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Lexipol: The Privatization of Police Policymaking

Ingrid V. Eagly & Joanna C. Schwartz*

This Article is the first to identify and analyze the growing practice of privatized police policymaking. In it, we present our findings from public records requests that reveal the central role played by a limited liability corporation—Lexipol LLC—in the creation of internal regulations for law enforcement agencies across the United States. Lexipol was founded in 2003 to provide standardized policies and training for law enforcement. Today, more than 3,000 public safety agencies in thirty-five states contract with Lexipol to author the policies that guide their officers on crucial topics such as when to use deadly force, how to avoid engaging in racial profiling, and whether to enforce federal immigration laws. In California, where Lexipol was founded, as many as 95% of law enforcement agencies now rely on Lexipol's policy manual.

Lexipol offers a valuable service, particularly for smaller law enforcement agencies that are without the resources to draft and update policies on their own. However, reliance on this private entity to establish standards for public policing also raises several concerns arising from its for-profit business model, focus on liability risk management, and lack of transparency or democratic participation. We therefore offer several recommendations that address these concerns while also recognizing and building upon Lexipol's successes.

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* Professors of Law, UCLA School of Law. This Article benefitted greatly from valuable feedback from our colleagues at UCLA School of Law, and from Barry Friedman, Emi MacLean, Jon Michaels, Eric Miller, John Rappaport, David Sklansky, Samuel Walker, and Adrienna Wong. Thanks also to Tim Kensok and the others at Lexipol who shared their insights about the company. We thank Jessica Blatchley, David Koller, Jodi Kruger, Jenny Lentz, and Phillip Shaverdian for their superb research support, and the editors of the *Texas Law Review* for their editorial assistance. Finally, we thank Jennifer Mnookin for suggesting that we write this Article.

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Introduction

The conduct of American police is never far from the front page of the news. A wide range of policing issues—such as use of force, racial profiling, stop and frisk, roadblocks, Tasers, body cameras, and immigration policing—have garnered significant attention from community members, courts, advocacy organizations, and law enforcement agencies. Much of the discussion about improving police practices has focused on how best to regulate police conduct.[1] Gaining increasing traction in this discussion is the view that comprehensive internal police policies can guide the opaque and largely discretionary conduct of the police.[2] Those engaged in these discussions appear to assume that police departments, local governments, and nonprofits will play leading roles in the creation of police policies. However, the most significant national player in policing policy today is a private limited liability corporation—Lexipol LLC—that has, to date, received almost no scholarly attention.[3]

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1. *See generally* Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437 (describing various police reformers and their strengths and limitations).

2. *See infra* notes 175–177 and accompanying text (summarizing scholarship in this area).

3. To date, the only limited descriptions of Lexipol in academic scholarship occur in our own work and that of John Rappaport. *See* Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEXAS L. REV. 245, 256 (2016) (discussing the role of Lexipol, "a private service that writes and updates policies and procedures for public safety organizations, including police departments"); John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1575 (2017) (noting that "some insurers fund or subsidize subscriptions to a turnkey policy-

This Article is the first to examine Lexipol's role in police policymaking. Lexipol explains on its website that it "offers a customizable, reliable and regularly updated online policy manual service, daily training bulletins on your approved policies, and implementation and management services to allow us to manage the administrative side of your policy manual."[4] And Lexipol contends that it is "America's leading provider of state-specific policy management resources for law enforcement organizations."[5] But beyond the statements Lexipol posts about itself online, there is little publicly available information about Lexipol LLC's products, its relationships with local jurisdictions, or the values that its products promote. Accordingly, we submitted public records requests to the 200 largest law enforcement agencies in California, seeking copies of their policy manuals as well as any communications or agreements with Lexipol. In response, we received thousands of pages of Lexipol-authored policy manuals, contracts, promotional materials, and e-mails.[6] We supplemented these public records responses with court records, newspaper stories, and other documentation of Lexipol's work in California and around the country.

We found that Lexipol has expanded like wildfire since its founding in 2003. In only fifteen years, Lexipol has grown from a small company servicing forty agencies in California to a leading national police policymaker, replacing the homegrown manuals of local police departments with off-the-shelf policies emblazoned with the Lexipol LLC copyright stamp. Company employees and executives promote the fact that 95% of California law enforcement agencies subscribe to Lexipol[7]—an assertion

writing service from a company called Lexipol"); Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1188 (2016) (explaining that some risk pools offer discounts on premiums to jurisdictions that subscribe to Lexipol).

4. *Lexipol Products & Services*, LEXIPOL, http://www.lexipol.com/law-enforcement/law-enforcement-products/ [https://perma.cc/TMH9-ZTZX].

5. *Id.*

6. We discuss our methodology in Part I, *infra*. Our focus in this Article is on the manuals created by Lexipol for police and sheriff's departments. We note, however, that Lexipol also provides policy manuals for fire departments.

7. *See, e.g.*, SBN Staff, *Dan Merkle, Chairman and CEO, Lexipol LLC*, SMART BUS. (July 1, 2012), http://www.sbnonline.com/category/industry-topics/legal-industry-topics/page/2/ [https://perma.cc/27R9-G5GQ] ("Ninety-five percent of the police agencies in California now use Lexipol's online Knowledge Management System, which includes law enforcement standardization and training programs, and the company has exceeded 30 percent growth for each of the last five years, all without infusions of outside capital."); Report of Bruce D. Praet at 1, Mitz v. City of Grand Rapids, No. 1:09-cv-365, 2009 WL 6849914 (W.D. Mich. Oct. 21, 2009) ("Lexipol currently has 94% of all California law enforcement agencies subscribing to our policy and training systems."). California jurisdictions regularly use the 95% figure in their public communications, suggesting that that figure is used in Lexipol's marketing materials as well. *See, e.g.*, CITY OF LAGUNA BEACH: AGENDA BILL NO. 5, at 2 (Sept. 3, 2013), http://lagunabeachcity.granicus.com/MetaViewer.php?view_id=3&clip_id=314&meta_id=24551 [https://perma.cc/6FJS-5F6B] ("Lexipol dominates with over 95% of the cities [in California] using its services."); VALLEJO POLICE DEPARTMENT, 2013: THE YEAR IN REVIEW 29 (2014), http://www.ci.vallejo.ca.us/common/pages/DisplayFile.aspx?itemId=74914 [https://perma.cc/Q3RY-F8UW] ("More than 95 percent of

consistent with agencies' responses to our public records requests.[8] Lexipol's rapid growth has allowed it not only to saturate the market in California but also to expand its reach to 3,000 public safety agencies in thirty-five states across the country.[9] Although Lexipol is not the only private entity to sell policies to local police departments in the United States, it appears to sell policy manuals and trainings to far more local law enforcement agencies than its competitors.[10] Indeed, law enforcement agencies in several states describe

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California law enforcement agencies . . . now utilize Lexipol for their policies and procedures . . . ."); Alex Emslie, *Vallejo City Manager Responds to Questions About Police Shootings*, KQED NEWS (May 20, 2014), https://ww2.kqed.org/news/2014/05/20/vallejo-city-manager-responds-to-questions-about-police-shootings/ [https://perma.cc/L6B3-MGGG] ("More than 95 percent of California law enforcement agencies . . . subscribe to the Lexipol Policy system."). Lexipol executives reported to us that 94% of all California public safety agencies use Lexipol—a figure which reflects not only police departments and sheriff's departments, but also law enforcement for parks, college campuses, transit systems, and airports. E-mail from Tim Kensok, Vice President, Prod. Mgmt., Lexipol, to authors (Sept. 13, 2017, 4:07 PM) (on file with authors).

8. *See infra* Table 2; Appendix. Our public records requests revealed that 83% of California's 200 largest law enforcement agencies were Lexipol customers. Smaller agencies were especially likely to use Lexipol: 95% of responding agencies with fewer than 100 officers relied on Lexipol policies.

9. *See infra* Table 1. Lexipol executives assert that approximately 2,500 of those 3,000 public safety agencies are local police and sheriff's departments. *See* LEXIPOL: REVIEW OF LEXIPOL: THE PRIVATIZATION OF POLICE POLICYMAKING 4 (2017) (on file with authors) [hereinafter SECOND LEXIPOL POWERPOINT] (presenting company information in a PowerPoint given to authors by Lexipol LLC). The remainder are fire departments, probation departments, and other types of public safety agencies. Telephone Interview with Tim Kensok, Vice President, Lexipol, Gordon Graham, Vice President, Lexipol, Leslie Stevens, Vice President, Lexipol, Kevin Piper, Vice President, Lexipol, and Shannon Piper, Dir. of Mktg. & Commc'ns, Lexipol (Sept. 8, 2017) [hereinafter Lexipol September Conference Call].

10. Other private entities that provide similar services include: OSS Law Enforcement Advisors, http://www.ossrisk.com/consultant/Law-Enforcement/page174.html [https://perma.cc/W54Z-P636]; Daigle Law Grp., LLC, http://daiglelawgroup.com [https://perma.cc/J36N-KFBA]; Pub. Safety Specialist's Grp., http://www.pssg.net/liability/liability.shtml [https://perma.cc/68LK-FPDA]; Legal & Liability Risk Management Institute, http://www.llrmi.com/index.shtml [https://perma.cc/8LTE-TWTX]; The Thomas & Means Law Firm, https://www.thomasandmeans.com/policy-manual-work [https://perma.cc/YDW3-UFLV]; and Hillard Heintze, http://www.hillardheintze.com/law-enforcement-consulting/police-department-assessment/ [https://perma.cc/V8WS-QBA5]. Most of these companies were reluctant to provide us with information about their law enforcement clients, but the information we have been able to collect suggests that these companies work with fewer law enforcement agencies than does Lexipol. *See* Telephone Interview by David Koller with Eric Daigle, Principal, Daigle Law Group, LLC (Aug. 28, 2017) (reporting that his company consults with approximately eighty law enforcement agencies, and confirming that Lexipol has only a couple of competitors—including The Daigle Group—because "Lexipol had the market cornered for so long"); Telephone Interview by David Koller with Dennis W. Bowman, President & Founder, Public Safety Specialist's Group (Aug. 31, 2017) (reporting that his company has worked with forty to fifty law enforcement agencies on their policy manuals since the company's formation in 2001); Telephone Interview by David Koller with David Lee Salmon II, Law Enforcement Advisor, OSS Law Enf't Advisors (Sept. 13, 2017) (reporting that OSS has "well over" 2,000 clients but explaining that that figure includes local law enforcement agencies, municipal groups, insurance companies, state agencies, state associations, and private employers). We repeatedly reached out to LLRMI, Thomas & Means, and Hillard Heintze, and did not get responses to our inquiries.

it as the "sole source provider" of standardized, state-specific law enforcement policy manuals.[11]

The key to Lexipol's commercial success appears to be its claims to reduce legal liability in a cost-effective manner. Lexipol promotes itself as providing departments with a "policy that is always up to date" containing "legally defensible content" that will "protect your agency today."[12] In fact, Lexipol's promotional materials assert that departments using Lexipol have fewer lawsuits filed against them and pay less to resolve the suits that are filed.[13] Lexipol also argues that its policy manuals are higher-quality, more user-friendly, and less expensive than manuals that local jurisdictions could create on their own. Lexipol claims its standardized policies reflect court opinions, legislation, and what it calls "best practices" in each state.[14] Lexipol updates its policies, and local jurisdictions can incorporate those updates into their policy manuals with a click of a button. And Lexipol's sliding-fee scale, which is based on the number of officers employed by the agency, makes this prepackaged deal particularly appealing for smaller departments that would not have the resources to develop and update policies on their own.[15]

Lexipol's meteoric rise has significant implications for longstanding debates about the role policymaking might play in police reform. Beginning in the 1960s,[16] Anthony Amsterdam, Kenneth Culp Davis, Herman Goldstein, and others argued that comprehensive police policies could guide police discretion, improve police decisionmaking, and increase transparency.[17] These scholars advocated for a rulemaking procedure akin to

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11. *See infra* notes 311–312 and accompanying text.

12. *About Lexipol*, LEXIPOL, http://www.lexipol.com/about-us/ [https://perma.cc/3W98-VXF5] (click on video).

13. *See infra* notes 144–148 and accompanying text.

14. *See infra* Figure 1.

15. For example, the Calaveras County Sheriff's Department, with fifty-nine officers, was charged less than $9,000 for a one-year contract, while larger agencies were charged more. *See infra* notes 110–120 and accompanying text for a discussion of Lexipol's cost structure.

16. For a history of administrative rulemaking in policing, see Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 14–17 (2003).

