qui tam* actions discussed in Section I of this note—reduces the likelihood that defendants' fraud will be punished with large settlements or verdicts. This in turn weakens the deterrent impact of the *qui tam* action generally, allowing fraudsters to get away with more wrongdoing.

Having addressed both anti-plaintiff rhetorical implications and case holdings perpetuated and underpinned by the frivolous lawsuit narrative, this note will now examine the impact of the frivolous lawsuit narrative on jury awards.

C. Impact on Jury Awards

The reliance on the frivolous lawsuit narrative as the weapon of choice in the tort reformers' arsenal has had an impact on the amount of damages awarded by juries, according to an empirical study conducted at the turn of this century.[152] The authors started from the premise that, not only are tort reformers aiming to effect legislative change, and change the composition of legislative bodies for the purpose of doing so, but also they seek "to affect the way in which the media, intellectuals, key elites, and ultimately the public at large think about the civil justice system."[153] The authors relied on three metrics to test their premise: (1) surveys of Texas plaintiffs' attorneys;[154] (2) an empirical analysis of car wreck suits;[155] and (3) trends in plaintiffs' lawyering.[156]

With respect to surveys of plaintiffs' attorneys, the authors' survey conducted shortly before writing the article[157] revealed that 82.4 percent of Texas plaintiffs' attorneys surveyed believed that juries in a personal injury suit were not as likely to decide in favor of the plaintiff today as compared to five years before the survey.[158] In addition, 70.8 percent of Texas plaintiffs' attorneys surveyed believed that juries were "less likely to award economic damages" at the time

---

152. *See* Stephen Daniels & Joanne Martin, *"The Impact That it Has Had is Between People's Ears:" Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453, 479–80 (2000) (discussing the authors' findings of a decrease in "jury verdicts in car wreck cases," which they determined via data from San Antonio and Austin dockets between 1983 and 1998).

153. *Id.* at 453.

154. *Id.* at 472–73.

155. *Id.* at 479–80.

156. *Id.* at 482.

157. *Id.* at 456 (discussing the authors' "recent survey" of plaintiffs' attorneys in Texas).

158. *Id.* at 473.

of the survey, and 89.4 percent of the surveyed attorneys believed that juries were "less likely to award non-economic damages."[159]

In terms of jury verdict awards, the authors compared car wreck verdict "patterns" from the period from 1983–1985 to 1988–1990 to verdicts during the period from 1988–1990 to 1993–1995.[160] The authors found reduced median jury awards, fewer successful cases in which non-economic damages were awarded, and lower non-economic damages in successful cases from the perspective of the plaintiff.[161]

Finally, regarding plaintiffs' attorney behaviors, the authors found that "bread and butter" lawyers—defined as attorneys with at least five years of experience as plaintiffs' attorneys whose average contingency case value in the year before the survey was at or below the median value of all similar attorneys surveyed[162]—changed their behavior during the heated years of tort reform in five ways.[163] Attorneys (1) got out of the run-of-the-mill personal injury game; (2) downsized; (3) increased scrutiny in intake procedures; (4) modified case handling strategies; and (5) "diversif[ied]" law practice.[164] The results of this study are consistent with the results of the State Bar of Texas 1997 Attorney Economic Survey, as reported in the WALL STREET JOURNAL.[165] For reasons explained in the remainder of this section, these figures and changes in lawyer behavior have likely only worsened from the perspective of plaintiffs' attorneys, although the empirical evidence necessary for an apples-to-apples comparison is unavailable.

---

159. *Id.*
160. *Id.* at 479.
161. *Id.* at 479–80.
162. *Id.* at 476.
163. *Id.* at 482.
164. *Id.*
165. Mary Flood, *Plaintiffs Bar Takes a Financial Hit From Tort Reform, Survey Shows*, WALL STREET JOURNAL (Dec. 10, 1997, 12:01 AM ET), http://www.wsj.com/articles/SB881692744566529500. For whatever reason, the State Bar of Texas does not have a record of this study on its *Demographic & Economic Trends* page. *See Demographic & Economic Trends*, STATE BAR OF TEXAS, https://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends (last visited Jan. 20, 2017, 1:59 PM) (listing a handful of studies dating back to 2013). However, according to the Wall Street Journal article on the 1997 Texas State Bar's economic study—which tabulated survey results from over 2,800 Texas lawyers—the "roughest" two years preceding the study, financially, were experienced by lawyers practicing in plaintiff-oriented specialties. Flood, *supra* note 165.

Since the Daniels and Martin study in 2000, tort reformers have pressed steadily onward with their efforts to combat the alleged deluge of frivolous lawsuits overwhelming the American judicial system. For instance, on May 10, 2016, California Governor Jerry Brown signed Senate Bill 269 into law, which a writer for Courthouse News Service claimed protected "small businesses against frivolous Americans with Disabilities Act lawsuits."[166] Additionally, in 2015, Texas Governor Gregg Abbott signed two tort reform bills championed by groups such as Texans Against Lawsuit Abuse.[167] Finally, in May, 2015, Governor Jay Nixon of Missouri signed a bill reinstating damage caps "for Missouri medical malpractice cases," which added damage caps for all medical malpractice cases, adding to a 2005 law that capped damages exclusively for wrongful death malpractice suits.[168] Indeed, these are simply three relatively recent instances of tort reformers' self-proclaimed victories as of the time of writing. Therefore, the significant impacts on plaintiff practice revealed by Daniels and Martin have likely increased in magnitude and thereby hurt plaintiffs' attorneys more substantially in the past sixteen years since the study.

Like prohibitions of practices that benefit plaintiffs and their attorneys, the negative costs of reductions in jury awards are borne by deserving plaintiffs. This, in turn, leads to a redistribution of wealth that benefits tortfeasors, which only reduces incentives for companies and individuals to curb unsafe behaviors and practices. Thus, a reduction in jury awards is symptomatic of a society headed in a dangerous direction. This note will now outline policy implications and strategies designed to curb the negative impacts of the frivolous litigation narrative.

---

166. Nick Cahill, *Calif. Governor Signs ADA Tort-Reform Bill*, COURTHOUSE NEWS SERVICE (May 11, 2016, 1:22 PM), http://www.courthousenews.com/2016/05/11/calif-governor-signs-ada-tort-reform-bill.htm.

167. David Yates, *Abbott signs off on two new tort reform measures, ends asbestos double dipping*, SOUTHEAST TEXAS RECORD (Jun. 17, 2015, 11:51 AM), http://setexasrecord.com/stories/510607472-abbott-signs-off-on-two-new-tort-reform-measures-ends-asbestos-double-dipping.

168. Greg Minana & Ashley Rothe, *Missouri Tort Reform Reformed Again: Medical Malpractice Damage Caps Reinstated*, HUSCH BLACKWELL HEALTHCARE LAW INSIGHTS (May 11, 2015), http://www.healthcarelawinsights.com/2015/05/missouri-tort-reform-reformed-again-medical-malpractice-damage-caps-reinstated/.

D. Policy Implications and Potential Strategies

The policy implications of this note's finding that the frivolous litigation narrative lacks empirical support are potentially enormous in scope and significance. Although a virtual pipedream in terms of the current political situation at the state level, repeal of damages caps legislation by state legislatures that have already passed in some states[169] appears to be the most logical course of action in light of the lack of empirical evidence in support of the frivolous litigation narrative. Moreover, the narrative's lack of support pulls the rug out from under the case for prohibiting beneficial practices like litigation funding, removing any reasonable justification for banning the practice. State courts of last resort that have interpreted ancient doctrines as prohibiting this practice, like the Ohio Supreme Court did in *Rancman*, should overrule their deleterious holdings and permit funders to conduct business in their states. To the extent that state legislatures have enacted statutes heavily regulating the practice of litigation funding,[170] these bodies should repeal the legislation or modify it so as to reduce the burden on litigation funding entities. Finally, public interest organizations should take more steps to educate the public about the lack of support for a narrative that has proven to be a sharp blade for tort reformers and pro-business groups in their efforts to dismember corporate and physician liability throughout the American legal system.

CONCLUSION

In summation, the true victims of the frivolous litigation narrative are the deserving plaintiffs who have been genuinely wronged by tortfeasors. The narrative has no basis in empirical reality, as revealed by the studies on frivolousness with respect to *qui tam*, IP, and medical malpractice litigation reviewed in this note. Based on the

---

169. As of March, 2014, states with damage caps for medical malpractice suits included California, Colorado, Florida, Kansas, Maryland, Massachusetts, Michigan, North Carolina, and Texas. Ken LaMance, *State Limits on Medical Malpractice Awards*, LEGALMATCH (Mar. 19, 2014, 11:12 AM PDT), http://www.legalmatch.com/law-library/article/state-limits-on-medical-malpractice-awards.html.

170. At recent count, the number of states with regulations is six. *Consumer Litigation Funding: Balancing Consumer Protection and Access*, William H. Sorrell, Vermont Attorney General, 3 (Dec. 1, 2015), http://www.dfr.vermont.gov/sites/default/files/2015%20Act%2055%20Consumer%20Litigation%20Funding%20Report%20.pdf. At least some of these statutes put a cap on the interest that can be collected. *Id.*

lack of evidence for the narrative, the idea that America's courts are clogged with frivolous lawsuits appears to be little more than a concocted fairytale designed to insulate wrongdoers from liability.

The solution to the problems caused by the prevalence of the frivolous litigation narrative—the hampering of the practice of plaintiff-side litigation, the related disenfranchisement of deserving plaintiffs, and the nullification of juries, to name a few—could come in several forms. A legislative solution seems unrealistic given political realities at the state level. To the extent that state supreme court case holdings permitting practices that benefit plaintiffs and their attorneys would alleviate the first two concerns listed above and thereby level the litigation playing field, state supreme courts should take every chance they are given to so hold. Perhaps the most realistic—albeit not the strongest—possible solution would be generated by public interest organizations engaging in campaigns to inform the public of the lack of support for the frivolous litigation narrative. The modern, second-wave tort reform movement has been based heavily on this false narrative since its genesis, and its progress must be halted and reversed if any reasonable notion of justice is to be preserved in the American legal system.

Adam & Eve, Adam & Steve, and Ada & Eve: Gender Neutrality in Defining Parental Status in Assisted Reproduction

Sophia Makris*

* Sophia Makris earned her J.D. from The University of Texas School of Law, where she was named to The Order of Barristers, a member of the Duberstein National Bankruptcy Moot Court Team, Associate Editor for *The Review of Litigation*, and President of the Student Bar Association. She earned her B.A., magna cum laude, from Texas A&M University.

Sophia is an associate in the Dallas office of Alston & Bird LLP's Finance Group. She represents borrowers, equity sponsors, and lenders in a variety of domestic and international finance transactions, some of which include secured financings, acquisition financings, real estate financing, and asset-based financing.

Sophia would like to acknowledge her parents, Elias and Kathy Makris, for their tireless support throughout all of her endeavors, her sister and brother in law, Ioanna and Zachary Papas, for their love and encouragement, and Rachael Baine, for being a constant source of joy and inspiration.