17. *See, e.g.*, Herman Goldstein, *Police Discretion: The Ideal Versus the Real*, 23 PUB. ADMIN. REV. 140, 146 (1963) (arguing that police should acknowledge the role of discretion in law enforcement); Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 588–89 (1960) (suggesting that legislatures should create Policy Appraisal and Review Boards to review the nonenforcement decisions of police officers and make policy recommendations); Jerome Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 146 (1953) (advancing the idea that police methods and policies should "reflect democratic values"); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 904 (1962) (asserting that "criminal law enforcement can often be improved substantially by the imposition of legal procedures and standards upon the exercise of discretion"); Wayne R. LaFave, *The Police and Nonenforcement of the Law (pt. 1)*, 1962 WIS. L. REV. 104, 104 (1962) (discussing the reasons why police discretion has rarely been recognized in the law); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 674 (1972) (highlighting the lack of actual police participation in the making of rules

that which exists for administrative agencies, whereby proposed policies would be subject to notice and comment by the public before promulgation, so as to invite "community reaction."[18] In recent years, Barry Friedman, Christopher Slobogin, Eric Miller, and others have renewed these earlier calls for policing policies created by an administrative rulemaking process.[19] Yet Lexipol does not appear in these ongoing discussions about the types of police policies that will best guide police behavior, or the need for transparency and community engagement in the development of those policies.

As we reveal in this Article, Lexipol's approach to police policymaking diverges in several significant ways from that long advocated by scholars and experts. Commentators have viewed police policies as a tool to constrain officer discretion and to improve officer decisionmaking. Lexipol, in contrast, promotes its policies as a risk management tool that can reduce legal liability. Commentators have long contended that the Supreme Court's policing decisions are wholly inadequate to guide law enforcement discretion regarding racial profiling, stop and frisk, and other practices.[20] Yet Lexipol has resisted efforts to craft policies that go beyond the minimum

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governing police). Note, however, that the earliest calls for administrative rulemaking for police occurred in the early 1900s. *See* Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 123 (2016) (citing BRUCE WYMAN, THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS (1903)).

18. Gerald M. Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 L. & CONTEMP. PROBS. 500, 509 (1971); *see also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 423 (1974) ("[I]nformed authorities today agree with rare unanimity upon the need to direct and confine police discretion by the same process of rulemaking that has worked excellently to hold various other forms of public agencies to accountability under standards of lawfulness, fairness and efficiency."); Kenneth Culp Davis, *An Approach to Legal Control of the Police*, 52 TEXAS L. REV. 703, 725 (1974) ("My central idea is that police practices should no longer be exempt from the kind of judicial review that is usual for other administrative agencies."); *see also* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 164–65 (1968) (arguing in favor of formal policymaking pursuant to an administrative-type procedure for police departments).

19. *See, e.g.*, Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1833 n.28 (2015) (observing that, in calling for administrative rulemaking in policing, they "stand on the shoulders of giants"); Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 525 (2015) (proposing that police reformers "focus on the departmental level of police policy-making to give local communities and disadvantaged individuals a more meaningful voice in evaluating and checking local police policy"); Slobogin, *supra* note 17, at 91 (arguing that when police create "statute-like policies that are aimed at largely innocent categories of actors . . . they should have to engage in notice-and-comment rulemaking or a similar democratically oriented process and avoid arbitrary and capricious rules"); *see also* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2050 (2016) (identifying a trend calling "for a pivot to law enforcement self-regulation as a primary means of constraining state power in the criminal justice arena").

20. *See, e.g.*, Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 125 (2017) (criticizing Fourth Amendment law as in fact "legaliz[ing] racial profiling," resulting in ongoing police surveillance, social control, and the injury and death of African Americans); *see also infra* notes 189–192 and accompanying text.

requirements of court decisions because such policies might increase legal liability exposure.[21]

Moreover, the process by which Lexipol develops its policies is not consistent with the approach recommended by many policing experts who have emphasized the importance of transparent policymaking, with opportunities for public input.[22] Lexipol does not disclose information about who is making Lexipol's policies and what interests are prioritized in their process. And although Lexipol informally receives feedback from subscribing jurisdictions about its policies, its policymaking process departs considerably from the transparent, quasi-administrative approach recommended by scholars and policing experts and adopted by some law enforcement agencies.[23] Also, Lexipol's profit-seeking motive influences its product design in concerning ways. For example, Lexipol's policies are copyrighted, and the company vigorously defends that copyright as a means of maintaining its profitability. Yet police policymaking has long been viewed as a collaborative enterprise. Departments across the country have traditionally shared their policies as a means of learning from each other and have borrowed liberally from each others' policies. Lexipol's business model impedes this generative process.[24]

In this Article, we do not reach any conclusions about how Lexipol's policies compare to those adopted by law enforcement agencies that do not purchase Lexipol's products. Indeed, some of these same critiques have been made of local law enforcement agencies that draft their own policies.[25] Yet because Lexipol appears to be the single most influential actor in police policymaking, its successes—and failures—have an outsized impact on American police policy. As Lexipol goes, so go thousands of law

21. *See infra* notes 180–194 and accompanying text for further discussion of these concerns.

22. *See, e.g.*, Friedman & Ponomarenko, *supra* note 19, at 1827 (arguing that police practices should be legislatively authorized and "subject to public rulemaking").

23. *See infra* notes 213–226 and accompanying text for further discussion of these concerns.

24. *See infra* notes 241–253 and accompanying text for further discussion of these concerns.

25. For example, although we critique Lexipol's resistance to model use of force policies recommended by the International Association of Chiefs of Police and the Police Executive Research Forum, see *infra* notes 180-195 and accompanying text, we recognize that there have also been powerful critiques of use of force policies promulgated by departments that do not contract with Lexipol. *See, e.g.*, Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 212 (2017) (arguing that use of force policies of the fifty largest policing agencies in the United States are insufficiently specific and lack guidance in key areas); *see also* POLICE USE OF FORCE PROJECT, http://useofforceproject.org/#project [https://perma.cc/57AN-GAWE] (reviewing police use of force policies in ninety-one of the one hundred largest law enforcement agencies and finding that policies frequently failed to include eight "common-sense limits on police use of force"). Critics have also argued that police departments should—but do not—view policymaking as a quasi-administrative exercise. *See generally* Friedman & Ponomarenko, *supra* note 19, at 1833 (summarizing scholarly arguments for using administrative processes to govern policing policy). And critics have complained that police policies are often kept secret. *See, e.g.*, Garrett & Stoughton, *supra*, at 277 (finding that only seventeen of the fifty largest police departments published their policies and patrol manuals online).

enforcement agencies across the country. And Lexipol's for-profit status raises additional concerns that do not apply to government and nonprofit police policymakers.

By identifying Lexipol as a force to be reckoned with in American policing, this Article also begins an important conversation about the privatization of police policymaking. Privatization scholars tend, in varying degrees, to applaud privatization of government functions as cost-effective[26] or to despair that privatization impedes democratic values.[27] Our research regarding the privatization of police policymaking offers evidence to support both views. Lexipol appears to have solved a problem that has proven elusive to those advocating for police policymaking—how to promulgate police policies in the almost 18,000 highly localized law enforcement agencies across the country.[28] And agencies that contract with Lexipol may well have a more complete and up-to-date policy manual than they would have developed on their own—Lexipol subscribers quoted on its website certainly make that claim.[29] But our research also raises serious questions about the values, process, and expertise called upon to create the Lexipol policies that regulate the public police.

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26. *See, e.g.*, Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective* (arguing that privatization will often be the most efficient solution for government and that limitations on privatization can be counterproductive), *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 153, 158–59 (Jody Freeman & Martha Minow eds., 2009); Stan Soloway & Alan Chvotkin, *Federal Contracting in Context: What Drives It, How to Improve It* (arguing that private companies often have better resources and research capacity than government entities), *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* at 192, 221–22; Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1296 (2003) ("From this pragmatic perspective, privatization is a means of improving productive efficiency: obtaining high-quality services at the lowest possible cost . . . .").

27. *See, e.g.*, JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC (2017) (describing how privatization threatens constitutional principles and threatens government health and stability); Sharon Dolovich, *How Privatization Thinks: The Case of Prisons* (arguing that operators of private prisons will promote efficiency over other important interests), *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 26, at 128, 134; Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy* (describing concerns about the process by which contracts are awarded for government work and the difficulty of monitoring private employees), *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 26, at 110, 111; David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1277–78 (1999) (highlighting how the growing private security industry undermines the function of the criminal law).

28. As Monica Bell has noted, "the sheer volume of locally controlled police departments, all of which have slightly different policies and issues," has impeded systemic police reform across these different localities. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2138 (2017); *see also* Friedman & Ponomarenko, *supra* note 19, at 1886 (arguing that "the real challenge" to applying rulemaking to policing "is identifying methods of public participation that can be scaled to communities and police forces of various sizes").

29. *See infra* notes 152–158 and accompanying text.

Many believe—and we agree—that police departments need comprehensive and detailed policies to guide officer discretion and should engage with local communities in some manner when shaping those policies. We additionally believe that plans to improve law enforcement policymaking must recognize the prevalence of Lexipol and take account of the strengths and weaknesses of its approach. Accordingly, we recommend that Lexipol be more transparent about its policymaking process so that local governments can make more informed decisions about the policies that guide their law enforcement agencies; that local governments and courts take a more active role in police policymaking; and that nonprofits and scholars develop more easily accessible alternative model policies that are compatible with Lexipol's user-friendly platform. We believe that these recommendations will encourage local jurisdictions to craft their own policies when possible and, when contracting with Lexipol, view the company as a first—but not final—step in the policymaking process.

I. The Rise of Lexipol

In this Part, we share our findings about Lexipol's founders, its products, and its relationships with the local governments it serves. In conducting this research, we first gathered information from Lexipol's website, financial filings, press releases, news sources, and court documents. We supplemented this research with public records requests to the 200 largest police and sheriffs' departments in California, seeking each department's policy manual and any dealings with Lexipol LLC—including contracts, payments, correspondence, and other memoranda.[30] We chose to conduct this research in California, where Lexipol was founded. Soon thereafter, we were contacted by a vice president at Lexipol who had learned about our public records requests from Lexipol subscribers. We had several conversations with this vice president and other Lexipol executives about the company's business model and process for creating its policy manuals.

In this Part, we provide a descriptive account of Lexipol's services, drawn from the information we gathered. We begin by introducing what we know about Lexipol's founders and employees. We then describe the company's products, cost structure, sales methods, and growth. Later, in Part II, we build on our findings to analyze Lexipol's model of police policymaking.

30. To identify the 200 largest police and sheriff's departments in California, we relied on a census of local law enforcement agencies conducted by the Bureau of Justice Statistics (BJS). *See* Appendix (describing our methodology).

A. People

Lexipol LLC was founded in 2003 by Bruce Praet, Gordon Graham, and Dan Merkle.[31] Praet, an attorney and former law enforcement officer, appears to have had the initial vision for the company. While working as a partner at the Southern California law firm of Ferguson, Praet and Sherman, Praet developed a specialty in "aggressively defending police civil matters such as shootings, dog bites and pursuits."[32] In the late 1990s, Praet's firm assisted the California agencies he represented to reduce liability exposure by recommending they adopt a policy he authored on vehicular pursuits.[33] A 1959 California law provided that agencies with a written policy for vehicular pursuits were immunized from certain forms of civil damages.[34] By drafting such a policy for his clients, Praet shielded them from civil liability for these types of claims.

Praet's experience developing a model policy for vehicle pursuits inspired him to create a more comprehensive set of policies that local law enforcement agencies could purchase. Working with Geoff Spalding, a Police Captain with the Fullerton Police Department, Praet created a model California law enforcement manual based on Fullerton's policies.[35] Praet used this model when the Escalon Police Department retained his firm to write its entire policy manual in 1999. By 2002, the firm maintained the policy manuals for about forty California-based law enforcement agencies.[36]

In 2003, Praet founded Lexipol with Gordon Graham and Dan Merkle, and transferred his policy development work from his law firm to the new company.[37] Graham, also a former law enforcement officer and law school graduate, additionally has a master's degree in Safety and Systems

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31. Deposition of Bruce D. Praet at 7, Schrock v. Taser Int'l, Inc., No. CIVDS-14-8556, 2016 WL 5656893 (Cal. Super. Ct. Mar. 25, 2016) (on file with authors) [hereinafter Praet Deposition].

32. Thadeus Greenson, *Arraignment Only the First Step in Moore Case*, EUREKA TIMES STANDARD (Dec. 12, 2007), http://www.times-standard.com/general-news/20071212/arraignment-only-the-first-step-in-moore-case [https://perma.cc/46Q2-9SCR] (quoting a description of Praet's firm from the Lexipol website); *see also* Mark I. Pinsky, *Former Officer Defends Police in Courtroom: Law: Bruce D. Praet Faces What May Be the Challenge of His Legal Career in the Newport Police Sexual Harassment Case*, L.A. TIMES (Dec. 28, 1992), http://articles.latimes.com/1992-12-28/local/me-2115_1_police-officers [https://perma.cc/3GPQ-TAKR] (chronicling Praet's career from police officer to lawyer).

33. LEXIPOL, LEXIPOL POLICY DEVELOPMENT—HOW WE DO WHAT WE DO 12 (Feb. 10, 2017) (on file with authors) [hereinafter FIRST LEXIPOL POWERPOINT] (presenting company information in a PowerPoint given to authors by Lexipol).

34. *Id.* (citing CAL. VEH. CODE § 17004.7 (West 2007)).

35. *Id.* at 13.

36. *Id.*

37. Letter from Lexipol to Pat Smith, Chief of Police, Beaumont Police Dep't (Sept. 4, 2003) (on file with authors) ("Lexipol has assumed all functions of the policy manual development work formerly performed by the law firm of Ferguson Praet and Sherman.").

Management.[38] In the 1980s, while a sergeant in the California Highway Patrol, Gordon developed daily trainings for officers that he called the "SROVT program: Solid, Realistic, Ongoing, Verifiable, Training."[39] In the early 1990s, Graham began adapting his training programs for private sector and public safety organizations.[40] When Graham joined Lexipol as co-President, he drew on his expertise in public entity risk management to develop training materials to accompany the manuals.[41]

Dan Merkle served as Lexipol's first Chairman and CEO.[42] Merkle has a background as a corporate executive[43] and was recruited to focus on building the company's infrastructure.[44] When Merkle left Lexipol in 2013 to join a media technology company,[45] Ron Wilkerson became the new CEO of Lexipol.[46] As the company has grown beyond its original founders, it has hired scores of attorneys, marketing specialists, and account managers.[47]

Although Lexipol applauds the "all-star team of public safety veterans"[48] that drafts its polices and trainings, there is no publicly available information about who these public safety veterans are. We found information about Praet and Graham, but could find no information about the identities or credentials of their 120 employees.[49] Indeed, none of the marketing materials that we obtained from the California jurisdictions we surveyed included information on names or credentials of Lexipol's employees. When we spoke to company executives about this issue, they

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38. *About GRC, Bio: Gordon Graham*, GRAHAM RES. CONSULTANTS, http://www.gordongraham.com/about.html [https://perma.cc/9Z33-EAAE].

39. *Id.*

40. *Id.*

41. *See* Letter from Lexipol to Pat Smith, *supra* note 37 ("Gordon is leading a group developing a training system based on the content of each agency's policy manual and his extraordinary knowledge base."); *see also* GRAHAM RES. CONSULTANTS, *supra* note 38 (recounting Graham's expertise in police training programs before establishing Lexipol).

42. SBN Staff, *supra* note 7.

43. Dan Merkle, LINKEDIN, https://www.linkedin.com/in/dan-merkle/.

44. *See* Letter from Lexipol to Pat Smith, *supra* note 37 ("Dan Merkle has been recruited to lead our investment in systems and resources to better serve our subscribing agencies.").

45. Merkle, *supra* note 43.

46. Ron Wilkerson, LINKEDIN, https://www.linkedin.com/in/ron-wilkerson-8a075b8a. In 2013, Praet and Graham sued Merkle for allegedly attempting to strip Praet of his ownership interest in Lexipol. *See* Praet v. Merkle, No. 30-2013-00622437 (Cal. Super. Ct. Jan. 4, 2013); *see also Veritone Appoints New President of Public Safety, Expanding Cognitive Media Platform to Law Enforcement*, CISION: PRWEB (Sept. 15, 2016), http://www.prweb.com/releases/2016/09/prweb13690214.htm [https://perma.cc/9NZU-5EK6] (announcing Dan Merkle as the new CEO of Veritone, Inc.).

47. *See Current Career Opportunities*, LEXIPOL, http://www.lexipol.com/careers/ [https://perma.cc/S9YF-KXP8] (stating that Lexipol is currently hiring product managers, attorneys, and development representatives).

48. Letter from Lexipol to Roy Davenport, Assistant Chief Deputy, Denton Cty. (Dec. 3, 2012) (on file with authors).

49. FIRST LEXIPOL POWERPOINT, *supra* note 33, at 13 (reporting a rapid growth from 61 employees in 2014 to 120 employees in 2016).

provided us with the photos, names, and titles of ten Lexipol executives, and one vice president told us that he would love to include photos and bios of staff on Lexipol's website, but that he had not yet had a chance to do so.[50] Another vice president observed that law enforcement agencies can always call Lexipol to learn more about the people who develop policies.[51]

Bruce Praet was equally unforthcoming about Lexipol's employees in a recent deposition taken after Lexipol was sued over its Taser policy.[52] Praet testified that Lexipol identifies best practices by relying on their internal subject matter experts and feedback from their subscriber agencies.[53] Yet when Praet was directly asked whether Lexipol "employ[s] subject matter experts on different areas of law enforcement practices who determine what best practices are," he acknowledged that they did not.[54] He explained: "We don't have a specific subject matter expert on a specific topic, but a good number of our people are law enforcement background, so there's a wealth of information that we draw upon, depending on the subject."[55] Similarly, Praet could not (or would not) identify Lexipol employees who had particular expertise in Tasers.[56] Instead, he said, Lexipol "had a wealth of people who have a significant amount of information about Tasers, but not one person who was the go-to person."[57]

B. Products

On its website and in its promotional materials sent to potential law enforcement customers, Lexipol markets three main products: (1) a policy

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50. *See* Lexipol September Conference Call, *supra* note 9 (statement of Tim Kensok, Vice President, Prod. Mgmt., Lexipol); SECOND LEXIPOL POWERPOINT, *supra* note 9, at 8, 12 (responding to the authors' criticisms about a lack of transparency with pictures and brief descriptions of ten executives).

51. Lexipol September Conference Call, *supra* note 9 (statement of Leslie Stevens, Vice President, Legal Dep't, Lexipol).

52. In the deposition, Praet was repeatedly asked to identify employees involved in crafting Lexipol's 2008 Taser policy. After several nonresponsive answers, Praet was asked whether he could name a single person with whom he consulted about a Taser-related memo. Praet's response:

> A: [T]he staffing at Lexipol has changed so many times over 15 years, I couldn't tell you. All I can tell you is that whoever was on staff in 2009 at the time of this I probably would have consulted with several people.
>
> Q: Can you name any of those several people?
>
> A: That's my problem. I don't have a roster of who was on staff in 2009 to give you names, and I don't want to give you somebody who came on in January of 2010 or somebody who may have left in 2008. So . . . .

Praet Deposition, *supra* note 31, at 41. For additional details about the case, see *infra* note 237.

53. Praet Deposition, *supra* note 31, at 12.

54. *Id.*.

55. *Id.* at 12–13.

56. *Id.* at 21.

57. *Id.*

manual, (2) Daily Training Bulletins, and (3) implementation services.[58] In this section, we share what we have learned about each product.

1. Policy Manual.—Lexipol's signature product is its copyrighted policy manual.[59] Lexipol has a "global master" manual that is based on federal standards and best practices.[60] It has used this global master to create "state master" manuals that incorporate state-specific standards.[61]

There is limited public information available regarding how Lexipol goes about drafting the policies contained in its manuals. We know from speaking with executives at Lexipol that they work with a team of company attorneys and former law enforcement officials to review court decisions, legislation, and other materials applicable to a state.[62] Lexipol also considers media reports, client feedback, trends in law enforcement, and reports by outside groups including the Department of Justice, the American Civil Liberties Union (ACLU), and the National Institute of Justice.[63] Anecdotal evidence also plays a significant role in Lexipol's policy development process. As Bruce Praet explained in a deposition, "we're constantly getting anecdotal information, and I can't speak for everybody, but everybody on the Lexipol staff, when they become aware of something that may impact policy . . . they share that and then that is round-tabled, and if it has a policy impact, then that's incorporated into our content."[64]

The Lexipol vice presidents we interviewed offered little guidance about how Lexipol ultimately weighs and balances these various sources of

58. *See Lexipol Products & Services*, LEXIPOL, http://www.lexipol.com/law-enforcement/law-enforcement-products/ [https://perma.cc/LDS6-JGRA] (describing a "customizable, reliable and regularly updated online policy manual service, daily training bulletins on your approved policies, and implementation and management services to allow [Lexipol] to manage the administrative side of [an agency's] policy manual").

59. Lexipol vice presidents made clear that Lexipol offers a "policy manual," not a "procedure manual." Telephone Interview with Tim Kensok, Vice President, Lexipol, Leslie Stevens, Vice President, Lexipol, and Kevin Piper, Vice President, Lexipol (Feb. 10, 2017) [hereinafter Lexipol February Conference Call]. In Lexipol's view, a policy manual "[a]nswers major organizational issues," is "[u]sually expressed in broad terms," has "[w]idespread application," and "[c]hanges less frequently." FIRST LEXIPOL POWERPOINT, *supra* note 33, at 16. In contrast, a procedure manual "[d]escribes a process," is "[o]ften stated in detail," is "[p]rone to change," and has "[n]arrow application." *Id.*

60. Lexipol February Conference Call, *supra* note 59.

61. FIRST LEXIPOL POWERPOINT, *supra* note 33, at 15; *see also* Letter from John Fitisemanu, Client Servs. Representative, Lexipol, to Tammie Stilinovich, Officer, Long Beach Police Dep't (Feb. 28, 2014) (on file with authors) (stating that "Lexipol provides . . . [c]ustomized content for the state of California"). For a copy of Lexipol's California state master policy document, see LEXIPOL, CALIFORNIA STATE MASTER POLICE DEPARTMENT: POLICY MANUAL (n.d.), which the authors obtained through their public records request to the Irvine Police Department.

62. Lexipol February Conference Call, *supra* note 59.

63. FIRST LEXIPOL POWERPOINT, *supra* note 33, at 19, 21; Lexipol September Conference Call, *supra* note 9.

64. Praet Deposition, *supra* note 31, at 107.

information. They simply reported that policies are designed by looking at all available evidence and having all relevant employees weigh in on how the policies should be crafted.[65] As Bruce Praet similarly reported in his deposition, "if an issue comes up, typically, among the attorneys and subject matter experts that we have, we would, for lack of a better term, turkey shoot or brainstorm the issue and see what we could come up with [as] an appropriate response."[66] Once Lexipol decides to develop a policy, employees determine how the policy should be written. The vice presidents with whom we spoke described this process as "a challenge" that often results in disagreements between the legal team (which is focused on risk to its agency clients in the courtroom) and the content-development team (which is focused on risk to law enforcement officers on the street).[67] How these disagreements resolve "varies based on what the issue is and the timing."[68] Lexipol does not make public the substance of its deliberative process or the justifications for its policy decisions. Indeed, Lexipol appears to keep no discoverable records of its decisionmaking process regarding policy content.[69]

Agencies that contract with Lexipol are provided a draft state-specific policy manual for review.[70] The draft manual is typically accompanied by a diagram (reproduced in Figure 1) that captures the framework that Lexipol uses for categorizing the policies included in its manuals. According to this typology, some policies are required by federal or state law, whereas others are considered "best practices" or "discretionary." Lexipol's draft policy

65. Lexipol February Conference Call, *supra* note 59.

66. Praet Deposition, *supra* note 31, at 21.

67. Lexipol February Conference Call, *supra* note 59.

68. *Id.*

69. In a deposition about Lexipol's Taser policy, Bruce Praet was asked about the process by which the company wrote the policy and an advisory memorandum to its subscribers. Praet answered:

> I'm sure that I had communications with all of our people involved in the development of the policy, and we have a collaborative forum in which the attorneys and everybody on staff at Lexipol can brainstorm issues, so I'm sure there was a good deal of communication between myself as an attorney, other attorneys in the—on Lexipol's staff and those who might have any subject matter interest or expertise.