I. INTRODUCTION**

The recognition of parental rights for those who have contributed to the creation of a child has long been protected by the Due Process Clause.[1] Many married lesbian couples choose to begin a family through the use of assisted reproductive technology. One common procedure is artificial insemination. For a married lesbian couple, one female partner is inseminated with the sperm of a donor. Generally, the sperm donor has given up any rights to the child that results from the use of his sperm. The child is genetically related to the artificially inseminated female spouse but jointly raised by the two women as parents. This process results in a child that has one biological mother and one non-biological mother. The non-biological mother often adopts the child in this situation.[2] However, if the child has not been adopted and the marriage dissolves, the applicability of the common-law presumption of paternity to the non-biological mother is unclear.[3] This note proposes a just solution for the

** *Editor's Note:* Since this article was originally written, the Supreme Court settled the issue of same-sex adoption in *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam). In *Pavan*, the Court considered an Arkansas Supreme Court decision that refused to extend to same-sex couples the rule under state law that required the name of a married woman's male spouse to appear on the birth certificate of the woman's child, regardless of his biological relationship to the child. *Id.* at 2077. The Court summarily reversed the state court's judgment, holding that "this differential treatment infringes *Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage . . . .'" Id. at 2078 (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015)). The Supreme Court noted that it expressly identified birth and death certificates as among the rights that both same-sex and opposite-sex couples must have access to. *Id.* (citing *Obergefell*, 135 S. Ct. at 2601). The Court additionally reasoned that the Arkansas state law was not merely a recording of biological parentage, as it allowed opposite-sex couples to have the husband's name listed regardless of genetics, and as a result the birth certificate gave "married parents a form of legal recognition that is not available to unmarried parents." *Id.* at 2078–79. Therefore Arkansas could not deny married same-sex couples the recognition that it gave to opposite-sex couples. *Id.*

1. *See* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (stating that the right of a parent to contribute to their child's education is protected under due process).

2. In an adoption case, the Supreme Court held that the mere existence of a biological link does not merit the same Due Process Clause protection as the demonstration of a full commitment to the responsibilities of parenthood by participation in child rearing when the biological parent does not act promptly after birth. Lehr v. Robertson, 463 U.S. 248, 248 (1983).

3. In *Stanley v. Illinois*, the Supreme Court held that a biological, unmarried father was entitled to a hearing on his fitness before his children were removed from his custody. 405 U.S. 645, 658 (1972). The case also opined that the law recognizes family relationships not legitimized by a marriage as protected by the Due Process Clause. *Id.* at 651. This language finds its root in an early Supreme Court decision

applicability of the presumption of paternity to married homosexual women and a gender-neutral written consent requirement for married and unmarried intended parents that best meets the competing needs of the biological mother, the non-biological mother, and the child.

A. Medical Background

Reproductive technology has made lesbian biological motherhood possible. The use of artificial insemination dates back to 220 A.D., and today it is a "popular and publicly accepted manner of producing children when a woman's partner cannot provide viable sperm, or when the mother decides to have her child without a partner."[4] Artificial insemination is "most frequently used to combat male reproductive problems," or in the case of lesbians, the absence of male sperm.[5] The procedure itself involves the "introduction of semen from . . . an anonymous donor into the recipient's vagina or uterus."[6] Following this procedure, women generally become pregnant after an "average of seven insemination attempts over 4.4 cycles to establish a pregnancy."[7] This alternative means of conception is problematic for married lesbians in that there is no presumption of paternity for the non-biological mother. In contrast, a heterosexual married couple can be assured of the presumption that a child born through artificial insemination will be legally considered to be the child of the husband, even though he has provided no biological material.

Another procedure, in vitro fertilization ("IVF"), "involves the fertilization of a human egg outside of a woman's body and the subsequent transfer of the egg to the uterus."[8] Roughly "twenty to forty percent of mature eggs fail to be fertilized by IVF, and most fertilized eggs fail to establish a pregnancy."[9] This technique results in the child having "two natural mothers—the genetic mother and the

---

in which Justice Stewart stated, "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *See* Caban v. Mohammed, 441 U.S. 380, 397 (1979).

4. William M. Lopez, Note, *Artificial Insemination and the Presumption of Parenthood: Traditional Foundations and Modern Applications for Lesbian Mothers*, 86 CHI.-KENT L. REV. 897, 908 (2011).

5. Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 58 (1994).

6. *Id.*

7. *Id.*

8. *Id.* at 60.

9. *Id.*

gestational mother, or birth mother."[10] In the event that a married lesbian couple uses in vitro fertilization to produce a child, the mother that gestates the child may be able to successfully assert legal rights to the child even if there is no biological link to the child. This paper will not focus on IVF and will instead focus solely on the use of artificial insemination by married lesbian couples and the resulting challenges to parental legal recognition.

B. Legal Background

1. Presumption of Paternity

Marriage acts as a parental marker. English common law first established the legal presumption that "a child born to a married woman is the legitimate child of her husband."[11] This presumption was rebuttable and only defeated if it was proven that the husband was "impotent or 'beyond the four seas' [out of England] during the entire pregnancy."[12] The purpose of the presumption is the subject of some disagreement, with some authorities "emphasizing its role in promoting child welfare, others focusing on its protection of the public purse, and still others criticizing it as a means of imposing patriarchal and racist norms or protecting husbands' vanity."[13]

The Uniform Parentage Act ("UPA") adopted the rebuttable presumption (hereinafter referred to as "the presumption") for married heterosexual couples in the present day.[14] The pertinent language prescribes that a man is presumed to be the father of the child if the child is born during the marriage, conceived during the marriage but born after the marriage's dissolution, conceived or born during an invalid marriage, or born before a valid or invalid marriage accompanied by some other proof of fatherhood.[15] Presently, all jurisdictions within the United States have adopted the presumption, provided that the challenging party meets the burden of proof designated by the jurisdiction.[16] Generally, this requires some showing "that the husband could not have been the father of the child."[17]

---

10. *Id.*

11. Brenda J. Runner, *Protecting A Husband's Parental Rights When His Wife Disputes the Presumption of Legitimacy*, 28 J. FAM. L. 115, 116 (1989).

12. *Id.*

13. Lopez, *supra* note 4 at 899.

14. *See* UNIF. PARENTAGE ACT § 204 (UNIF. LAW COMM'N 2002) (codifying the presumption of paternity).

15. UNIF. PARENTAGE ACT § 204(a)(1–4).

16. Runner, *supra* note 11 at 116.

17. *Id.*

In consideration of the increased use and acceptance of artificial insemination, the Uniform Law Commission drafted a number of provisions to meet the needs of state legislatures seeking to enact legislation specifically on assisted reproductive technology. The UPA provides that "[c]onsent by a woman, and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man" and "[f]ailure of a man to sign a consent . . . does not preclude a finding of paternity if the woman and the man, during the first two years of the child's life resided together in the same household with the child and openly held out the child as their own."[18] Therefore, a "man who . . . consents to assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is the parent of the resulting child."[19] Note that, in these provisions, marriage is not required. Status as the legal father is predicated on the consent of the man despite the complete absence of a biological connection to the child.

The UPA provisions related to paternity in cases of artificial insemination are confined to gender similarly to the presumption of paternity. As lesbians begin to receive federal and state recognition of marriage following the Supreme Court's decision in *Obergefell v. Hodges*, "[s]tates still grapple with determining motherhood when one, two, or no mothers have a genetic tie to the child."[20] The nuclear family has met its demise and in its wake, variations on our traditional understanding of family composition have found their origin and flourished, but the law has not flourished accordingly.

Legal recognition of parental status is a right the Supreme Court has decreed merits Constitutional Due Process protection. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court held that "the most intimate and personal choices a person may make," such as "decisions about whether or not to beget and bear a child," "are central to the liberty protected by the Fourteenth Amendment."[21] This is not new dogma. In 1923, the Supreme Court enunciated in *Meyer v. Nebraska* that the Fourteenth Amendment right not to be deprived of life, liberty, or property without due process of law extends to the liberty to marry, establish a home, and bring up children.[22] The Court furthered this fundamental interest application

---

18. UNIF. PARENTAGE ACT § 704.

19. UNIF. PARENTAGE ACT § 703.

20. Jaclyn N. Kahn, Comment, *The Legal Minefield of Two Mommies and a Baby: Determining Legal Motherhood Through Genetics*, 16 FLA. COASTAL L. REV. 245, 253 (2015).

21. 505 U.S. 833, 851 (1992).

22. 262 U.S. 390, 399 (1923).

in *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary* when it decreed that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[23] For lesbian couples, the decision whether or not to have a child and the subsequent right to nurture and direct the destiny of that child as enunciated in *Pierce* have considerable meaning in the absence of a biological connection.

2. Same-Sex Marriage

In order to take effect, the presumption rests upon the existence of a marriage, whether valid or invalid, to establish the husband's paternity. Same-sex relationships are now commonplace and have gained legal recognition across the United States. In *Obergefell v. Hodges*, the Supreme Court overturned *Baker v. Nelson* and extended the fundamental right of marriage under the Fourteenth Amendment to same-sex couples.[24] Justice Kennedy's majority opinion included a considerable amount of language on how the protection of the right to marry "safeguards children and families and thus draws meaning from related rights of childbearing, procreation, and education."[25] Notably, the Court recognized the connection between marriage, procreation, and childrearing when it described them as a unified whole and "'a central part of the liberty protected by the Due Process Clause.'"[26] The Court explicitly acknowledged that the recognition of same-sex marriage "allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.'"[27] The absence of such recognition and predictability creates an environment in which children "suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life."[28] Presently, "hundreds of thousands of children are . . . being raised by [same-sex] couples" who "provide loving and nurturing homes to their children, whether biological or adopted."[29] It is within this framework that children conceived through artificial insemination

23. 268 U.S. 510, 535 (1925).
24. 135 S. Ct. 2584 (2015).
25. *Id.* at 2600.
26. *Id.* (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).
27. *Id.* at 2600 (quoting United States v. Windsor, 570 U.S. ___, No. 12-307, slip op. 23 (2013)).
28. *Id.* at 2590.
29. *Id.* at 2600.

to married lesbian couples grapple to have their parent-child relationship with their non-biological mother legally recognized so as to create the predictability of which the Court spoke so highly in *Obergefell*.

II. COMPETING CONCERNS

The Uniform Law Commission promulgated the Uniform Parentage Act in 1973.[30] The UPA has since been revised and amended twice to modernize the law for determining the legal parent-child relationship.[31] Multiple states have either adopted the entire Uniform Parentage Act, adopted select portions of it, or introduced it to be adopted.[32] The UPA provides a number of ways that a mother-child relationship may be established between a woman and a child.[33] Curiously absent from these methods is an equivalent to the presumption of paternity found under the establishment of the father-child relationship. The presumption rests upon the existence of a marriage, whether valid or invalid, to establish the legal presumption of the husband's paternity. This same presumption does not exist for the wife in a heterosexual marriage or homosexual marriage.

Interestingly, the UPA provides in Section 106 that "[p]rovisions of this [Act] relating to determination[s] of paternity apply to determinations of maternity."[34] Thus, there is an argument to be made that the presumption of paternity is applicable to determinations of mother-child relationships for married lesbian couples as well, even though it is not explicitly found in the UPA. Considering that *Obergefell* has established legal recognition of same-sex marriage,[35] the presumption will likely be used to assert legal recognition of children born to married lesbian couples through artificial insemination. Now that lesbian couples have the ability to be legally married, this presumption should also apply to them, as it is in the best interest of all parties involved.