Praet Deposition, *supra* note 31, at 27. The attorney then asked for documentation regarding these conversations:

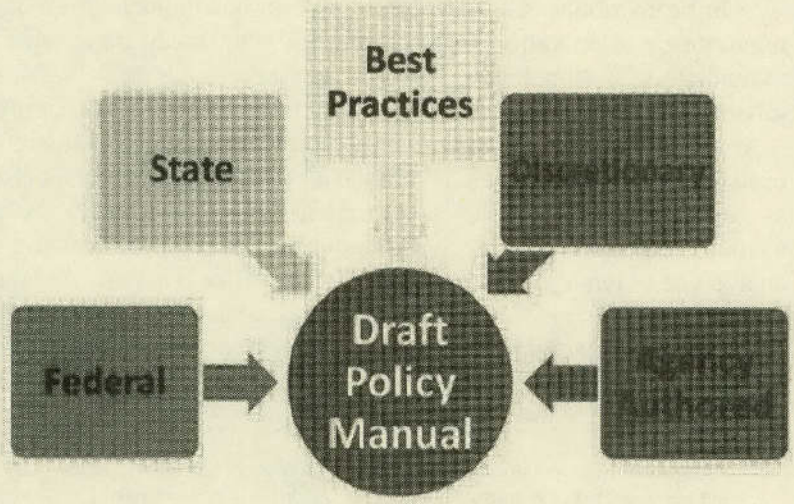
> Q: Do you know whether there are any e-mails regarding these communications?
> A: I doubt it.
> Q: Why is that? I mean, why would there not be?
> A: Because we don't communicate much by way of e-mail.
> Q: How would those communications take place?
> A: Um, I'd be guessing, and I don't want to guess, but I would imagine there would have been phone calls.

Id. at 27–28.

70. *See, e.g.*, LEXIPOL, LAW ENFORCEMENT POLICY MANUAL & DAILY TRAINING BULLETINS: PRESENTED TO COSTA MESA POLICE DEPARTMENT (2014) (on file with authors) (proposing a Law Enforcement Policy Manual to the Costa Mesa Police Department).

manuals are coded to inform readers of the categorization of each proposed policy.[71]

Figure 1: The Components of a Lexipol Policy Manual[72]



Jurisdictions can choose whether to adopt, reject, or modify each policy.[73] Lexipol advises its users to "fully understand the ramifications and use caution before changing or removing" policies derived from federal and state law.[74] Policies characterized as "best practices" are reportedly "considered the currently accepted best practice in the public safety field," and Lexipol advises adopters that "[t]his content may be changed if necessary, with caution."[75] Discretionary policies are described as those "that

71. *See, e.g.*, Invoice from Lexipol to Alameda Police Dep't (Sept. 26, 2007) (on file with authors) (referring to a "color coded draft").

72. Figure 1 was obtained from the Long Beach Police Department in response to our public records request. LEXIPOL PROPOSAL PRESENTED TO LONG BEACH POLICE DEP'T, LAW ENFORCEMENT POLICY MANUAL & DAILY TRAINING BULLETINS (Feb. 28, 2014) (on file with authors) [hereinafter LONG BEACH PROPOSAL].

73. *See, e.g.*, E-mail from Chris Hofford, Lieutenant, Baldwin Park Police Dep't, to authors (Nov. 7, 2016, 3:51 PM) (on file with authors) ("Policy changes proposed by Lexipol are addressed electronically in Lexipol's online environment. Proposed changes that we accept in part or whole are incorporated into the next released edition of the Policy Manual. Proposed changes that we reject are not retained.").

74. LEXIPOL, LEXIPOL CITATION FAQS: GUIDANCE FOR AGENCY ADMINISTRATORS ON THE USE OF CITATIONS AND EDIT LEVELS IN LEXIPOL POLICY MANUALS 4 (2015) (on file with authors) [hereinafter LEXIPOL CITATION FAQS].

75. DAN FISH, BILL MCAULIFFE & JEFF WITTENBERGER, SANTA CLARA POLICE DEPARTMENT PROJECT MANAGEMENT GUIDE AND POLICY IMPLEMENTATION PLAN 5 (2017) (on file with authors) [hereinafter SANTA CLARA POLICE DEPARTMENT POWERPOINT].

may or may not be important for your agency" and "may be changed or removed as needed."[76] Jurisdictions understand this message: as one agency representative told us in responding to our public records request, those Lexipol policies designated as "best practices" or "discretionary" are "optional," but those that are the "law" are required.[77]

In promotional materials, Lexipol describes its manual as "a complete regulatory and operational policy manual" that "may be accepted for use immediately."[78] Nonetheless, Lexipol does take some steps that enable local jurisdictions to customize their manuals. When Lexipol first begins working with a department, it asks the department to fill out a questionnaire that is used by the company to ensure that the terminology used in the manual (such as "officers" or "deputies") is consistent with that used by the particular agency.[79] Once Lexipol receives the questionnaire, its staff members spend an average of ten to fifteen hours "to further refine the manual to the specific needs of the agency."[80] Agencies may also work with Lexipol to customize certain policies or supplement the manual with original policy content.[81] For

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76. *Id.* Another Lexipol document describes discretionary content as:

> not necessarily a best practice, doesn't have a direct impact on risk or may not apply to your agency. . . . For example, the Administrative Communications Policy outlines specifications for letterhead, memorandum style, fax cover sheets, etc. It is appropriately classified [as] Discretionary since it is agency-specific and does not have a direct risk management impact.

LEXIPOL CITATION FAQS, *supra* note 74, at 5.

77. *See, e.g.*, Telephone Interview by Ingrid Eagly with Joseph May, Deputy Chief, Simi Valley Police Dep't (Nov. 23, 2016) (explaining which policies are mandatory and which ones are merely optional).

78. Letter from Martha Bereczky, Mktg. Coordinator, Lexipol, to Cliff Baumer, San Joaquin Sheriff Office (Aug. 27, 2008) (on file with authors).

79. *See* LEXIPOL, LEXIPOL LLC DELAWARE POLICY GUIDE 1 (2016), http://www.lexipol.com/wp-content/uploads/2016/10/DE-LE-Policy-Guide-Sheets-2016-10-10.pdf [https://perma.cc/ZMD2-9784] (explaining that the "implementation process begins when you complete the agency Questionnaire" and that the responses will be used to replace certain bracketed terms "with terminology familiar to your agency"); *see also* E-mail from Nicole Falconer, Account Manager, Lexipol, to Tyson Pogue, Lieutenant, Madera Cty. Sheriff's Dep't (Jan. 28, 2016, 2:35 PM) (on file with authors) (instructing Lt. Pogue to complete and return a questionnaire that would assist Lexipol "to define key titles and terms specific to your agency's structure and operation so the manual is consistent with how you operate"); Letter from John Fitisemanu, Client Servs. Representative, Lexipol, to Tammie Stilinovich, Officer, Long Beach Police Dep't (Feb. 20, 2014) (on file with authors) (explaining that Lexipol's "proprietary software allows efficient and accurate generation of a draft version of the manual from an online questionnaire"); Letter from Bruce D. Praet, Attorney at Law, to Pat Smith, Chief, Beaumont Police Dep't (Jan. 30, 2002) ("If you subscribe, the first phase of the manual development requires that you (or your assigned staff member) [] simply complete the questionnaire and return it at your earliest convenience.").

80. Letter from Dan Merkle, CEO, Lexipol, to Bob Gustafson, Captain, City of Orange Police Dep't (Oct. 20, 2003) (on file with authors).

81. For example, an official from the Los Angeles Port Police Department explained in responding to our public records request that his agency modified the Lexipol policies before accepting them so that they would match the agency's practices. Telephone Interview by Ingrid Eagly with Lt. Kevin McCousky, L.A. Port Police Dep't (Dec. 1, 2016).

those agencies that wish to author some of their own policies, Lexipol issues a style guide in which it describes "house rules for spelling, punctuation, citations and other style issues."[82]

Lexipol executives informed us that they also make policy "guide sheets" available to their subscribers that offer additional information agencies can use when deciding whether to customize their manuals.[83] But when we requested a copy of this policy guide, Lexipol refused to provide us with a copy[84] and none of the California agencies we queried provided us with guide sheets or a policy guide in response to our public records requests.[85] Indeed, when we asked a detective at the Fontana Police Department—a Lexipol subscriber—about Lexipol's policy guide, he said that they had never "heard of" or "seen" such a guide.[86] Lexipol executives conceded that the guide is a "well-kept secret" because it is difficult for subscribers to access online.[87] Lexipol marketing material that we obtained from the Santa Clara Police Department included a single sample "guide sheet" for a policy on Records Release and Security. The sample "guide sheet" stressed the necessity of adopting Lexipol's policy with little or no modification: "This is a highly recommended policy that all agencies should have as part of their manual. . . . [W]e have provided you with a comprehensive policy . . . . [I]t is unlikely that you will want to modify it to any great extent."[88]

The Lexipol-issued policy manuals we reviewed from California law enforcement agencies follow a nearly identical format.[89] After an initial page concerning the law enforcement code of ethics and a page for a mission statement, there is a table of contents that covers the role of law enforcement officers, the organizational structure of the department, general operations,

82. LEXIPOL, LEXIPOL STYLE GUIDE 3 (2015), http://www.lexipol.com/wp-content/uploads/2016/10/StyleGuide_2015.pdf [https://perma.cc/H59U-W6D7].

83. Lexipol September Conference Call, *supra* note 9.

84. E-mail from Tim Kensok, Vice President, Prod. Mgmt., Lexipol, to authors (Sept. 13, 2017, 7:27 AM) (on file with authors) ("We would not be able to give you a copy of the entire policy guide."). Kensok did suggest that we could try to get a policy guide from one of Lexipol's subscribers through our public records requests, but the company reported that it would not provide us with a copy of its copyrighted materials. *See id.*

85. After Lexipol informed us of the existence of a "policy guide," we followed up with several California agencies to request a copy, but none were provided.

86. Telephone Interview by Joanna Schwartz with Matthew Roth, Detective, Custodian of Records, Fontana Police Dep't (Oct. 2, 2017).

87. Lexipol September Conference Call, *supra* note 9. Lexipol executives told us that they are working to make it easier for customers to access the policy guide. *Id.*

88. SANTA CLARA POLICE DEPARTMENT POWERPOINT, *supra* note 75, at 10.

89. In this project, we do not analyze the California departments' policy manuals to assess the frequency or extent to which departments customize Lexipol's California state master policies. Lexipol has informed us that its subscribers change, on average, 20% of the manual text, but the company has not assessed whether or to what extent those changes are substantive. *See infra* note 212 and accompanying text.

patrol operations, traffic operations, investigation operations, equipment, support services, custody, and personnel.[90] Each section has several policies, and each policy has an identical numbering system and title. For example, Policy 310 concerns "Officer-Involved Shootings and Deaths"; Policy 402 concerns "Racial- or Bias-Based Profiling"; and Policy 1014 concerns "Sick Leave."

2. Daily Training Bulletins.—Daily Training Bulletins (DTBs) are the second principal component of the Lexipol platform. The company describes DTBs as a system of short "training scenarios" that give departments and officers the ability to understand their policies and apply them in practice.[91]

The concept of short daily trainings is based on founder Gordon Graham's philosophy that "every day is a training day."[92] The approach focuses on "high risk, low frequency events" that, according to Lexipol, "pose the greatest risk to agencies and their personnel."[93] DTBs are made available to agency personnel via any web-enabled device, including a mobile phone, in-car computer, or desktop computer.[94] Company executives informed us that each DTB training is designed to be completed in only two minutes.[95] They explained that this is because two minutes of daily training—which amounts to one hour per month and twelve hours per year—is sufficient to satisfy minimum police training requirements set by some states' Peace Officer Standards and Training (POST) organizations.[96]

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90. *See, e.g.*, BREA POLICE DEPARTMENT: POLICY MANUAL 3–6 (2016) (on file with authors).

91. FIRST LEXIPOL POWERPOINT, *supra* note 33, at 29.

92. Rachel Cisto, *City Cleaning Up Tax Rules*, DAILY NEWS-RECORD (Mar. 7, 2016), http://nl.newsbank.com/nl-search/we/Archives?p_action=doc&p_docid=15B7618C0ED53208&p_docnum=129 [https://perma.cc/C88G-CE6B].

93. ROSEMARIE CURRAN, LEXIPOL OVERVIEW FOR BEVERLY HILLS POLICE DEPARTMENT: CALIFORNIA LAW ENFORCEMENT POLICY MANUAL AND DAILY TRAINING BULLETINS 9 (2016) (on file with authors); *see also* Agreement Between Lexipol and Reedley Police Dep't for Use of Daily Training Bulletins (Aug. 18, 2014), http://www.reedley.com/departments/city_clerk/agreements_contracts_and_leases/PDFs/Lexipol%20Addendum%20to%20Online%20Subscription%20Agreement%20%20-%20August%202014.pdf [https://perma.cc/3VZA-U3B8] (offering a subscription to Lexipol's DTB online training program and describing its design and features).