Moreover, when a child is conceived through artificial insemination, the UPA provides that "[a] man who. . .consents to assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child."[36]

---

30. *Prefatory Note*, UNIF. PARENTAGE ACT.
31. *Id.*
32. *Id.*
33. UNIF. PARENTAGE ACT § 201.
34. UNIF. PARENTAGE ACT § 106.
35. *Obergefell*, 135 S. Ct. 2584.
36. UNIF. PARENTAGE ACT § 703.

It is arguable that, by applying the language of Section 106, a female, whether married or unmarried, who consents to assisted reproduction by her partner with the intent to be the parent of the resulting child, may also be presumed to be a legal parent of the resulting child, because determinations of paternity within the UPA also apply to determinations of maternity. However, the UPA does not explicitly include this language. Thus, courts and states are able to deviate from the gender-neutral approach to the presumption of paternity, as implied in the UPA.

A. California Statute & Application

California stands out in this analysis because it recognized the parental rights of an *unmarried* lesbian woman to a child born by artificial insemination to her partner by applying the presumption of paternity.[37] In *Elisa v. Superior Court*, the two women whose parental rights were at issue could not be legally married because the law did not yet permit same-sex marriage.[38] Recognition outside of marriage absent written consent emphasizes the importance of the action of the California court in comprehending the rights and obligations that come with parenthood by taking a gender-neutral approach to the presumption of paternity when parentage is intended.

In 2005, the California Supreme Court overturned precedent and held that "a woman who agreed to raise children with her lesbian partner, supported her partner's artificial insemination using an anonymous donor, and received the resulting twin children into her home, holding them out as her own, is the children's parent under the Uniform Parentage Act."[39] The subjects of *Elisa B. v. Superior Court*, Elisa and Emily, were in a relationship that dated back to 1993.[40] Over time, the two women referred to each other as "partner," exchanged rings, and held a joint bank account.[41] Together, the women selected a sperm donor and both became pregnant in 1997.[42] During the pregnancies, they attended medical appointments and childbirth classes together.[43] Eventually, Elisa had one child and Emily had twins.[44] The two women agreed Emily would be the stay-at-home

37. Elisa B. v. Superior Court, 117 P.3d 660, 662 (Cal. 2005).
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*

mother while Elisa would be the "primary breadwinner for the family."[45]

The women selected the children's names and joined their surnames with a hyphen to form the children's surname.[46] Elisa claimed all three children as dependents and named Emily as the beneficiary in her life insurance policy.[47] Elisa held the children out as her own to her employer, various organizations, and the general public.[48] Notably, the couple consulted an attorney to proceed with adopting each other's biological children, but never completed the process for reasons not included in the opinion.[49] In 1999, the two women separated, and Elisa stopped financially supporting her and Emily's biological children in 2001.[50] Shortly after, Emily sued Elisa for child support.[51]

The court held that Elisa and Emily "intended to create a child and 'acted in all respects as a family,'" adding "that a person who uses reproductive technology is accountable as a de facto legal parent for the support of that child . . . [l]egal parentage is not determined exclusively by biology."[52] The court noted that the Uniform Parentage Act provides that "'[a] man is presumed to be the natural father of a child,' . . . if he is the husband of the child's mother, is not impotent or sterile, and was cohabiting with her . . . and if '[h]e receives the child into his home and openly holds out the child as his natural child.'"[53] The court acknowledged that a presumption of motherhood is not expressly found within the UPA, but it did contain a provision which provides "'[i]nsofar as practicable, the provisions of this part applicable to the father and child relationship appl[ies]'" to the mother and child relationship.[54] Under this reasoning, the court "perceive[d] no reason why both parents of the child [could not] be women."[55]

The court provided a number of reasons to acknowledge the parental status of the non-biological mother. First, two women who are in a committed relationship and have common residency have the same "rights and obligations of registered domestic partners with

45. *Id.* at 663.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 664.
51. *Id.*
52. *Id.* (quoting the lower superior court's written decision on July 11, 2002).
53. *Id.* (quoting UNIF. PARENTAGE ACT § 7611).
54. *Id.* at 665 (quoting UNIF. PARENTAGE ACT § 7650).
55. *Id.* at 666.

respect to a child of either of them."[56] Second, an adopted child can have two female parents, and the court determined "no reason why the twins in the present case [could not] have two parents, both of whom are women."[57] Rebutting the presumption of motherhood in this case would leave the twins "with only one parent and would deprive them of the support of their second parent," which is against their best interests.[58] Third, the court applied a test for the presumption of paternity. The test had two parts: (1) the individual receives the child into her home; and (2) the individual openly holds out the child as her natural child.[59] In this case, Elisa "received the children into her home and openly held them out as her natural children. . . ."[60] Elisa "actively participated in causing the children to be conceived" with the understanding that the "resulting child or children would be raised by Emily and her as coparents . . . ."[61] The two women were coparents for a substantial period. Elisa held the children out to her coworkers and the public as her natural children, gave them her surname, breast-fed the children, claimed them as dependents on her tax returns, and even "candidly testified that she considered herself to be the twins' mother."[62] The court determined all of this evidence amounted to Elisa meeting the two-part test for the presumption of paternity and thus was obligated to pay child support.[63]

The court stated "[a] person who actively participates in bringing children into the world, takes the children into her home and holds them out as her own, and receives and enjoys the benefits of parenthood, should be responsible for the support of those children—regardless of her gender or sexual orientation."[64] Significantly, the benefits of parenthood also come with obligations and responsibilities. The court's holding that the non-biological mother should be "responsible for the support of those children" is indicative of the court's understanding of what the recognition of parenthood realistically entails—rights *and* obligations to the child.[65] Thus, the California court adopted a gender-neutral approach to the presumption of paternity even where the couple was unmarried.[66]

---

56. *Id.*
57. *Id.*
58. *Id.* at 670.
59. *Id.* at 664.
60. *Id.* at 670.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* (quotation marks and citation omitted).
65. *Id.*
66. *Id.*

B. *Texas Statute & Application*

The establishment of a parent-child relationship in Texas is textually very similar to that of other states, as it has adopted the language of the Uniform Parentage Act.[67] However, application and interpretation of the UPA varies. The California interpretation of the presumption of paternity led to the application of a gender-neutral approach even where no marriage existed in *Elisa B. v. Superior Court*.[68] The gender-neutral interpretation practiced by California has not yet been adopted by Texas courts.

The Second District Court of Appeals of Texas engaged with a similar fact pattern as the *Elisa* court in *In Interest of S.D.*[69] In this case, S.L.D. filed a suit seeking joint managing conservatorship over a child born by artificial insemination to her partner, S.M.D., during their relationship.[70] The Texas Family Code defines joint managing conservatorship as "the sharing of the rights and duties of a parent by two parties, ordinarily the parents, even if the exclusive right to make certain decisions may be awarded to one party."[71] S.L.D. based her claim on the Texas Family Code, which provides "that 'a person, other than a foster parent, who has had actual care, control, and possession of the children for at least six months ending not more than 90 days preceding the date of the filing of the petition,' has standing to bring a suit affecting the parent-child relationship."[72] The statute instructs that "the court may not require that the time be continuous and uninterrupted, but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit."[73] The term "principal residence" is considered to be "(1) a fixed place of abode; (2) occupied consistently over a substantial period of time; (3) which is permanent rather than temporary."[74] On appeal, S.L.D. argued that the Texas Family Code does not "require a person to have *exclusive* care, control, or possession of the child to have standing."[75] The court disagreed and held that "[t]he record does not reflect that

---

67. TEX. FAM. CODE ANN. § 160.001 (West 2017).

68. Elisa B. v. Superior Court, 117 P.3d 660, 662 (Cal. 2005).

69. In the Interest of S.D., No. 02-14-00102-CV, 2014 WL 6997169, at *1 (Tex. App.—Fort Worth Dec. 11, 2014, no pet. h.).

70. *Id.*

71. TEX. FAM. CODE ANN. § 101.016 (West 2017).

72. *In the Interest of S.D.*, No. 02-14-00102-CV, 2014 WL 6997169, at *2 (quoting TEX. FAM. CODE ANN. § 102.003(a)(9) (West 2014)).

73. TEX. FAM. CODE ANN. § 102.003(b) (West 2017).

74. In re M.K.S.-V., 301 S.W.3d 460, 464 (Tex. App.—Dallas 2009, pet. denied).

75. *In Interest of S.D.*, No. 02-14-00102-CV, 2014 WL 6997169, at *1.

S.M.D. ever relinquished or abdicated permanent care, control, and possession of [the child] to S.L.D."[76] The court determined that without standing to sue, it would not proceed on the merits of the non-biological mother's claim to the child.[77]

Much of the substantive information contained in the footnotes of *In Interest of S.D.* supports S.L.D.'s role as a parent in the child's upbringing. Specifically, S.L.D. testified that "she was the parties' sole provider when S.M.D. was a stay-at-home mother . . . ."[78] S.L.D. would get up at night when the child woke up crying, she changed the child's diapers, she bought clothing for the child, she helped with day-to-day child raising, and the two women had plans for S.L.D. to legally adopt the child.[79] However, the court did not take these matters into consideration because it held that S.L.D. did not even have standing to sue due to a lack of *exclusive* control of the child.

The similarities between *Elisa B.* and *In Interest of S.D.* are striking. Both cases involve committed relationships between women that are akin to marriage, children planned for and created through artificial insemination by the women together, a stay-at-home mother and a financially supportive mother, participation in day-to-day child rearing, and numerous other parallels. Despite the similarity of these fact patterns, the California case applied the presumption of paternity to maternity under a gender-neutral approach whereas the Texas case failed to even reach the substantive issues due to a procedural loophole.

Importantly, *In Interest of S.D.* differs from *Elisa B.* because S.L.D. sued for conservatorship of the child instead of recognition of parental status. Notably, if the presumption of paternity had applied in this context as the California court determined it did, S.L.D. would not have been forced to sue for conservatorship and would have had the option to establish her right to be recognized as a parent to the child based upon a gender-neutral approach to the presumption.

Theoretically, if S.M.D. and S.L.D. had been a married heterosexual couple, the presumption of paternity to a child conceived by artificial insemination would have bestowed S.L.D. the rights and obligations of parental status to S.D. at birth, thereby avoiding the parent-child relationship litigation resulting from the dissolution of their relationship. However, the case took place between two women and prior to *Obergefell*. As a result, one can merely speculate about

76. *Id.*
77. *Id.* at n. 4.
78. *Id.*
79. *Id.* at n. 5.

the outcome had the case proceeded on the merits. If S.M.D and S.L.D. had been married under *Obergefell*, it is plausible that the Texas court would have applied the presumption of paternity to maternity as the California court did. However, the Texas court is not bound to do so, and it is unclear whether that would have been the outcome.

The court in *In Interest of S.D.* acknowledged that "other courts of appeals might have reached the opposite conclusion on the same or similar facts."[80] Interestingly enough, the court included a case following this assertion from a neighboring court of appeals a mere thirty miles east, the Fifth District Court of Appeals, which concluded differently on a similar set of facts.[81]

The Second District Court of Appeals refused to extend the reasoning of the Fifth District Court of Appeals despite a similar fact pattern. In the Fifth District Court of Appeals case, K.V. and T.S. were in a committed relationship and discussed rearing a child together.[82] Following counseling, T.S. became pregnant through artificial insemination and delivered M.K.S. in 2004.[83] Shortly after, the relationship between K.V. and T.S. ended, but the two women agreed to "maintain some continuity for the child" by agreeing "on a schedule allowing K.V. regular access to and possession of the child."[84] Two years later, T.S. refused to allow K.V. to visit M.K.S., and K.V. "filed suit seeking to be appointed joint managing conservator of M.K.S. or, in the alternative, to adopt her."[85]

On K.V.'s claim for adoption, the court sided with the biological mother despite claims by K.V. that the two had an agreement that K.V. would adopt M.K.S.[86] Consent is a requirement for adoption under the Texas Family Code that is separate from the issue of standing.[87] T.S. denied that she consented to K.V. adopting M.K.S. and brought numerous other witnesses who testified that they were "unaware of any agreement to adopt."[88] Of course, a lack of awareness does not signify nonexistence of such an agreement. In fact, T.S. included K.V.'s last name on the birth certificate of M.K.S. so that they would share a name, held K.V. out as M.K.S.'s mother, and

80. *Id.*
81. *In re M.K.S.-V.*, 301 S.W.3d at 464.
82. *Id.* at 462.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 466.
87. *See* TEX. FAM. CODE ANN. § 162.001 (West 2017) (listing consent as a require element to adoption)
88. *In re M.K.S.-V.*, 301 S.W.3d at 466.

spoke of adoption with K.V.[89] Despite the evidence indicating there was an adoption agreement between the women, the Fifth District Court of Appeals affirmed the trial court's dismissal of the adoption and equitable adoption claims.[90]

On the issue of standing to sue for conservatorship, the court ruled that K.V. met the standard of actual care, control and possession of the child for at least six months.[91] The court determined that K.V. had sufficient care, control, and possession of M.K.S. as a result of the child possessing a room at K.V.'s home, modifications made to the home for the child, K.V.'s care for the child during sickness, K.V.'s attendance at the child's school activities, and witnesses' testifying that T.S. referred to K.V. as the child's mother.[92] *In Interest of S.D.* had a similar fact pattern as S.L.D acted as the sole financial provider, got up at night to care for the crying child, changed diapers, bought clothing, and helped with day-to-day child rearing.[93] Despite these similarities, the Second Court of Appeals refused to adopt the reasoning of the Fifth District Court of Appeals in finding standing to sue for a joint managing conservator.

These different outcomes within the same state are indicative of the current legal state of lesbian parental rights to children resulting from artificial insemination. K.V. was able to assert standing to sue for conservatorship but not adoption of the child. On a similar set of facts, the Second Court of Appeals determined that S.L.D. did not have standing to sue and did not consider anything further on the merits.

The Texas cases differ from the California case because the women sued for conservatorship instead of recognition of parental status. The cases were similar in that the couples were not married and could not be married, as *Obergefell* had not yet been adjudicated. Still, if the Texas couples had been married, there is no indication that the Texas courts would have adopted a gender-neutral approach to the presumption of paternity. Texas courts are partisan, meaning the judges are chosen by statewide election.[94] In contrast, California state judges are nominated by the governor and confirmed by the

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 465.
93. In the Interest of S.D., No. 02-14-00102-CV, 2014 WL 6997169, at *1 (Tex. App.—Fort Worth Dec. 11, 2014, no pet. h.).
94. *Judge Qualifications and Selection in the State of Texas*, TXCOURTS.GOV, http://www.txcourts.gov/media/48745/Judge-Qualifications-6_26_14.pdf (last visited January 30, 2018).

commission on judicial appointments.[95] As a result, Texas courts are notoriously more conservative than California courts, so an adoption of the gender-neutral presumption outside of marriage is speculative at best.[96] Since the Uniform Parentage Act does not explicitly include this language, these cases are examples of state courts deviating from the most just solution, a gender-neutral approach to the presumption of paternity.

C. New York Statute & Application

Many courts have not specifically adjudicated the applicability of the presumption of paternity to the parental rights of the non-biological mother of a child conceived through artificial insemination during a homosexual marriage. Following the recent *Obergefell* ruling, same-sex couples have only recently had the ability to be legally recognized as married across the United States. As a result, gender-neutral application of the presumption of paternity to motherhood where a child is conceived by artificial insemination is a novel issue for married lesbian couples and the courts. New York is one of the few jurisdictions that has had these facts adjudicated before it.

In May of 2014, the New York Supreme Court of Monroe County held that, under New York common law, the female spouse of a biological mother was a presumed parent of a child conceived from artificial insemination and born during the marriage of the same-sex couple.[97] In *Wendy G-M v. Erin G-M*, two women married in a civil ceremony in Connecticut.[98] The marriage was recognized in New York, where the couple resided.[99] In October 2011, the couple decided to have a child together and signed a consent form "agreeing to artificial insemination procedures."[100] The consent form explicitly read, "'We declare that any child or children born as a result of a pregnancy following artificial insemination shall be accepted as the legal issue of our marriage.'"[101] The spouse of the biological mother

95. *Judicial Selection in the States: California*, NATIONAL CENTER FOR STATE COURTS, http://www.judicialselection.us/judicial_selection/index.cfm?state=CA (last visited January 30, 2018).

96. *See State of the States*, GALLUP (May 12, 2016 1:15 PM), http://www.gallup.com/poll/125066/State-States.aspx (showing a conservative advantage in Texas of 19.8 versus California at 1.6).

97. Wendy G-M. v. Erin G-M., 985 N.Y.S.2d 845 (N.Y. Sup. Ct. 2014).

98. *Id.* at 847.

99. *Id.* at n. 1.

100. *Id.* at 847–48.

101. *Id.* at 847.

funded the sperm donation and artificial insemination.[102] After two years, the biological mother became pregnant and the two parties attended pre-birth classes, baby care, CPR classes, and baby showers, as well as celebrating the approaching birth together.[103] Both women were present at the birth of the child, jointly gave a name to the child that included a hyphenated surname, and listed themselves both as parents on the birth certificate.[104] In addition, the biological mother acknowledged her female spouse as a parent.[105]

One week after the child began residing in their joint household, the two women established separate households as a result of marital trouble.[106] The divorce proceedings commenced shortly afterwards, and the birth mother denied her spouse access to their child.[107]

The court acknowledged that, at common law, "parentage derived from two events, a child's birth to its 'mother,' and the mother's marriage to a man."[108] The New York court relied upon case law precedent that stated, "the word 'parents' suggests the presumption for children born during a marriage is fulfilled when every child has two legitimate parents to provide for them, regardless of their respective sex."[109]

This is mirrored in New York statutory law within the Domestic Relations Act and the Family Court Act, which provide "a child born to married parents 'is the legitimate child of both parents.'"[110] The "intent of these statutes, and the common law presumption, is unambiguous: a child born in marriage is the child of the *couple*."[111] While the New York State Legislature never defined the word "parent" statutorily, the legislature did address the legal obligations to a child conceived by artificial insemination, thereby having no biological link to one "parent." Section 73 of the New York Domestic Relations Law provides that "'[a]ny child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate birth child of

102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 848.
107. *Id.*
108. *Id.*
109. *Id.* at 850 (citing In re Findlay, 170 N.E. 471, 474 (N.Y. 1930)).
110. *Id.* at 848.
111. *Id.* (emphasis added).

the husband and his wife for all purposes.'"[112] The purpose of such a provision was to "give certainty to the legitimacy of those children conceived via AID [Artificial Insemination by Donor] whose parents complied with all the statutory prerequisites."[113] Thus, under the "liberal policy expressed by such a statute, it would seem absurd to hold illegitimate a child born during a valid marriage, of parents desiring, but unable to conceive a child, and both consenting and agreeing to the impregnation of the mother by a carefully and medically selected anonymous donor."[114] The *G-M* court determined that these cases and the legislative history made clear that "the statute was designed not to benefit the adults in the marriage, but to benefit the child, born into a marriage by transforming what the common law considered an illegitimate child into a legitimate child."[115]

With the understanding that the presumption of paternity in cases of artificial insemination should apply to married couples, the court moved to the analysis of how such a presumption impacts same-sex married couples. Specifically, the court quoted Section 2 of the New York Marriage Equality Act, which provided:

No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law.[116]

The court determined that the implication of this language is "unmistakable: wherever the word 'husband' or 'wife' exist in statute or common law, the [Marriage Equality Act] requires the courts to read the terms as gender non-specific and extend the same rights to same-sex couples as exist for opposite-sex couples."[117] Therefore, the common-law presumption of paternity must be read under New York law as gender-neutral so as to apply to motherhood as well.[118] This strong presumption of parental status that exists "across the

112. *Id.* at 850 (citing N.Y. DOM. REL. LAW § 73 (McKinney 2017)).

113. *Id.* (citing Laura WW. V. Peter WW., 856 N.Y.S.2d 258, 262 (N.Y. App. Div. 2008)).

114. *Id.*

115. *Id.* at 852.

116. *Id.* at 854–55 (citing N.Y. DOM. REL. LAW § 10(a) (McKinney 2017)).

117. *Id.* at 856.

118. *Id.*

boundaries of many states" is a reflection of the connection between marriage and parenthood.[119]

Ultimately, the New York court held that the presumption of paternity for children born in a marriage should not be so easily discarded if the married couple shares the same sex, because the Marriage Equality Act eliminates that distinction.[120] Prior New York case law stated that "New York [goes] down the path of presuming that the child of either partner in a married same sex couple will be presumed to be the child of both, even though the child is not genetically linked to both parents."[121] As a result, in this case there was "no evidence before the court to suggest that the birth mother . . . did not consent to her spouse's status as a parent" and the gender-neutral presumption of paternity must stand.[122] In sum, the court held "that the non-biological spouse is a parent of this child under the common law of New York as much as the birth-mother."[123]

Admittedly, the New York case differs from the California and Texas cases in a few respects. First, in the New York case the couple was in a legally recognized marriage; thus, the presumption applied more readily. Fortunately, the New York court determined that there was an "open door" for New York to recognize "a partner, in a civil union, as a parent of the child born by AID during the civil union."[124] This "open door" provides same-sex couples in New York with some reassurance that there is a possibility, in the event they are not married, that the non-biological mother will be viewed as a legally recognized parent to a child born through artificial insemination. The California court adopted the New York "open door" interpretation, but there is no indication that this interpretation would have been adopted by the Texas courts. Of course, now that *Obergefell* allows for legally recognized same-sex marriage, it is realistic to assume that more same-sex couples will begin exercising their right to marry. Once couples are married, the "open door" interpretation is not relevant, as a gender-neutral approach to the presumption of paternity suffices to recognize parental status of the non-biological parent regardless of sex. Marriage is often a predecessor to children, and it is logical to assume lesbian couples will begin to assert their parental rights to children born through artificial insemination during the marriage more

119. *Id.*
120. *Id.*
121. *Id.* at 860–61.
122. *Id.* at 860.
123. *Id.* at 861.
124. *Id.* at 857.

often in the event of dissolution of the marriage than dissolution of a relationship.