94. SECOND LEXIPOL POWERPOINT, *supra* note 9, at 4.

95. *Id.* (clarifying that two-minute trainings add up to an hour per month and twelve hours per year, the minimum that state-required police officer standards and trainings (POST) require).

96. *Id.*; *see also* Lexipol, *Four Ways to Integrate Policy into Police Training*, http://www.lexipol.com/news/4-ways-to-integrate-policy-into-police-training/ [https://perma.cc/3X6J-LTJ2] (asserting that law enforcement agencies in Kansas and Utah have used Lexipol's DTBs to satisfy their states' POST requirements). California's POST requires that its law enforcement officers complete at least twenty-four hours of training every two years. *See* CAL. CODE REGS. tit. 11, § 1005 (2017) (requiring that "[e]very peace officer . . . satisfactorily complete the CPT requirement of 24 or more hours of POST-qualifying training during every two-year CPT cycle"). Yet, we learned through our public records requests that California's POST has twice declined to certify Lexipol as a provider of state-approved trainings for California law enforcement agencies. *See infra*

Figure 2: A Lexipol Daily Training Bulletin[97]

Daily Training Bulletin - Review Question
6 / 1 / 2007

Please answer the following question, and submit your response using the button at the bottom of the page. You may change your answer at any time prior to submission.

DEADLY FORCE (Furtive Movements)

While patrolling late one night, you monitor a BOLO broadcast on a vehicle containing multiple armed robbery suspects. The suspects committed a robbery of a convenience store, killing the clerk with a shotgun. Several minutes later, you observe the suspect vehicle turn in front of you, in a remote part of the city. You begin following the vehicle and advise dispatch of its location. Before backup officers arrive, the vehicle abruptly stops at the right curb of the highway. You stop behind the vehicle, at which time the suspects begin looking in your direction and making numerous furtive movements within the vehicle.

ISSUE: An officer may use deadly force to protect him or herself or others from what they reasonably believe would be an immediate threat of death or serious bodily injury.

☐ True
☐ False

REFERENCE: 300 DEADLY FORCE APPLICATIONS

ANALYSIS:

Policy and law allow an officer to use deadly force to protect him or herself or others from what they reasonably believe would be an immediate threat of death or serious bodily injury. When determining whether or not to apply any level of force and evaluating whether an officer has used reasonable force, a number of factors should be taken into consideration. In this worst-case scenario, you are suddenly confronted with a potential threat of death or serious bodily injury. Any evaluation of the use of deadly force must include whether or not the threat was immediate. Because you are outnumbered by armed suspects without backup officers present, you should take immediate steps, consistent with your training, to place yourself in a position of cover. Although the use of deadly force would not be immediately appropriate in this situation, the circumstances could rapidly change if the suspects were to exit their vehicle and/or display a weapon. Another tactical option to consider in this scenario would have been to continue driving past the suspect vehicle once it stopped at the right curb. Apprehension can then be accomplished after sufficient resources arrive on scene to better protect the safety of officers and citizens.

CONCLUSION:

This scenario represents a high-risk, low frequency event. It is recognized that officers are expected to make split-second decisions and that the amount of an officer's time available to evaluate and respond to changing circumstances may impact his/her decision. Constant training in tactics and policy is the key to ensuring a successful resolution.

Figure 2 contains a sample DTB taken from Lexipol's promotional materials. According to Lexipol's founding CEO Dan Merkle, DTBs follow

notes 219–224 and accompanying text for further discussion of the reasons California's POST declined to certify Lexipol DTBs as sufficient to satisfy their training requirements.

97. Figure 2 was obtained from the San Joaquin Sheriff's Office in response to our public records request.

"the well-respected 'IRAC' (Issue, Rule, Analysis, Conclusion) method of training commonly used in law schools."[98] Using this standardized IRAC format,[99] all DTBs begin with a three to four sentence scenario that could occur in the field.[100] Next, the DTB provides the number of the Lexipol policy that guides police decisionmaking in the scenario.[101] The officer is asked to respond to a multiple choice or true/false question that highlights application of the policy to the scenario.[102] Finally, the DTB provides a short analysis of why the policy applies and summarizes the learning objective for the training.[103]

For those departments that choose to supplement their Lexipol policy manuals with DTBs, officers can receive one of these short trainings each day during roll call. As Deputy Chief of the Simi Valley Police Department explains in an advertisement on Lexipol's web page: "It can be challenging for the supervisor to come up with relevant topics for roll call training, but having the DTBs gives us a pool of topics to choose from."[104] Lexipol keeps a record of each officer's participation in the training exercises.[105]

3. Implementation Services.—In addition to the policy manual and DTBs, Lexipol offers departments a range of consulting services to assist in implementing and managing their Lexipol products.[106] For example, agencies

98. Letter from Dan Merkle, CEO, Lexipol, to Paul Cappitelli, Director, California Commission on Peace Officer Standards and Training (June 4, 2009) (on file with authors).

99. *See* LEXIPOL STYLE GUIDE, *supra* note 82, at 5–7 (describing the standard style format for Lexipol's DTBs).

100. Letter from Martha Bereczky, *supra* note 78.

101. *Id.*

102. *Id.*; *see also* MIKE DIMICELI & ALAN DEAL, CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING, REPORT ON APPEAL OF LEXIPOL TO POST COMMISSION 9, JULY 7, 2009 (on file with authors) [hereinafter POST LEXIPOL REPORT] (noting that the Commission reviewed paper versions of the DTBs and all contained a "single true/false question at the end").

103. Letter from Martha Bereczky, *supra* note 78.

104. Shannon Pieper, *Simi Valley Police Department: Q&A with Deputy Chief John McGinty*, LEXIPOL (May 17, 2016), http://www.lexipol.com/casestudycategory/law-enforcement/page/2/ [https://perma.cc/WV2Z-QRVW].

105. Lexipol February Conference Call, *supra* note 59; *see also* Letter from Dan Merkle, *supra* note 98, at 2 (explaining that "[a]ll DTBs and all training records are retrievable from Lexipol's searchable database").

106. *Implementation and Management Services*, LEXIPOL, http://www.lexipol.com/law-enforcement/law-enforcement-products/implementation-management-services/ [https://perma.cc/RE9K-HWTY]. In a call with company executives, they explained that implementation services have been offered since 2014 and that currently about half of their new customers purchase at least some implementation services. For example, for a few thousand dollars, Lexipol will provide the agency with a "cross-reference" guide that compares its current manual to the Lexipol guide. Full implementation services, which give the agency access to a "team of people over an 18-month period," might cost as much as $200,000. Lexipol executives did not provide us with information about the total number of law enforcement clients that have purchased these services. Lexipol September Conference Call, *supra* note 9.

can hire Lexipol to draft custom policies based on specific needs, as well as to ensure that departments' DTBs are consistent with any custom policies that the departments have modified.[107] Agencies can choose between a basic "silver plan" that provides a "quick start," or go with a "platinum" plan that will "help with implementation."[108] As a Lexipol executive told the Beverly Hills Police Department in 2016, departments can retain a "Project Manager" to "facilitate" the "entire project" and "do all the heavy lifting when it comes to edits, linking policy to procedure and anything else you would need."[109]

4. Cost.—The cost of a Lexipol subscription varies significantly depending on the size of the agency and the services purchased. The initial start-up cost for the first year generally includes access to the policy manual, policy updates, and DTBs. The cost of a basic subscription to the Lexipol service depends upon the size of the agency. For example, Lexipol charged the Calaveras County Sheriff's Office, which has fifty deputies, $8,600 for the first year of services;[110] Lexipol's proposal to the Simi Valley Police Department for up to 150 full-time sworn officers priced the first year at $15,150.[111] The larger Long Beach Police Department, which is no longer a Lexipol client,[112] was quoted $24,950 for up to 820 full-time sworn officers.[113]

Once an agency adopts the Lexipol manual, it can choose to subscribe to Lexipol's updating service, as well as its Daily Training Bulletins, for an additional fee.[114] Subscribers to the updating service will periodically receive revised policies from Lexipol.[115] When departments accept these policy

107. *See generally* LEXIPOL, LEXIPOL DTB AND POLICY MANUAL UPDATE ADMINISTRATION SERVICES (2015) (on file with authors) (provided by the San Leandro Police Department).

108. E-mail from Bill McAuliffe, Operations Manager, Lexipol, to Tony Lee, Beverly Hills Police Dep't (Nov. 18, 2016, 1:41 PM) (on file with authors).

109. *Id.*

110. Agreement Between Lexipol and Calaveras Cty. Sheriff's Office for Use of Subscription Material (Aug. 1, 2015) (on file with authors).

111. LEXIPOL, LAW ENFORCEMENT POLICY MANUAL & DAILY TRAINING BULLETINS: PRESENTED TO SIMI VALLEY POLICE DEPARTMENT 7 (2014) (on file with authors).

112. E-mail from Tim Kensok, *supra* note 84 (advising authors that Long Beach Police Department is no longer a Lexipol client); Letter from Robert G. Luna, Chief, Long Beach Police Dep't, to Peter Roth, Chief Customer Officer, Lexipol (Jan. 12, 2016) (on file with authors) (cancelling Lexipol subscription).

113. LONG BEACH PROPOSAL, *supra* note 72, at 7.

114. Praet Deposition, *supra* note 31, at 10–11 (explaining that the "updating component" Lexipol offers "is something that most agencies don't have the resources for").

115. *See, e.g.*, LEXIPOL, POLICY MANUAL UPDATE: RELEASE NOTES 1 (June 2013) (on file with authors) (provided by the Folsom Police Department) [hereinafter FOLSOM UPDATE] (describing "a list of recommended changes and updates to your manual"); *see also* Telephone Interview by Joanna Schwartz with Lon Milka, Captain, Rocklin Police Dep't (Nov. 8, 2016) (explaining that when Rocklin began working with Lexipol in 2004, Lexipol would send out an updated manual every six months, but now Lexipol uses software that sends out individual amended policies every few weeks to be accepted or rejected by the jurisdiction).

revisions, they are incorporated automatically into the existing policy manual.[116] Again, prices for these services vary based on the size of the department. For example, the Simi Valley Police Department (which has 127 sworn officers) was quoted $13,250 for ongoing updates and DTBs,[117] while the Long Beach Police Department (which has 968 sworn officers) was quoted $64,500.[118]

Beyond these standardized services, jurisdictions can pay additional fees for consulting services. For example, the Baltimore (Maryland) Police Department paid Lexipol $340,000 in 2013 for "overhauling the manual providing the basis for Standard Operating Procedures and providing professionally created training bulletins."[119] Similarly, the New Orleans Police Department (NOPD) paid Lexipol $295,000 to help develop policies required by the Department of Justice following a civil rights investigation of the NOPD.[120]

Sometimes the costs for Lexipol are partly or wholly covered by municipal insurers.[121] More often, local jurisdictions pay for Lexipol's

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116. *See* FOLSOM UPDATE, *supra* note 115, at 1 ("Each time you accept an update the new content will automatically replace your current content for that section of your manual."); Telephone Interview with Lon Milka, *supra* note 115.

117. LEXIPOL, TERMS AND CONDITIONS FOR USE OF SUBSCRIPTION MATERIALS (2014) (on file with authors) (provided by the Simi Valley Police Department).

118. E-mail from Tammie Stilinovich, Officer, Long Beach Police Dep't to Randy Allan (Feb. 26, 2014, 10:06 AM) (on file with authors).

119. Justin Fenton & Doug Donovan, *Use of Local Foundation Allowed Baltimore Police Surveillance Project to Remain Secret*, BALT. SUN (Aug. 25, 2016), http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-community-foundation-20160824-story.html [https://perma.cc/EY7J-YJZA].

120. Charles Maldonado, *Paying for the Consent Decree*, GAMBIT (Aug. 14, 2012), https://www.bestofneworleans.com/gambit/reform-at-a-cost/Content?oid=2057022 [https://perma.cc/5VYT-V62X].