Second, the New York case differs because the court dealt with the issue of written consent. In cases where written consent is not provided, such as the cases in Texas and California analyzed above, the artificial insemination of a married woman creates a rebuttable presumption of spousal consent.[125] This reaffirms public policy of providing for the best interests of the child of having two parents.[126] In many instances of conception by artificial insemination, the couple may fail to have written consent altogether.

III. PROPOSED SOLUTIONS

A. Gender-Neutral Approach to the Presumption of Paternity

> This court will not stop that march to greater equality for all lawfully married couples. The pervasive and powerful common law presumptions that link both spouses in a marriage to a child born of the marriage. . .apply to [same-sex] couple[s]. This court holds that the non-biological spouse is a parent of [the] child under the common law of New York as much as the birth-mother.[127]

The adoption of a gender-neutral approach to the presumption of paternity for married couples was the approach selected by the New York court and the California court. This solution guards against discrimination of same-sex parents merely because of their sexual orientation. If a married heterosexual man can be presumed to be the father of a child created by artificial insemination, then a married homosexual woman should be afforded the same right. It is important to note that this issue also applies to assisted reproduction used by homosexual male married couples. Homosexual male couples using assisted reproduction have the same issue where the sperm donor parent shares a biological connection with the child while the other does not. Thus, a gender-neutral approach to the presumption of paternity guards against this issue affecting homosexual men and women. The presumption would remain rebuttable even in gender-neutral terms, for instance, if the non-biological parent did not hold the child out as his or her own.

Furthermore, the adoption of a gender-neutral approach to the presumption of paternity recognizes what the courts have long held is

125. *Id.* at 853.
126. *Id.*
127. *Id.* at 861.

in the best interest of the child—having two parents.[128] In fact, one reason for the creation of the presumption of paternity was to "[recognize] the many advantages that flowed to children from having two parents;" thus "legislatures enacted filiation or paternity proceedings to confer legal parentage on non-marital biological/genetic fathers, a status which carries support and other obligations."[129] Presently, "[p]ublic policy considerations" that seek "to prevent children born as a result of [artificial insemination procedures] from becoming public charges or being bastardized" necessitate the existence of a strong gender-neutral presumption of paternity at birth.[130]

Moreover, when a couple voluntarily enters into a marriage, the creation of "familial bonds is one of the most significant reasons, particularly for the benefit of their children."[131] Justice Kennedy mirrored this language in *Obergefell* when he noted that the protection of the right to marry "safeguards children and families and thus draws meaning from related rights of childbearing, procreation, and education."[132] In *Obergefell*, the Supreme Court explicitly recognized that same-sex marriage "allows children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[133] The absence of such recognition and predictability means children "suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life."[134] The absence of a gender-neutral presumption of paternity leads to a lack of predictability for children born through artificial insemination to married lesbian couples. The material costs of such unpredictability, of not being recognized as the legal child of both individuals the child considers to be parents, and the costs of years of litigation, cannot be understated as against the best interests of the child.

B. Gender-Neutral Written Consent

This note proposes a solution that is one step further than merely a gender-neutral approach to the presumption of paternity in the marital context. The presumption rests upon the necessity of a

128. Caban v. Mohammed, 441 U.S. 380, 391 (1979).
129. Wendy G-M. v. Erin G-M., 985 N.Y.S.2d 845, 848 (N.Y. Sup. Ct. 2014).
130. *Id.* at 853.
131. *Id.* at 857.
132. Obergefell v. Hodges, 135 S. Ct. 2584, 2590 (2015).
133. *Id.* at 2600 (internal quotations omitted).
134. *Id.*

marriage between the couples, and while it is clear that there are benefits to children born within the framework of a marriage, this is not always the reality for children born through artificial insemination to heterosexual or homosexual couples. Therefore, the best solution for this issue is a gender-neutral approach to the presumption of paternity in the marriage context, and, additionally, a requirement of gender-neutral written consent by the intended non-biological parent in order for that person to be legally recognized as the parent of the child resulting from artificial insemination, whether the couple is married or not.

This solution merely gender-neutralizes the written consent requirement already found within UPA § 704. Moreover, this section is already written outside of the marital context. Of course, states are free to adopt this section of the UPA verbatim, not adopt it, or alter it within the marital and gender-specific context. However, a consent requirement for the intended parent, married or not, is already found in New York[135] and California.[136]

Not surprisingly, the consent requirement in Texas is within the marital context, and requires a husband to consent to artificial insemination by his wife but does not require the consent to be written.[137] Generally, however, the marital written consent requirement entails that any child born to a married women by artificial insemination, with the consent *in writing* of the woman and her husband, is deemed to be the birth child of the husband and wife for all purposes.[138]

In New York and California, the written consent requirement is expressed in more gender-neutral terms and outside of the marital context, with the pertinent language dictating that "a woman conceives through assisted reproduction. . ..with the consent of another intended parent, that intended parent is treated in law as if *he* or *she* were the natural parent of a child thereby conceived . . . [t]he other intended parent's consent shall be in writing and signed by the other intended parent and the woman conceiving through assisted reproduction."[139] Notice the language included in the California statute quoted is both gender-neutral and allows for the intended parent in a homosexual or heterosexual partnership to consent to be the legal parent of the resulting child whether married or not.

A gender-neutral approach to the rebuttable presumption of paternity within the marital context ensures that a child born to a

135. N.Y. DOM. REL. LAW § 73(1) (McKinney 2017).
136. CAL. FAM. CODE § 7613(a) (West 2017).
137. TEX. FAM. CODE ANN. §§ 160.703, 160.704(a), 160.704(b) (West 2017).
138. N.Y. DOM. REL. LAW § 73(1) (McKinney 2017).
139. CAL. FAM. CODE § 7613(a) (West 2017) (emphasis added).

married couple through artificial insemination has two parents at birth—regardless of whether the parents are heterosexual or homosexual. Similarly, a written consent requirement for the intended parent ensures a child born to the couple through artificial insemination has two parents at birth—whether married or not. This approach safeguards the interests of all parties involved.

In *Elisa B*, the non-biological mother was trying to abandon her parental obligations to a child born through artificial insemination to her ex-partner.[140] If both women had signed written consent documents to be the intended parent of the child resulting from artificial insemination, they would have each been bound by contract as the legal parents of the child no matter their marital status or sexual orientation. Thus abandoning child support responsibilities and parental obligations would not have been an option for either parent in the eyes of the judicial system. The court in *Elisa B.* used a gender-neutral approach to the presumption of paternity outside of the marriage context, but if a written consent form had been required at the onset, the court would not have had to apply the presumption of paternity outside of the marital context. Instead, the court could have relied upon the written consent form to reach a result more efficiently.

C. Uniform Parentage Act & Legislation

The proposed solution above best serves the needs of the children, the biological parent, and the non-biological parent. Implementing this solution is best done through an adoption by the UPA of (1) a gender-neutral approach to the presumption of paternity; and (2) a gender-neutral written consent requirement for all intended parents, no matter their marital status. Specifically, the UPA should be amended to use gender-neutral terms in Section 204 (Presumption of Paternity),[141] Section 703 (Paternity of Child of Assisted Reproduction),[142] and Section 704 (Consent to Assisted Reproduction).[143] Presently, Section 704 (Consent to Assisted Reproduction) has a general application, meaning it is not limited to marriage.[144] Section 704 should remain general so as to provide for the rights of unmarried intended parents of children born by artificial insemination. The UPA provides the framework for states to enact

140. Elisa B. v. Superior Court, 117 P.3d 660, 662 (Cal. 2005).
141. UNIF. PARENTAGE ACT § 204.
142. UNIF. PARENTAGE ACT § 703.
143. UNIF. PARENTAGE ACT § 704.
144. UNIF. PARENTAGE ACT § 704.

mirroring legislation, and by altering these provisions, it is more likely that states will follow accordingly.

D. Adoption as an Alternative Solution

In lieu of the above solution, an intended parent has the ability to adopt a child, in marriage or not, depending upon state restrictions. Adoption provides the benefit of legal recognition of the parent-child relationship despite the absence of a biological connection. It is not uncommon for the intended non-biological parent to adopt the child resulting from artificial insemination of his or her partner, whether married or not.

On May 3, 2016, same-sex adoption became legal in all fifty states when Mississippi "failed to appeal a recent federal ruling that deemed its ban on same-sex adoption unconstitutional."[145] In the wake of this development, second-parent adoption is a viable alternative for same-sex couples across the nation. According to the Family Equality Council, second-parent adoption is defined as a law that permits "a parent in a same-sex relationship to adopt his/her partner's child and become a legal parent of that child, giving the child two legal parents and giving both parents legal rights . . . [s]tepparent adoption laws require the parents be married, while second-parent adoption laws do not."[146] Some states explicitly allow same-sex couples to petition for a second parent adoption and, not surprisingly, New York and California are states that provide this solution.[147] According to the United States Census Bureau, there are approximately 115,000 same-sex-parent households with children in the United States.[148] Of these households, 72.8% are home to biological children only and 6% are home to a combination of biological, step, or adopted children.[149] These statistics indicate that a large number of the children in same-sex parent households are biologically related to one of the parents, but it is unclear how many of these children resulted from artificial insemination or a previous relationship.

---

145. Becca Stanek, *Same-sex adoption is now legal in all 50 states*, THE WEEK (May 3, 2016), http://theweek.com/speedreads/622069/samesex-adoption-now-legal-all-50-states.

146. MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws?iframe=single#sthash.JHaYhmDu.dpuf (last visited January 30, 2018) (navigate to second/stepparent tab).

147. *Id.*

148. Daphne Lofquist, *Same-Sex Couple Households: American Community Survey Briefs*, U.S. CENSUS BUREAU, ACSBR/10-03, 2 (Sept. 2011), https://www.census.gov/prod/2011pubs/acsbr10-03.pdf.

149. *Id.* at 3.

Make no mistake, while adoption is a solution, it leaves much to be desired and imposes additional burdens upon homosexual couples merely because they cannot rely upon the marital presumption of paternity or do not have written consent of intended parentage. Adoption requires additional legal fees for the intended parent.[150] It also requires evaluations of the conditions of the home and social environment,[151] criminal background checks,[152] accounting and/or biological reports to be filed with the court,[153] consent by the biological parent or managing conservator, [154] and numerous other burdens. Adoption requires additional time, money, and effort to receive the same recognition of parental status that heterosexual couples are provided under the presumption of paternity or written consent at birth. Thus adoption adds a number of obstacles for homosexual parents simply because of their sexual orientation. Therefore, adoption is not the best solution for this issue. The best solution is a gender-neutral approach to the presumption of paternity and a gender-neutral written consent requirement.

IV. CONCLUSION

In conclusion, this note proposes a solution that is one step further than merely a gender-neutral approach to the presumption of paternity in the marital context because of its rebuttable nature and limited application to marriage. The best solution for this issue is a gender-neutral approach to the presumption of paternity in the marriage context and a gender-neutral written consent requirement by the intended non-biological parent to be legally recognized as the parent of the child resulting from the artificial insemination, whether the couple is married or not. Men and women that intend to be parents to children conceived through artificial insemination—whether homosexual or heterosexual, married or unmarried—equally deserve to be recognized as parents under the law.

---

150. CAL. FAM. CODE § 8811(d) (West 2017); N.Y. DOM. REL. LAW § 115(8) (McKinney 2017).

151. CAL. FAM. CODE § 8811.5(a) (West 2017); TEX. FAM. CODE ANN. § 107.153(b) (West 2017); N.Y. DOM. REL. LAW §§ 112, 115 (McKinney 2017).

152. CAL. FAM. CODE § 8811 (West 2017); N.Y. DOM. REL. LAW § 112(2) (McKinney 2017); TEX. FAM. CODE ANN. § 162.0085(a) (West 2017).

153. CAL. FAM. CODE § 8610 (West 2017); N.Y. DOM. REL. LAW § 112(2) (McKinney 2017).

154. CAL. FAM. CODE § 8603 (West 2017); N.Y. DOM. REL. LAW § 111 (McKinney 2017); TEX. FAM. CODE ANN. § 162.010(a) (West 2017).

The Selection of a Tripartite Panel: You Get What You Contract For

Rebecca Williams*

INTRODUCTION

On September 14, 1872, a tribunal of five men entered a judgment against Great Britain of $15.5 million to be paid to the

* The University of Texas School of Law, J.D. 2017.

United States in gold.[1] This punishment arose from Great Britain's violation of international law by providing ships to the then-defeated Confederate Army, despite Great Britain's alleged position of neutrality and disinterest in the Civil War.[2] The judgment entered by the tribunal, which has become known as the Alabama Arbitration, is widely credited with preventing another war between Great Britain and the United States. The conflicts avoided by arbitration are not always quite so drastic, but the public policy in favor of arbitration is substantial. The Federal Arbitration Act (FAA), enacted and codified in 1925, recognizes arbitration as a legitimate alternative to litigation that binds parties to a decision and, for the most part, relieves them from the possibility of appeal or judicial oversight.[3] In addition to its relative informality and cost-effectiveness, arbitration affords disputing parties substantial autonomy in shaping the arbitral process. One of the many freedoms afforded to arbitrating parties is their ability to either choose the arbitrators themselves or choose the method by which the arbitrators are chosen. The ability to select arbitrators or the method by which arbitrators will be chosen is material not just to the outcome of the dispute, but also to the very fabric of arbitration.

This Note will first address the role of the arbitrator and make a comparison between arbitration and litigation generally. It will then survey the various arbitrator selection methods used by private parties and commercial arbitration houses, as well as the reasons why parties choose these methods. Third, this Note will assess some of the perceived values of arbitration, mainly those impacted by the selection of the arbitration tribunal. Fourth, this Note will apply these perceived values against the various available methods in order to analyze the costs and benefits of each method. Finally, this Note will argue that tripartite arbitration, one of the most popular panel selection methods, serves very few of the apparent values of arbitration.

I. THE ROLE OF THE ARBITRATOR

The role of the arbitrator is quasi-judicial in that it oversees the dispute in question and grants a binding award at the end. Black's Law

---

1. HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY (Hereinafter "ALABAMA CLAIMS ARBITRATION") (Washington, Government Printing Office, 1898), Vol. 1, at 658–659.

2. *Id.* at 653, 656–657.

3. *See* 9 U.S.C.A. § 2 (West) (finding arbitration agreements "valid, irrevocable, and enforceable, save upon" the specified narrow grounds allowing for revocation).

Dictionary defines an arbitrator as a "neutral decision-maker who is appointed directly or indirectly by the parties to an arbitration agreement to make a final and binding decision resolving the parties' dispute."[4] The neutrality of the arbitrator is a key component of the arbitral process because it preserves the integrity of the process and leads to more just and equitable results. In fact, the FAA codified this theory in Section 10, which recognizes the serious nature of arbitrator impartiality and allows for vacation of the arbitral award when partiality is apparent.[5] The method by which the parties agree to select the arbitration panel can impact the quality and diversity in expertise of the arbitrators, the actual and perceived neutrality of the arbitrators, and the finality of the judgment. The method chosen is therefore hugely influential on the process as a whole.

II. SELECTION METHODS

According to the FAA, parties to a dispute have the right to agree on the method by which they select the arbitrators to their dispute.[6] This Note will analyze three popular selection methods: (1) the party-appointment method, (2) the list-and-rank method, and (3) the third-party deference method.

It should be noted that there are a few widely-used selection methods that will not be discussed in this paper. First, there is the option for parties to elect (or allow someone else to elect) a single arbitrator.[7] In fact, the American Arbitration Association (AAA)—one of the most influential arbitration institutions—defaults to this single arbitrator method unless enough money is at stake.[8] However, the use of a single arbitrator is usually reserved for less complex disputes or those with less money on the line.[9] The increasing costs and complexities of arbitration proceedings have consequentially

4. *Arbitrator*, BLACK'S LAW DICTIONARY (10th ed. 2014).

5. 9 U.S.C.A. § 10(a)(2) (West) ("Where there was evident partiality or corruption in the arbitrators, or either of them").

6. 9 U.S.C.A. § 5 (West) ("If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein. . .then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire.").

7. Alternatively, parties can have more than three arbitrators. Historically, this was commonly used. *See* ALABAMA CLAIMS ARBITRATION (Referencing five-person tribunals).

8. *See* Commercial Arbitration Rules, Rule 1, Am. Arb. Ass'n, Nov. 1, 2001 (hereinafter AAA Rules) (Stating that any dispute with at least $500,000 at issue is treated as a "Large, Complex Commercial Dispute.").

9. *Id.*

increased the use of the multi-arbitrator tribunal.[10] This Note will therefore focus on the selection methods for tripartite panels—the most commonly used arbitration method in commercial and international arbitration.[11]

Alternatively, parties can mutually agree on all arbitrators. This is not uncommon and clearly serves many purposes. In fact, AAA requires[12] that parties first attempt to agree on a panel of arbitrators selected from an AAA-approved list before then proceeding to other selection methods.[13] However, when there is enough at stake, parties are often unable to find a consensus, and other selection methods are resorted to. This Note will therefore survey the primary methods used in high-stakes cases.

A. Tripartite Panel with Party Appointed Arbitrators

Although free to choose any selection process, parties to arbitration often favor the tripartite method with party-selected arbitrators.[14] It is a method that has been employed for hundreds of years, including such famous uses as George Washington's last will and testament, where he stated that all disputes as to his property should be resolved by "three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants—each having the choice of one—and the third by those two."[15] In fact, most early American arbitrations utilized this selection method.[16] Under this method, each party to the dispute appoints an arbitrator, and the two party-appointed arbitrators then agree on a third arbitrator. This third arbitrator usually serves as the "lead" arbitrator. If the party-appointed arbitrators are unable to agree on a third, then

---

10. Richard W. Naimark & Stephanie E. Keer, *What Do Parties Really Want From International Commercial Arbitration?*, 57-JAN DISP. RESOL. J. 78 (2003).

11. Bernard Gold & Helmut F. Furth, *Tripartite Boards in Labor, Commercial, and International Arbitration*, 68 HARV. L. REV. 293 (1955).

12. This is a default rule. Of course, parties can always contract otherwise. *See* AAA Rules, Rule 12 (qualifying the default rule).

13. *Id.*

14. David J. McLean & Sean-Patrick Wilson, *Is Three A Crowd? Neutrality, Partiality and Partisanship in the Context of Tripartite Arbitrations*, 9 PEPP. DISP. RESOL. L.J. 167, 167 (2008).

15. Olga K. Byrne, *A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-Appointed Arbitrators on A Tripartite Panel*, 30 FORDHAM URB. L.J. 1815, 1819 (2003) (internal quotations omitted).

16. David J. McLean & Sean-Patrick Wilson, *Is Three A Crowd? Neutrality, Partiality and Partisanship in the Context of Tripartite Arbitrations*, 9 PEPP. DISP. RESOL. L.J. 167, 168 (2008).

the third arbitrator is selected by a court or dispute resolution center.[17] This third, mutually-selected arbitrator is often called "the neutral," or less commonly the "umpire," "referee," or "chairman."[18] There is controversy over what role the lead arbitrator plays on these panels in relation to the party-appointed arbitrators, as will be discussed in Part V of this Note.

This method of a tripartite panel with party appointed arbitrators is the most commonly used in commercial and international arbitration, as well as labor disputes.[19] Parties are drawn to this method for a number of reasons: It gives them a sense of autonomy in an otherwise daunting process, it helps balance out impartiality of the other arbitrators through a somewhat adversarial model, and in international commercial contexts the party-appointed arbitrator can even act as a sort of cultural and linguistic translator.[20] Having three panelists is often seen as a risk-allocation method.[21] The adversarial relationship among three independent arbitrators who disagree puts a check on what might otherwise be a single rogue decision-maker. Appointing one of the arbitrators democratizes the process, giving the parties a sense that someone is looking out for their interests and overseeing the procedural integrity of the proceeding.

B. List Selection

Arbitration agreements often reference popular arbitration institutions such as the AAA, the Judicial Arbitration and Mediation Services (JAMS), and International Institute for Conflict Prevention & Resolution (CPR).[22] These institutions provide many services, such as arbitration rules and ethical regulations, and provide panels of prospective arbitrators that the parties may choose from. Under a "list selection" method, the parties would review the prospective arbitrators, eliminate those who they believe would be unhelpful for their case, and rank those remaining based on preference.[23] The arbitration house then reviews both parties' lists and selects the

17. *Id.*

18. Byrne, *supra* note 15, at 1819.

19. Gold & Furth, *supra* note 11, at 293.

20. Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L L.J. 59, 65 (1995).

21. Gold & Furth, *supra* note 11, at 321.

22. JAY FOLBERG, DWIGHT GOLANN, THOMAS STIPANOWICH, & LISA KLOPPENBERG, RESOLVING DISPUTES: THEORY, PRACTICE AND LAW, 566 (2nd Ed. 2010).

23. AAA Rules, Rule 12.

arbitrators based on mutual rankings.[24] This is the preferred method of the AAA, so it is the default method for parties utilizing their services unless they contract otherwise.[25] Under the AAA rules, the parties are each given a list of ten potential arbitrators that are pulled from an AAA-held "national roster".[26] First, the parties are asked to attempt to mutually agree on the panel.[27] As discussed earlier, this effort is often futile, especially in high-stakes cases.[28] The parties then each "strike" any potential arbitrators who they object to.[29] No cause is required and parties are allowed to strike as many as they object to.[30] After the lists have been submitted to AAA, the agency selects approved arbitrators in accordance with the preferences of the parties.[31]

C. *Third Party Deference*

The FAA states that if parties fail to agree on an arbitration method, the court will appoint the arbitrators to oversee the dispute.[32] If the parties, however, agree to arbitrate under the rules of an arbitration house or institution, the institution's default selection method will be used unless the parties contract otherwise. Under the AAA rules, if there is more than one disputant or respondent on any given side of a dispute, the AAA will appoint all the arbitrators, unless the parties agree otherwise.[33] There are obviously several situations under which the choice of arbitrators will be left to someone other than the parties to the dispute. Since the arbitrative procedures are usually shaped prior to the conflict, parties might not be opposed to deferring this judgment to a court or arbitration house. However, some disputants might fear that less autonomy might mean higher risk of a prejudicial tribunal.