121. *See, e.g.*, E-mail from Cathie Bigger-Smith, Risk Control Consultant, to Steve Pangelinan, Commander, Milpitas Police Dep't (Apr. 22, 2008, 7:12 AM) (on file with authors) (reporting that the municipal insurer—the Association of Bay Area Governments—would cover the cost of Lexipol for the Milpitas Police Department); Invoice from Lexipol to Porterville Police Dep't (June 1, 2016) (on file with authors) (noting that the DTB subscription service and management service invoice was "Paid by CSJVRMA [the Central San Joaquin Valley Risk Management Authority]"); E-mail from Brenda Haggard, Assistant City Clerk, City of Elk Grove, to Ingrid Eagly (Feb. 13, 2017, 9:37 AM) (on file with authors) ("The City does not directly contract with Lexipol; rather, the City is a member of the Northern California Cities Self Insurance Fund (NCCSIF), who provides various services to the City, including on-line policy services via Lexipol."); *see also* John Rappaport, *Cops Can Ignore Black Lives Matter Protestors. They Can't Ignore Their Insurers*, WASH. POST (May 4, 2016), https://www.washingtonpost.com/opinions/cops-can-ignore-black-lives-matter-protesters-they-cant-ignore-their-insurers/2016/05/04/c823334a-01cb-11e6-9d36-33d198ea26c5_story.html?utm_term=.0d4b1e53381c [https://perma.cc/BJ4K-VKQ9] ("Insurers work closely with police departments on policies and training. . . . The companies sometimes bring in outside consultants—usually police veterans—to do this work or send departments off-the-shelf rules from policy-writing services such as Lexipol."). For further discussion of the role insurance plays in police reform—and in the proliferation of Lexipol policies—see *infra* notes 133–134, 149, 179, 266–269 and accompanying text.

products directly through their general city or county budgets,[122] or through the law enforcement agency's budget.[123] One jurisdiction reported using forfeiture funds to pay Lexipol.[124]

C. *Sales Techniques*

Lexipol LLC engages in an aggressive marketing campaign with its potential customers. The company hosts booths at government and law enforcement conventions to promote its wares.[125] For example, in 2017,

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122. *See, e.g.*, Lexipol Bill to the City of San Leandro (June 30, 2011) (on file with authors) (reflecting that the cost of Lexipol's online policy manual should be billed to the finance department of the City of San Leandro and delivered to the San Leandro Police Department); Purchase Order from the City of Oxnard, to Lexipol (Jan. 19, 2016) (on file with authors) (billing the city for the police department's contract with Lexipol); Centralized Purchase Order from the Cty. of Ventura Gen. Servs. Agency, to Lexipol (Nov. 20, 2009) (on file with authors) (billing the county for Lexipol subscription materials to be shipped to the sheriff's department); Purchase Order from the City of Riverside, Fin. Dep't—Purchasing Div., to Lexipol (Mar. 16, 2011) (on file with authors) (billing the city for a Lexipol subscription service to update the police department manual); Purchase Order from the Cty. of San Joaquin, Purchasing & Support Servs., to Lexipol (Sept. 12, 2008) (on file with authors) (paying Lexipol invoice for the sheriff's department from the county budget); Purchase Order from the City of Corona, Purchasing Div., to Lexipol (July 1, 2006) (on file with authors) (billing the city for a Lexipol subscription for the police department); Purchase Order from the City of Richmond, Accounts Payable, Fin. Dep't, to Lexipol (Jan. 20, 2016) (on file with authors) (listing the City of Richmond as the "bill to" addressee for Lexipol's contract with the Richmond Police Department); Purchase Order from the City of El Monte to Lexipol (Mar. 14, 2007) (on file with authors) (billing the police department's Lexipol contract price to the City of El Monte); Check from the City of Newport Beach to Lexipol (June 22, 2007) (on file with authors) (paying $4,950 out of city funds to Lexipol); Purchase Order from the City of Roseville, Purchasing Dep't, to Lexipol (Mar. 14, 2016) (on file with authors) (paying the Lexipol invoice on behalf of the city's police department); Check from the City of Rialto, to Lexipol (Aug. 25, 2006) (on file with authors) (making a payment of $8,950 to Lexipol out of city funds).

123. *See, e.g.*, Cty. of Madera Board Letter Approving Lexipol Contract (Feb. 23, 2016) (on file with authors) (seeking authorization to purchase Lexipol's service, with funds coming from the sheriff's department's budget); E-mail from Kristie Velasco, Fin. Office Prof'l, Santa Barbara Sheriff's Dep't, to Craig Bonner, Commander, N. Cty. Operations Div. (July 8, 2016, 11:38 AM) (on file with authors) (obtaining approval to have the sheriff's department pay the invoice for Lexipol); Purchase Order from the City of Glendale, to Lexipol (Sept. 5, 2007) (on file with authors) (billing the police department for Lexipol's policy service); E-mail from Suzanne Perez, City of Irvine, to Mike Hallinan, Commander, City of Irvine Police Dep't (Apr. 18, 2016, 12:19 PM) (on file with authors) (indicating that Irvine's "OPD will handle payment" and that police department funds have been used "in the past"); E-mail from Deirdre Rockefeller-Ramsey, Police Bus. Manager, Fremont Police Dep't, to John Harnett, Lieutenant, Fremont Police Dep't (Feb. 8, 2016, 2:17 PM) (on file with authors) (indicating that the police department will budget $5,750 for Lexipol services).

124. *See* Memorandum from Lili Hadsell, Chief of Police, City of Baldwin Park, to the Mayor and Members of City Council, City of Baldwin Park (June 3, 2010) (on file with authors). "Forfeiture funds" are funds collected through civil forfeiture, which are sometimes used by law enforcement agencies for various needs. For further discussion of civil forfeiture, see generally Beth A. Colgan, *Fines, Fees, and Forfeitures*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 22 (2017).

125. Public records from the San Francisco Sheriff proclaim that Lexipol will be at "booth 1024" at the 2016 National Sheriffs' Association Annual Conference and Exhibition. E-mail from marketing@lexipol.com, to Carl Koehler, S.F. Sheriff's Dep't (June 6, 2016, 12:01 PM) (on file with authors); *see also* E-mail from Nicole Falconer, Account Manager, Lexipol, to Christian

Lexipol representatives attended the Kansas Sheriff's Association Fall Conference, the New Jersey Association of Chiefs of Police Annual Mid-Year Meeting, and the Oregon State Sheriff's Association Annual Conference, among other conferences and events.[126] Lexipol clients who visited the Lexipol booth at the 2016 conference for the International Association of Chiefs of Police could "enter [its] drawing to win a free iPad air 2."[127]

Lexipol also attracts clients by sponsoring free webinars on hot policing issues such as "Immigration Violations & Law Enforcement" or "How Not to Speak to the Media" that may encourage departments to purchase their services.[128] One e-mail sent to the Madera Police Department explained that state law "offers unprecedented protection from liability risks associated with police pursuits" but that "[m]any law enforcement agencies fall short in meeting these requirements and are exposing their cities and counties to much greater financial risk than necessary."[129] The e-mail then invited representatives of the department to attend a free thirty-minute educational webinar.[130]

Some of the solicitation correspondence we collected reveals that Lexipol researches the target departments to learn about their particular law enforcement challenges. For example, in 2015 Lexipol approached the Chief of the San Francisco Police Department, writing: "I recognize the current challenges your department is facing. I reviewed your policies and they are severely outdated and insufficient. Case in point, you don't have a Department's Use of Social Media policy and your Use of Force policy hasn't been updated/revised since 1995."[131] Lexipol provided the Chief with sample policies and a few ideas for improving his department's policies, and asked for a fifteen-minute call to discuss Lexipol's services. Similarly, a Lexipol Client Services Representative reached out to the Chief of the Beverly Hills Police Department to complement him for "the amazing manner in which" his officers "presided over the Trayvon Martin protests recently," before going on to warn that "with recent racial tensions rising, now would be the

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Lemoss, Lieutenant, City of Santa Cruz Police Dep't (Oct. 13, 2016, 10:59 PM) (on file with authors) (inviting Lemoss to come by Lexipol's booth at the International Association of Chiefs of Police Convention in 2016).

126. *Event Calendar*, LEXIPOL, http://www.lexipol.com/event-calendar/ [https://perma.cc/4VZD-GBJZ].

127. E-mail from Nicole Falconer, *supra* note 125.

128. *Lexipol Webinars: Timely, Free Education on Important Issues*, LEXIPOL, http://www.lexipol.com/webinars/ [https://perma.cc/HDU2-WRV5].

129. E-mail from John Fitisemanu, Senior Account Exec., Lexipol, to undisclosed recipients (Oct. 5, 2015, 2:40 PM) (on file with authors) (provided by the Madera Police Department).

130. *Id.*

131. E-mail from John Fitisemanu, Senior Account Exec., Lexipol, to Greg Suhr, Chief of Police, S.F. Police Dep't (May 28, 2015, 5:03 PM) (on file with authors).

perfect opportunity to re-examine ways Lexipol can help ensure the safety of your officers to avoid any potential risks."[132]

Lexipol also appears to have directed its advertising to municipal liability insurers that provide liability insurance to small governments. Our research has revealed that insurance companies will sometimes reduce their annual premium for cities that contract with Lexipol, or even pay outright for their insureds' Lexipol contracts.[133] In California, for example, more than 100 law enforcement agencies are given access to Lexipol as a benefit of their insurance agreement with one large insurer, the California Joint Powers Insurance Authority.[134]

Lexipol has a standard sales pitch that was repeated in communications with multiple California jurisdictions. The message describes the high costs of "[o]utdated [p]olicy and [l]ack of [t]raining," measured in "Increased Risk and Liability to Deputies, Department and Community," "Damaged [sic] to Reputation, Negative news Headlines and/or Viral Footage," "Lawsuits," "Legal Fees," "Settlements," "Injury and/or Death," and "Distrust with the Community."[135] Lexipol's solicitation e-mails to department officials include catchy taglines such as "Are Outdated Policies Putting Your Agency at Risk?,"[136] "Is Your Use of Force Policy Properly Protecting You?,"[137] and "What is the Cost of Outdated Policy and Lack of Training?"[138] After attracting the attention of top officials, Lexipol makes a web-based or in-person presentation to the department that highlights the Lexipol approach

132. E-mail from John Fitisemanu, Client Servs. Representative, Lexipol, to David L. Snowden, Chief of Police, Beverly Hills Police Dep't (July 29, 2013, 2:09 PM) (on file with authors).

133. *See, e.g.*, Pub. Agency Risk Sharing Auth. of Cal., *Training Resources*, PARSAC, http://www.parsac.org/services/trainingresources/ [https://perma.cc/F8VW-G64D] ("[Public Agency Risk Sharing Authority of California] subsidizes each member's subscription to Lexipol . . . .").

134. *See* Alex Mellor, *Legislative Update: Law Enforcement Must Report Details on Shootings and Uses of Force Under New California Law*, CAL. JPIA (Jan. 2016), https://cjpia.org/news/newsletter/newsletter-article/2016/01/28/january-2016—issue-47#four [https://perma.cc/MP67-4QTL] (reporting that in January 2009, Lexipol and CJPIA entered a "strategic business partnership . . . whereby the California JPIA funds the cost of a member's participation in the Law Enforcement Policy Manual Update and Daily Training Bulletin subscriptions"); Cal. Joint Powers Ins. Auth., *Members*, CAL. JPIA, https://www.cjpia.org/join/members [https://perma.cc/X5TD-JQ67] (listing over 100 member agencies in California).

135. E-mail from James Quanico, S.F. Sheriff's Dep't, to Mark Nicco, S.F. Sheriff's Dep't (Nov. 21, 2016, 1:02 PM) (forwarding e-mail from Lexipol Senior Account Executive John Fitisemanu, with the subject line "The Cost of Policies?"); *see also About Lexipol*, LEXIPOL, http://www.lexipol.com/about-us/ [https://perma.cc/ALA5-L7WM] (click on video) (promoting Lexipol's service as allowing police, fire, and custody departments to have "up-to-date policies" that will "protect your agency today" by offering "legally defensible content").

136. E-mail from marketing@lexipol.com, *supra* note 125.

137. *Id.*

138. E-mail from John Fitisemanu, Senior Account Exec., Lexipol, to James Quanico, S.F. Sheriff's Dep't (Feb. 24, 2016, 4:28 PM) (on file with authors).

and the benefits of entering into a contract with Lexipol.[139] Lexipol may also make presentations to city council or other government officials who make the ultimate decision about whether to purchase Lexipol's services.

Although Lexipol describes many different types of risk in its marketing materials, liability risk plays the central role. As Lexipol's CEO Dan Merkle stressed in a letter to Captain Bob Gustafson of the Orange Police Department, the value in Lexipol's service is that it provides "[p]olicies that are court tested and successful in withstanding the numerous legal challenges prevalent today."[140] Lexipol constantly warns its potential customers that without Lexipol they are at risk of having their outdated policies turn up "downstream in litigation" and make the day for "plaintiff's lawyers."[141] In a document prepared for the Chula Vista Police Department, Lexipol summed up why its clients choose Lexipol this way: "Law Enforcement agencies by their nature are a high frequency target for litigation. It is the most compelling reason why our customers choose our services."[142]

Lexipol does not outline the precise ways in which updated policy manuals will reduce liability risk, but it does report that its products have in fact "helped public safety agencies across the country reduce risk and avoid litigation."[143] In a PowerPoint presentation offered to several departments in our study, Lexipol included a slide (reproduced as Figure 3) claiming that adoption of Lexipol policies was associated with reduced litigation costs. According to the slide, Lexipol's Oregon clients that "fully adopted" Lexipol reportedly had a 45% reduction in the "frequency of litigated claims" and a 48% reduction in the "severity of claims paid out," as compared to nonparticipating agencies.[144]

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139. *See, e.g.*, E-mail from Rosemarie Curran, Senior Account Exec., Lexipol, to Rob Ransweiler, Admin. Lieutenant, El Cajon Police Dep't (Oct. 26, 2016, 10:05 AM) (on file with authors) (setting up a web-based "go to meeting" regarding Lexipol's services as part of their marketing to the department).

140. Letter from Dan Merkle, CEO, Lexipol, to Bob Gustafson, Captain, City of Orange Police Dep't (Oct. 20, 2003) (on file with authors).

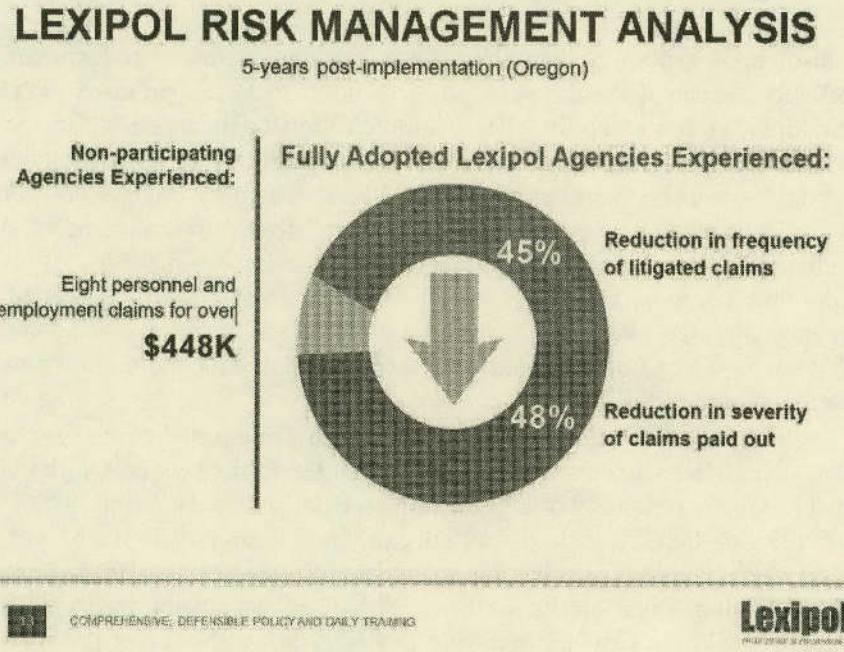
141. GORDON GRAHAM, REAL RISK MANAGEMENT: AN EXCLUSIVE ARTICLE SERIES BROUGHT TO YOU BY LEXIPOL (pt. 2) 5 (2016), http://www.lexipol.com/wp-content/uploads/2016/06/Lexipol_Real_Risk_Management_Part_2.pdf [https://perma.cc/FY3T-BJ88].

142. LEXIPOL, INDEMNIFICATION RATIONALE (n.d.) (on file with authors) (provided by the Chula Vista Police Department).

143. Donna Thompson, *Ilion Board OKs Policy Service for Police*, TIMES TELEGRAM (Dec. 22, 2015), http://www.timestelegram.com/news/20151222/ilion-board-oks-policy-service-for-police [https://perma.cc/7AU3-WTLH].

144. *See* CURRAN, *supra* note 93, at 13.

Figure 3: Lexipol Risk Management Analysis[145]



Other Lexipol promotional materials tout similar litigation-cost savings. Materials provided to the San Francisco Police Department in 2016 quoted one risk management association as saying this about Lexipol: "Two years post-Lexipol implementation, perhaps the most positive trend is that Lexipol users have 69% fewer litigated claims compared to pre-Lexipol implementation. And, the claims that are litigated have, on average, $7k paid out instead of $20k pre-Lexipol."[146] A company press release from 2014 claimed that "a 10-year third-party study demonstrated a 54% decrease in litigated claims and a 46% reduction in liability for agencies that adopted Lexipol."[147] Lexipol additionally provided us with marketing materials that tout "37% fewer claims," "45% reduced frequency of litigated claims," "48% reduction in severity of claims," and "67% lower incurred costs."[148] Lexipol's promotional materials identify insurance company claims data as the source

145. Figure 3 was obtained from the Beverly Hills Police Department in response to our public records request. *Id.*

146. LEXIPOL, THE LEXIPOL ADVANTAGE: LAW ENFORCEMENT 2 (n.d.) (emphasis omitted) (on file with authors) (provided by the San Francisco Police Department).

147. Chris Witkowsky, *Riverside Company Acquires Lexipol*, PE HUB NETWORK (Aug. 22, 2014), https://www.pehub.com/2014/08/riverside-company-acquires-lexipol/ [https://perma.cc/4JXW-42AP].

148. E-mail from Tim Kensok, *supra* note 84 (attaching a slide reportedly used by Lexipol's marketing staff titled "Proven Customer Results").

for these findings, but Lexipol provided us with no dataset, study, or other evidence to support these assertions by the company.[149]

Lexipol's marketing materials also contain detailed testimonials of jurisdictions explaining why they chose to adopt Lexipol. The justifications offered repeatedly echo Lexipol's claims that its products insulate jurisdictions from liability. For example, Sheriff Blaine Breshears of the Morgan County Sheriff's Office in Utah explains in an advertisement on Lexipol's website that after attending "a class taught by Lexipol co-founder and risk management expert Gordon Graham," he became concerned that his outdated policy manual "could actually be a serious liability."[150] After adopting Lexipol, however, Sheriff Breshears successfully defended his agency against a use of force lawsuit: "[A]s soon as the attorneys discovered that we have Lexipol, they said, 'We won't have an issue there.' Our policies were never in question."[151]

In the records we obtained from 200 California jurisdictions, we found that several departments justified the cost of Lexipol's products with claims that Lexipol's policies would protect them from possible lawsuits. The Chief of Police of the City of Baldwin Park explained in a memo to the Mayor and City Council that "[n]ot having an updated policy manual [from Lexipol] could result in litigation against the city."[152] The Riverside Police Department similarly told the City's Purchasing Division that without Lexipol it risked "continuing to fall behind as court decisions, laws, and law enforcement practices change. This deficiency can potentially expose the City, Department, and Officers to unnecessary liability and harm."[153] And the City of South San Francisco's Chief of Police told the Mayor and City Council that Lexipol would "assist in mitigating any litigation that is related to the policies of the Police Department."[154]

In addition to litigation-risk reduction, Lexipol promotes its products as cost effective by saving jurisdictions the time and money of developing their own policies. Lexipol repeatedly noted in its promotional materials that agencies would spend far more than Lexipol's modest subscription cost to

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149. Indeed, it is unclear whether any of these data are available. A Lexipol executive reported that he "plan[s] to do some additional work with our [Risk Management Association] partners to drive toward a more statistically defensible correlation of claims to excellence in policy management and training on policy." *Id.*

150. *Morgan County (UT) Sheriff's Office*, LEXIPOL, http://www.lexipol.com/casestudytype/morgan-county-ut-sheriffs-office/ [https://perma.cc/MP3V-CLXK].

151. *Id.*

152. Memorandum from Lill Hadsell, Chief of Police, City of Baldwin Park, to the Mayor and Members of City Council, City of Baldwin Park (June 3, 2010) (on file with authors).

153. CITY OF RIVERSIDE, JUSTIFICATION OF SOLE SOURCE/SOLE BRAND REQUEST 2 (n.d.) (on file with authors) [hereinafter RIVERSIDE PD SOLE SOURCE JUSTIFICATION].

154. Staff Report from Mark Raffaelli, Chief of Police, City of S. S.F., to the Mayor and City Council, City of S. S.F. 2 (Feb. 28, 2007) (on file with authors).

write and update policing policies on their own.[155] As Lexipol warned the Long Beach Police Department during contract negotiations: "A fully burdened officer can cost an agency upward of $100K in salary and benefits. Most small to mid-sized agencies assign one officer to update and maintain their policy manual, which can consume 50% to 80% of the officer's time."[156] In case studies on Lexipol's website, chiefs of small agencies explain that they did not have the capacity to create and maintain policies on their own and applaud Lexipol for providing up-to-date policies in a cost-effective manner.[157] Several California departments in our study justified their adoption of the Lexipol service in similar terms. For instance, the Riverside Police Department told city officials charged with approving the Lexipol contract that "the salary savings realized over having Department personnel research the constantly changing legal requirements and make the needed policy changes, would likely far exceed the cost of this service."[158]

D. Growth

Lexipol does not publish a list of its clients and refused to provide us with a list of its clients.[159] However, the company regularly makes public statements about the number of law enforcement and other public safety agencies that use Lexipol policies and boasts of the growing number of states that the company now services. In order to chart the company's growth, we collected the company's own statements from press releases, the company's

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155. Lexipol describes the high cost to a department to develop a "Legal[], Defensible Policy Manual and an Online Training Program," and asserts that "Lexipol's services are offered at a fraction of the cost, by way of an annual subscription fee, thus allowing us to pass along savings to departments." E-mail from John Fitisemanu, *supra* note 138.

156. LONG BEACH PROPOSAL, *supra* note 72, at 4.

157. For example, the Police Chief from Midland, Michigan, says:

> It just makes good sense to me to have experts overseeing our policy manual as opposed to relying on myself to track the case law and the legislation. This will make the maintenance part very easy. What I see happening in most departments is that the manual gets done but then it doesn't get updated for 10 years. Here, if something changes, we get notified, and then we review the updates and add them. And that frees up my time.

Midland (MI) Police Department, LEXIPOL, http://www.lexipol.com/casestudytype/midland-mi-police-department/ [https://perma.cc/2B67-TRNE]. Similarly, a Lieutenant from Bonners Ferry, Idaho observes:

> Small departments like mine don't have . . . a legal team or a policy/procedure division. We have only ourselves—seven people who are responsible for the department. With Lexipol, we have a resource we can go to if we have questions, and we know our policies stay current. It's an easy decision to make as far as cost.

Bonners Ferry (ID) Police Department, LEXIPOL, http://www.lexipol.com/casestudytype/bonners-ferry-id-police-department/ [https://perma.cc/DM5Z-GWP9].

158. RIVERSIDE PD SOLE SOURCE JUSTIFICATION, *supra* note 153, at 3.

159. *See* E-mail from Tim Kensok, *supra* note 84 (refusing to provide a list of clients in California).

web page, news articles, and marketing materials provided by Lexipol clients in response to our public records requests.

Our research reveals that the company has grown from forty California-based agencies in 2003 to 3,000 public safety agencies across thirty-five states in 2017.[160] This astronomical growth has been mainly focused on police and sheriff's departments, but also includes fire departments and other public safety agencies.[161] Table 1 reports these data in two-year increments.

Table 1: Lexipol's Growth, by Agencies and States (2003–2017)[162]

Year	*Agencies*	*States*
2003	40	1
2005	200	2
2007	500	4
2009	1,000	10
2011	1,100	12
2013	1,500	15
2015	2,000	25
2017	3,000	35

160. According to information we obtained from Lexipol, the only states in which its product is not yet active are Alaska, Arkansas, Connecticut, Hawaii, Kentucky, Maine, Mississippi, Nebraska, New Hampshire, New Mexico, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. LEXIPOL, LEXIPOL LIVE DATES (Sept. 13, 2017) (on file with authors); *see also* FIRST LEXIPOL POWERPOINT, *supra* note 33, at 13 (stating that in 2003, Lexipol had about forty agency clients).

161. Lexipol executives informed us that 2,500 of its current 3,000 clients are police departments and sheriff's departments. Lexipol September Conference Call, *supra* note 9.