III. VALUES OF ARBITRATION

When deciding which arbitrator selection method to use, parties must first remind themselves why they are electing to use arbitration in the first place. Since the selection method is usually

24. FOLBERG ET AL., *supra* note 22.
25. AAA Rules, Rule 2.
26. *Id.*
27. *Id.*, Rule 12.
28. *Infra* Section III.
29. AAA Rules, Rule 12.
30. *Id.*
31. *Id.*
32. 9 U.S.C.A. § 5 (West).
33. AAA Rules, Rule 12.

specified in the arbitration agreement and therefore before a dispute has arisen, parties tend to be less concerned with their specific interests in winning a given dispute and more interested in formulating a procedure that will protect against a fraudulent or inequitable process. This Note will survey some of the most compelling qualities of arbitration: the impartiality of the tribunal, the finality of the judgment, and the expertise of the arbitrators.

Other benefits of the arbitration process include its speed, discretion, cost-effectiveness, and relative lack of formality. These considerations are hugely important but also largely unaffected by the actual arbitrator selection method, so they will not be explored in this Note.[34]

A. Impartiality

Freedom of contract dictates that parties put themselves in whatever situation they choose, and, as Judge Learned Hand famously stated, "[t]he parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen."[35] The impartiality of the decision-maker is not a quality that is unique to arbitration. In fact, it is something that arbitration struggles with. The paradigm of the American justice system seems to involve two disputing parties and one decision-maker in the center who is entirely free of bias or partiality, and who therefore is able to render a verdict on the merits of the case in a neutral, yet informed manner. The role of the neutral judge is so central to our idea of justice that the contractual method by which arbitrators are chosen is often unsettling to the general public as well as academia.[36] When parties are free to choose their own tribunal, it is expected that they will choose arbitrators who are aligned with their viewpoint or at least more sympathetic to their situation. The mere existence of preference alludes to a lack of formal neutrality.

Because arbitration is a contractual instrument, it is not always necessary that the tribunal be neutral. In fact, some scholars have argued that a neutral judge is not only unrealistic, but arguably

---

34. However, it is important to keep in mind that considerations such as speed and cost-effectiveness do come into play when the finality of the award is threatened because appeals tend to be expensive and lengthy.

35. Am. Almond Prod. Co. v. Consol. Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944).

36. *See* Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REVIEW 339 (2010) ("The original concept that legitimates arbitration is that of an arbitrator in whom both parties have confidence. Why would any party have confidence in an arbitrator selected by its unloved opponent?").

undesirable.[37] Despite the realities of human nature, the goal of neutrality is still well established, at least in the realm of litigation. However, international arbitration law, ethical codes of large commercial arbitration houses, and the public opinion of arbitration are at stake when there are non-neutral panels. There is an important distinction here that this Note will address. When the concept of "impartiality" is discussed, it is important to remember that there is the virtue of actual impartiality versus perceived or apparent impartiality. This is more than just a semantic distinction.[38] As will be discussed, international and domestic laws treat these types of impartiality differently.

1. Appearance of Neutrality

The FAA recognizes "evident partiality" as grounds for vacation of an arbitral award.[39] Although the Act gives judges discretionary power to vacate on these grounds, it does not provide much clarification or define what a test for "evident partiality" would be. In *Aetna Cas. & Sur. Co. v. Grabbert,* the Supreme Court of Rhode Island attempted to clarify that it requires a showing of "more than an appearance of bias but less than actual bias."[40] The *Grabbert* court recognized that holding arbitrators to as high of a standard as judges[41] would be impractical and would go against some of the very qualities that make arbitration attractive: namely, the arbitrator's expertise and involvement in the industry or community that the dispute arose in.[42]

In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, the Supreme Court held that an impression of possible bias in a neutral arbitrator can give rise to a vacation of the arbitral award.[43] The Court famously stated that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."[44] In this case, the parties in an arbitration

---

37. Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1878 (1988).

38. *But see* William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 637 (2009) (calling these distinctions "intellectual hooks on which to hang analysis with respect to two basic principles expected of arbitrators").

39. 9 U.S.C.A. § 10 (West).

40. Aetna Cas. & Sur. Co. v. Grabbert, 590 A.2d 88, 96 (R.I. 1991).

41. *See* 28 U.S.C. § 455 (1988) (providing the standards for disqualification of justice, judge, or magistrate judge).

42. *Aetna*, 590 A.2d at 92.

43. 393 U.S. 145 (1968).

44. *Id.* at 150.

dispute elected to use the party-appointed tripartite method.[45] The supposedly neutral arbitrator failed to disclose that he had done business with the defendant in the case on numerous occasions.[46] The Supreme Court found that although the arbitrator had not committed any fraud or deceit in awarding his judgment, his lack of disclosure regarding his relationship to the parties was enough to vacate the award.[47]

2. Actual Impartiality

On the surface, the impartiality of the decision-maker seems to be an essential element to the resolutions of all disputes. As one scholar claimed, "[n]o one with a dog in the fight should judge the competition."[48] Although the FAA seems to require evident impartiality, American arbitration laws have historically not required actual impartiality. American disputants had the option of appointing arbitrators that were openly non-neutral until 2006.[49] In international arbitration, however, there has always been a prohibition against openly non-neutral arbitrators.[50] Due to the increasing globalization of arbitration disputes, even American disputants needed to be concerned with actual impartiality pre-2006. The AAA Code of Ethics contemplated this disparity:

> The sponsors of this Code believe that it is preferable for all arbitrators—including any party-appointed arbitrators—to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-

45. *Id.* at 146.
46. *Id.*
47. *Id.* at 153.
48. William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 632 (2009).
49. *The Code of Ethics for Arbitrators in Commercial Disputes*, AM. ARB. ASS'N (1977).
50. *See International Arbitration Rules*, AM. ARB. ASS'N Art. 13 (Nov. 1, 2001) (requiring that all arbitrators be "impartial and independent").

> appointed arbitrators be non-neutral and governed by special ethical considerations.[51]

The Code thus contemplated the level of caution that parties should exhibit and the risks they took on in appointing an arbitrator with a lack of neutrality.

In 2003, the ABA reexamined the Code of Ethics and, in an attempt to better align it with international standards, changed the presumption of non-neutrality to a presumption of neutrality and also disallowed ex parte communication with the appointing party.[52] The AAA Code requires that arbitrators in international disputes be "independent and impartial."[53] The new rule states that it is preferable for "all arbitrators—including any party-appointed arbitrators—to be neutral, that is, independent and impartial, and to comply with the same ethical standards."[54] This movement away from default non-neutrality reflects the growing suspicion of non-neutral arbitrators, and is aligned with the International Bar Association's requirement that all arbitrators be "neutral and independent of the parties who appointed them."[55]

Of course, there is no such thing as an entirely impartial or neutral human being. Still, parties should aspire to create a level playing field for their proceeding. Cynics tend to assert that parties engaged in arbitration are far less concerned with the justness and fairness of the process than with winning. While victory is obviously the end goal of any legal battle, empirical evidence shows that parties to arbitration rank "fair and just results" high on their list of virtues regarding arbitration.[56]

Additionally, when arbitration agreements involve mandatory state law, states do have an incentive to oversee the procedures and legitimacy of the arbitration.[57] Because arbitral tribunals are taking

---

51. The Code of Ethics for Arbitrators in Domestic and International Commercial Disputes, 2003 Revision, Canon X.

52. *Id.* at Canon X(C)(4).

53. *Id.*

54. *Id.* at Preamble.

55. Richard Chernick, *Selecting Party Arbitrators*, ABTL LOS ANGELES REP., Summer 2014, at 1.

56. William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 703 (2009) (referring to Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People*, 30 INT'L BUS. LAW. 203 (2002)).

57. *See* Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013). (disallowing "a provision in an arbitration agreement forbidding the assertion of

the place of what would otherwise be a federal or state court in the American justice system, there must be some degree of similarity to the court system so as to protect the interests of the government and the public.[58]

B. *Finality of the Judgment*

When parties agree to arbitrate, they agree to have the arbitration tribunal award a binding and final judgment, one that will likely never be seen by a court. Compared to the court system, disputes resolved through arbitration have a much stronger degree of finality. The FAA contains a default rule against vacating awards unless one of four exceptions are met:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[59]

On the whole, however, the FAA works to give broad deference to parties' decision to arbitrate and rarely overturns awards that lack blatant corruption or misconduct. Arbitrators are given the freedom to use their own personal knowledge and judgment in forming their opinion, and they are not bound by the rules of evidence.[60]

The ability to author dissenting opinions in arbitral awards is one avenue through which the finality of the judgment can be

---

certain statutory rights" and perhaps "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.")

58. For a discussion on this issue, *see* Christopher Drahozal, *Is Arbitration Lawless?* 40 LOY. L.A. L. REV. 187 (2006).

59. 9 U.S.C.A. § 10 (West).

60. Byrne, *supra* note 15, at 1821.

threatened. Alan Redfern has characterized specific dissents by which arbitrators may attack not just the award or decision but also the process itself.[61] These dissents can allege bias, ignorance of the law, or noncompliance with arbitration rules and procedures. Redfern calls these "ugly" dissents, and they do have the potential to threaten the finality of the award.[62] Under Article V of the New York Convention, a treaty by which international awards are recognized and thus enforceable in co-member states, enforcement may be refused if the necessary arbitral procedures were not met.[63] Dissenting opinions are often critical to the administration of justice and allow for arbitrators to act as whistleblowers of sorts when misconduct occurs. They can, however, also be a vehicle for abusive sabotage of otherwise legitimate awards.

C. *Expertise of the Arbitrators*

Another benefit of arbitration is the possibility to choose arbitrators with particularized knowledge regarding the dispute at issue. Complex commercial disputes and patent disputes are especially prone to utilizing technical knowledge that would otherwise have to be simplified and explained in detail to a jury or judge. When parties appoint arbitrators that already have knowledge in that field, they can save money and time.

When more than one arbitrator is to serve on the tribunal, there is also an opportunity to select a panel with a diversity of knowledge so that different aspects of the dispute, both legal and otherwise, can be intellectually represented. For example, an international commercial construction dispute would perhaps benefit from a construction expert, a contractual expert, and an expert on the business practices of the state where the dispute arose.

IV. VALUES OF VARIOUS SELECTION METHODS

Each of the above mentioned perceived values of litigation are represented differently through the various arbitrator selection methods. This section will analyze these perceived values against the three arbitrative selection methods discussed above.

---

61. Alan Redfern, *Dissenting Opinions in International Commercial Arbitration: The Good, the Bad, and the Ugly*, 20 ARB. INT'L. 223 (2004).

62. *Id.*

63. Codified at 9 U.S.C. §§201–208.

A. *Party-Appointment*

1. Evident Impartiality

Although the FAA explicitly allows for the vacation of an award on the grounds of "evident partiality", this vacation is discretionary and there is still some debate as to whether party-appointed arbitrators are considered neutral or not. In 1977, the AAA and the ABA codified in their Code of Ethics the idea that party-appointed arbitrators were presumed non-neutrals.[64] The AAA's revised Code of Ethics now allows for the parties to agree to have non-neutral party-appointed arbitrators. This is a deviation from the old rules that assumed the party-appointed arbitrators were non-neutral.[65]

The Supreme Court has held that the FAA "does not confer an absolute right to compel arbitration, but only a right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement.*'"[66] The bottom line is that case law suggests that parties can contract around the "evident partiality" standard prohibited by the FAA.[67] However, it is important to remember why the FAA included this standard and the fact that arbitration is increasingly being used as a replacement for litigation. This is especially concerning in the field of consumer arbitration, where arbitrator-selection-method clauses are enforced in contracts that only one party has read.[68]

2. Actual Impartiality

Although the modern AAA/ABA ethical code now assumes that party-appointed arbitrators are neutral, their actual neutrality is questionable. From a purely psychological perspective, knowing that they have been chosen by one of the parties can be hugely influential

---

64. *The Code of Ethics for Arbitrators in Commercial Disputes*, AM. ARB. ASS'N. (1977).

65. *The Code of Ethics for Arbitrators in Commercial Disputes*, AM. ARB. ASS'N. (2004).

66. Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 468 (1989) (emphasis in the original).

67. *See, e.g.*, Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 759 (11th Cir. 1993) (stating that "a party-appointed arbitrator is permitted, and should be expected, to be predisposed toward the nominating party's case"), abrogated by Lawson v. Life of the South Ins. Co. (11th Cir. (Ga.) 2011).

68. *See* Jessica Silver-Greenberg & Robert Gebelhoff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2013. (claiming that the shift in the legal system has "barely registered with Americans," in part because the operative language is "placed inside clauses added to contracts no one reads in the first place.").

on an arbitrator's subsequent (supposedly impartial) adjudication. Additionally, parties often meet with potential arbitrators before appointing them, so they are allowed an ex parte meeting at which they are afforded the opportunity to advance their position and gauge the level of support.[69]

When large companies or states involved in trade agreements are appointing arbitrators to their panels, there is more than just a sense of loyalty at play for the arbitrators. There exists an economic incentive to make the appointer happy and to advocate their position because they will likely be back in arbitration in the near future. This is known as the "repeat player" phenomenon.[70] A prime example is the consumer arbitration process. On one end, there is a public consumer who most likely will not go to arbitration again. On the other side is a company who sells contracts containing arbitration clauses to the general public. An empirical study done by Public Citizen regarding California credit card companies shows that "28 arbitrators handled 17,265 cases—accounting for a whopping 89.5 percent of cases in which an arbitrator was appointed—and ruled for the company nearly 95 percent of the time."[71] Potential arbitrators have an economic interest in being chosen again, and this phenomenon can harm the integrity of the process.[72]

Of course, it is arguable that any actual impartiality of one party-appointed arbitrator would nevertheless be corrected by the adversarial interests of the other party's appointment, especially when both parties have relatively equal bargaining power. However, the effects of these interests on both sides can also influence the ultimate decision of the umpire. Even if the umpire acts in good faith, the presence of two non-neutral advocates can lead the umpire to make compromised decisions that do not necessarily reflect the true opinions of the whole tribunal or the realities of the dispute. This

---

69. *See* Loewen Group, Inc., v. United States, ICSID Case No. ARB(AF)/98/3 (2003), reprinted in 42 I.L.M. 811 (2003) (regarding a NAFTA dispute in which about $500 million was at stake, where the appointed arbitrator of the prevailing party admitted in a lecture after the proceeding that he had met with the U.S. Department of Justice before the proceeding and was told that NAFTA might be exterminated if a judgment against them was entered).

70. John O'Donnell, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers*, PUBLIC CITIZEN (Sept. 27, 2007), http://www.citizen.org/documents/ArbitrationTrap.pdf.

71. *Id.*

72. *But see* William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 653 (2009) (arguing that any incentive to be chosen again as an arbitrator is outweighed by the stronger incentive to "safeguard professional status").

"splitting of the baby" is evidence of a lack of intellectual integrity. Despite the lack of empirical evidence on this matter, many courts and legal theorists have written about this effect and its dangers to intellectual integrity.[73]

3. Finality of the Decision

The finality of the arbitral judgment is threatened by the use of party-appointment. Besides the threat of a challenge from the losing party that "evident partiality" existed, there is another threat to the finality of the decision.

Dissents act as a vehicle through which party-appointees can carry out the wishes of their appointers, regardless of their true feelings toward the case. An empirical study conducted by Albert Jan van den Berg shows that, of the 150 published opinions on the Investment Treaty Arbitration (ITA) and the International Centre for Settlement of Investment Disputes (ICSID) websites, thirty-four dissenting opinions were written.[74] Not astonishingly, of those thirty-four reported dissents in that year, nearly all of them were written by the arbitrator that was appointed by the losing party.[75]

This pattern is problematic for a number of reasons. First, it threatens the finality of the judgment, which is one of the pillars of the arbitral decision. Second, it conflates the role of advocate and judge. Some would argue that the role of the arbitrator is determined by the parties in the contract and thus it is not problematic if they act as an advocate at times. Yet when the pseudo-advocate is then able to sabotage what might otherwise be a legitimate award, the most fundamental structure of the arbitral process is compromised. Proponents of this method argue that, in reality, dissents are relatively rare. However, as arbitration changes quickly, arbitration houses must acknowledge and patch up any vulnerabilities before they can be further abused.

---

73. *See, e.g.*, Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 693 (2000) ("The perceived advantages of the judicial forum for plaintiffs include the availability of discovery and the fact that courts and juries are viewed as more likely to adhere to the law and less likely than arbitrators to split the difference between the two sides, thereby lowering damages awards for plaintiffs.").

74. Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 821, 824 (Mahnoush H. Arsanjani et al. eds., 2010).

75. *Id.*

4. Arbitrator Expertise

By allowing parties to directly appoint an arbitrator, it is more likely that the person they appoint will be exceptionally well-qualified to advocate their position and therefore have some particular knowledge or opinions, whatever they may be. It is hard to conceive of a reason why a party would appoint someone who was inarticulate or ill-informed on the issues when that person is then going to advocate their position for them.

However, the unilateral appointment method does fail to look out for the interest of a diversity of expertise on a given panel. As discussed above, it can often be helpful and more efficient to have a panel with a multitude of expert knowledge. In this sense, strategic involvement can get in the way of what would otherwise be a balanced panel. This can occur through no fault of the parties. It is easy to imagine a situation in which both parties would prefer to have one panelist with contract knowledge and one with construction knowledge. The nature of partial unilateral selection, however, makes this result nearly impossible to secure.

B. List Method

1. Evident Impartiality

The list-and-rank method does not pose the same threat to the "impression of possible bias" test that the party-appointment method does. Of course, party preference is still at play, which necessarily means that there are going to be arbitrators who are more sympathetic than others. This is not quite as problematic as having direct appointment, especially considering that the arbitrators, once selected, are unaware of their rankings.

2. Actual Impartiality

Again, there is not a fundamental threat to the neutrality of the arbitrators when the list-and-rank method is used. The arbitrators are driven by an incentive to be chosen by the arbitration house and thus would have an interest in preserving their impartiality and their professional reputation, rather than pandering to the economic goals of one party.

3. Finality of the Decision

While damaging dissents are still a possibility, under the list selection method there is no external influence making dissents more or less likely to occur. In the words of Alan Redfern, it is more likely that the dissents would be of the "good" variety.[76] Of course, a failure to disclose potential prejudices could threaten the finality of the judgment. Unlike a party-appointed arbitrator who essentially acknowledges his bias toward his appointer, a potential arbitrator who is on a list has a stronger incentive to not disclose relationships and biases that might get him stricken by the other party or removed from the list by the arbitration house. This could later be revealed and challenged in court. These quasi ex ante challenges for bias are not uncommon due to the adversarial nature of these disputes.

However, the arbitrator has an incentive to preserve his professional reputation and therefore will most likely disclose or exclude himself from arbitrations that are clearly affected by his interests. The arbitration house will also likely screen out anyone with potential conflicts in order to preserve their professional reputation and protect against vacations on appeal.

4. Arbitrator Expertise

Where an increase in globalized competition, for example, might create a sort of "race to the bottom," the list-and-rank method creates more of a "race to the middle." When opposing parties strike potential arbitrators, they are most likely eliminating those who they believe are most helpful to the opposing side. A similar method is used in American jury selection. When this happens, it is possible that some of the most capable and relevant adjudicators are being eliminated from the process. Although this is not always a bad thing, it has the potential to lower the overall effectiveness of the eventual arbitrative board.

The interest in having a diversity of expertise, however, is preserved through the list selection method. Unlike jury selection, parties do not eliminate potential arbitrators until there are only three left. Instead, they eliminate a fixed number of candidates, and then rank the remaining. This gives the arbitration house some discretion to balance out the tripartite panel while still respecting the interests of the parties. All else being equal, arbitration associations are free to break a tie with a diversity of opinions.

---

76. Redfern, *supra* note 61.

C. *Arbitration House Deference*

1. Evident Impartiality

Evident impartiality is perhaps the most strongly preserved when a third party—in this case, the arbitration institution—chooses the entire arbitrative panel. Barring any bad faith on the part of the arbitration house, there is no reason for them to select arbitrators with skin in the game. Additionally, an institution like the AAA, for example, has an interest in conducting fair and equitable arbitration proceedings so that future business will not be deterred from using their services.

2. Actual Impartiality

While evident impartiality is well guarded against under this method, there is concern over lack of disclosure. Whereas party-appointment allows an arbitrator to acknowledge his or her non-neutrality, when an arbitration house chooses arbitrators there is more incentive for arbitrators to leave out their personal relationships with parties or any potential bias on the issues. The award would then only be challenged if any conflict were to be disclosed after the proceeding. Arbitration houses, however, guard against this through rigorous screening procedures.[77]

3. Finality of the Decision

While dissents are still a possibility, there is no external influence making them more or less likely to occur. Of course, a failure to disclose potential prejudices could threaten the finality of the judgment. However, the arbitrator has an incentive to preserve his professional reputation and therefore will most likely disclose or exclude himself from arbitrations that are clearly within his interest or bias.

4. Arbitrator Expertise

If the goal is to obtain a panel that is not just well-qualified but also varied in specialization, deference to any third party is a good means to that end. The odds that a panel with diverse expertise will be chosen are perhaps at their highest under this method. When parties

77. *Qualification Criteria for Admittance to the AAA National Roster of Arbitrators*, AM. ARB. ASS'N.

elect to have the arbitration house select the panel, they are enabling that institution to not only consider each arbitrator's qualifications, but also how the group fits together and complements one another. The arbitration house's lack of interest at stake also allows them to choose arbitrators that have more generalized expertise, rather than specific qualities that help one side. Also, the "strategic interference" phenomenon is not present through this selection method because the decision is consolidated into one decision-making entity.

CONCLUSION

Arbitration is a creature of contract and therefore contracting parties are free to shape it. Institutions like the AAA can set out guidelines and rules but these are merely default provisions; they can always be contracted around. Although this Note does not set out to promote any one method or argue against the freedoms enjoyed by mutually contracting parties, it should be apparent that the party-appointment method serves the perceived values of arbitration the worst and poses the most problems with finality and equitability. Parties concerned with the legitimacy and finality of a potential future dispute should strongly consider the list-and-rank method or allow a third party to choose the arbitral tribunal. What seems like a relinquishment of some autonomy in the arbitral process actually protects parties from unnecessary hardship and promotes a more just and equitable result.