162. The following sources were relied on to compile Table 1: FIRST LEXIPOL POWERPOINT, *supra* note 33, at 13 (stating that in 2003, when Lexipol was founded, it was only in California and had about forty agency clients); *Lexipol (from Latin: Law Enforcement Policy)*, LEXIPOL, http://plan.abag.ca.gov/rmm/rmm/pobp/Police%20-%20Lexipol%20Service.pdf [https://perma.cc/5BER-BMMY] ("Over two hundred law enforcement agencies operate from our policy manual system . . . ."); Press Release, Lexipol, Lexipol Launches Custody Policy Manual and Daily Training Bulletin Service in Idaho (July 15, 2011), https://globenewswire.com/news-release/2011/07/15/451250/226510/en/Lexipol-Launches-Custody-Policy-Manual-and-Daily-Training-Bulletin-Service-in-Idaho.html [https://perma.cc/FRX8-QKXZ] (explaining that in 2005, Lexipol expanded into Idaho); *id.* (noting that in 2011, Lexipol served more than 1,100 law enforcement agencies in twelve states); Memorandum, Lexipol, Lexipol's Position on Contractual Indemnification (Jan. 2008) (on file with authors) (provided by Rohnert Park Police Department) [hereinafter Lexipol's Position on Contractual Indemnification] (reporting that Lexipol then had over 500 clients in four states); Report of Bruce D. Praet at 1, Mitz v. City of Grand Rapids, No. 1:09-cv-365, 2009 WL 6849914 (W.D. Mich. Oct. 21, 2009) (reporting that by 2009, Lexipol was used by almost 1,000 agencies in ten states); Letter from Paul Workman, Chief of Police, City of Laguna Beach, to the Honorable Thomas J. Borris, Presiding Judge, Orange Cty. Super. Ct. (Sept. 3, 2013), http://www.ocgrandjury.org/pdfs/2012_2013_reports/Laguna%20Beach%20Police%20Department090313.pdf [https://perma.cc/ZEL3-WZGS] ("Lexipol provides a comprehensive policy program for . . . more than 1,500 law enforcement agencies throughout 15 states."); Praet

Not surprisingly, Lexipol enjoys a strong market presence in California, where the company began. Lexipol executives claim that as many as 95% of California law enforcement agencies now have their policies written by Lexipol.[163] Our public records requests to the 200 largest police and sheriff's agencies in California reveal that only twenty-six agencies (13%) are independent, meaning that they create their own policy manuals and have no relationship with Lexipol. The 174 remaining departments—or 87% of our sample—purchase Lexipol's services or receive them through their insurer. Of these 174 agencies, all but eight have adopted a copyrighted Lexipol policy manual for their police or sheriff's department.[164]

We also find that the smaller agencies are especially likely to use Lexipol's products. Among agencies with 1,000 or more officers, only 20% subscribe to Lexipol. In contrast, among agencies with fewer than 100 officers, 95% subscribe to Lexipol. The complete results of this size-based analysis are displayed in Table 2.

Table 2: Lexipol Subscriptions Among the 200 Largest Police and Sheriff's Departments in California, by Agency Size (2017)[165]

Agency Size	*Number of Agencies*	*Lexipol Subscribers*
1,000+	10	2 (20%)
500–999	10	5 (50%)
200–499	27	23 (85%)
100–199	57	53 (93%)
71–99	49	46 (94%)
48–70	47	45 (96%)

In 2010, Lexipol was ranked the twenty-fourth fastest-growing private company in Orange County, California.[166] In 2012, Lexipol was ranked 387 on Deloitte's Technology Fast 500, "a ranking of the 500 fastest growing technology, media, telecommunications, life sciences and clean technology

Deposition, *supra* note 31, at 7–10 (testifying that in 2015, Lexipol was used by approximately 2,000 agencies across twenty-five states); *Proud Partner of the Louisiana Fire Chiefs Association*, LEXIPOL, http://info.lexipol.com/louisiana-fire-chiefs [https://perma.cc/VWJ2-DPTK] (claiming that Lexipol is "[t]rusted by more than 3,000 public safety agencies in 35 states").

163. *See supra* note 7 (collecting sources).

164. As we develop further, these eight departments have a hybrid arrangement with Lexipol, whereby they produce their own manual with no Lexipol copyright stamp but have an agreement to consult with Lexipol on policy development. *See infra* note 253 and accompanying text.

165. In Table 2, "Agency Size" measures the number of sworn officers in the department. We include in Table 2 the eight "hybrid" jurisdictions that subscribe to Lexipol but produce a manual without a Lexipol copyright stamp. Additional information about the California law enforcement agencies that have adopted Lexipol is provided in the Appendix.

166. Michael Lyster, *Fast-Growing Privates: $12B in Sales, Growth of 23%*, ORANGE COUNTY BUS. J., Oct. 25, 2010, at 12.

companies in North America."[167] Lexipol was purchased by The Riverside Company in 2014.[168] The Riverside Company describes Lexipol as a company with "tremendous opportunity for growth due to a largely untapped market."[169] Riverside plans to help Lexipol expand into new states and offer clients additional risk management services.[170]

II. The Significance of Lexipol

Although there are other private, nonprofit, and government entities that draft police policies, Lexipol is now a dominant force in police policymaking across the country. Lexipol has saturated the market in California and provides its services to more than 3,000 public safety agencies in thirty-five states across the country. There is every reason to expect that Lexipol will play a controlling role in police policymaking in more states in the future.

Lexipol has achieved a goal that has proven elusive—disseminating and updating police policies for thousands of law enforcement agencies. Lexipol's business model appears to be the key to its growth. Lexipol has successfully marketed its policy and training products as risk management tools that can insulate police and sheriff's departments from liability. The company has also promoted its policies and trainings as being of higher quality than local jurisdictions could create on their own—the products are available online, are state-specific, are updated to reflect changes in governing law and best practices, and allow jurisdictions to track when their employees have viewed policies and completed trainings. Lexipol's products are therefore viewed as money-savers twice over—they reduce the cost of creating comparable policies and trainings, and those policies and trainings reduce the cost of litigation. Lexipol's service has been particularly popular with smaller jurisdictions that lack the personnel or resources to create and update their own policies and trainings. Mayors, city councils, and insurers have been willing to pay Lexipol's fees, apparently convinced that they more than pay for themselves given the litigation and risk management savings associated with Lexipol's products.

Yet Lexipol's approach appears to run contrary to the purposes, values, and processes recommended by two generations of advocates for police

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167. Press Release, Lexipol, Lexipol Is Proud to Be Selected as a Deloitte Technology Fast 500(TM) Award Winner for 2012 (Nov. 14, 2012), https://globenewswire.com/news-release/2012/11/14/505171/10012576/en/Lexipol-is-Proud-to-Be-Selected-as-a-Deloitte-Technology-Fast-500-TM-Award-Winner-for-2012.html [https://perma.cc/ZPE6-23C6].

168. Witkowsky, *supra* note 147. *See generally About*, RIVERSIDE, https://www.riversidecompany.com/About.aspx [https://perma.cc/T3HV-AS78] ("The Riverside Company is a global private equity firm focused on making control and non-control investments in growing businesses valued at up to $400 million.").

169. Press Release, Riverside Co., Riverside Trains Its Eyes on Lexipol (Aug. 22, 2014), http://www.riversideeurope.com/es/News%20and%20Media/Press%20Releases/Lexipol%20-%20Acquisition%20News%20Release [https://perma.cc/CF6Y-ZFUK].

170. *Id.*

policymaking. In this Part, we consider three main areas of divergence: Lexipol's unwavering focus on liability risk management, its lack of transparency, and its privatization of the policymaking role.

A. Liability Risk Management

Police policies have long been viewed as a means of regulating officers' vast discretion. When President Lyndon B. Johnson's National Crime Commission studied policing practices in 1967, it found that police did have some internal rules.[171] However, the few rules that existed were "mostly of a housekeeping character—how to wear the uniform, how to carry the gun, whether to scribble a report in triplicate or in quadruplicate, and what to do with the copies."[172] Police manuals did not address "the hard choices policemen must make every day."[173] That is, they did not resolve how officers should exercise discretion in high-frequency scenarios, such as "whether or not to break up a sidewalk gathering, whether or not to intervene in a domestic dispute, whether or not to silence a street-corner speaker, whether or not to stop and frisk, whether or not to arrest."[174] The end result was that police engaged in policymaking in an ad hoc way as they went about their work, rather than answering to a centralized set of rules when making the important discretionary decisions inherent to policing.

Scholars and policing experts in the 1950s and 1960s hoped that comprehensive police policies would give an officer "more detailed guidance to help him decide upon the action he ought to take in dealing with the wide range of situations which he confronts and in exercising the broad authority with which he is invested."[175] Internal policies could also help to achieve "uniformity" in police conduct within an agency, including by ensuring that when "individual police officers confront similar situations, they will handle them in a similar manner."[176] Today, scholars and experts echo concerns from

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171. THE PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 103 (1967), https://www.ncjrs.gov/pdffiles1/nij/42.pdf [https://perma.cc/J2QE-626K] [hereinafter CRIME IN A FREE SOCIETY] ("Many police departments have published 'general order' or 'duty' or 'rules, regulations, and procedures' manuals running to several hundred pages.").

172. Davis, *supra* note 18, at 712.

173. CRIME IN A FREE SOCIETY, *supra* note 171, at 103.

174. *Id.* As Kenneth Culp Davis famously explained in his classic text on the topic: "The police . . . make far more discretionary determinations in individual cases than any other class of administrators; I know of no close second." KENNETH CULP DAVIS, POLICE DISCRETION 222 (1975).

175. Herman Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123, 1128 (1967).

176. Gerald F. Uelmen, *Varieties of Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County*, 6 LOY. L.A. L. REV. 1, 4 (1973); *see also* Caplan, *supra* note 18, at 504 ("At the very least, the promulgation of policy will serve to reduce the uneven enforcement that now characterizes so much of street policing.").

half a century ago about the need to guide police discretion and the potential for comprehensive police policies to serve that role.[177]

Lexipol has a different set of goals and values that guide its approach to police policymaking. While scholars and experts have long viewed police policies as a means of limiting officer discretion, Lexipol appears to view its products primarily as a means of reducing legal liability. Lexipol relentlessly markets its products to jurisdictions by arguing that it will decrease the number of claims brought against police departments and the amount that jurisdictions pay in settlements and judgments in cases that are filed. We do not condemn Lexipol for focusing on limiting liability risk—its claim that Lexipol policies reduce financial liability appears to be a powerful selling point for local jurisdictions and insurers that purchase its services.[178] We also recognize that efforts to reduce liability risk will sometimes lead to the same policy prescriptions as efforts to constrain officer discretion.[179] But Lexipol's focus on reducing liability risk is sometimes in tension with longstanding efforts to guide and restrict officer discretion through police policies.

This tension can be seen in recent debates about use of force policies. Over the past few years, several groups—including the Fraternal Order of Police, the International Association of Chiefs of Police, the Police Executive Research Forum (PERF), academics, and nonprofit advocacy organizations—have recommended new policing policies to reduce unnecessary and excessive use of force.[180] Included in this approach are policies requiring that police use de-escalation techniques with suspects, refrain from shooting into moving vehicles, and intervene if another officer

177. *See supra* note 19 (collecting citations).

178. For example, the City of Fresno includes the claim that Lexipol's policies reduce legal liability in its signed agreement with Lexipol. *See* Agreement Between City of Fresno and Lexipol for Consultant Services 1–2 (Dec. 1, 2005) (on file with authors) (agreeing that the policies that Lexipol will create for the city "are court tested and successful in withstanding legal challenges"); *see also supra* notes 140–148, and accompanying text (describing claims of liability risk reduction made in promotional materials to several agencies).

179. Research by John Rappaport and Joanna Schwartz underscores that municipal liability insurers' financial incentives to reduce legal liability can sometimes lead them to demand policing improvements aimed at reducing misconduct. *See* Rappaport, *supra* note 3, at 1543–44 ("[A]n insurer writing police liability insurance may profit by reducing police misconduct. Its contractual relationship with the municipality gives it the means and influence necessary to do so—to 'regulate' the municipality it insures."); Schwartz, *supra* note 3, at 1207 ("[O]utside insurers have a uniquely powerful position from which they can demand improvements in policing."). Indeed, municipal liability insurers' financial incentives may make them better situated than self-insured municipalities to push for these types of policing reforms. *See id.* at 1203–04 (finding that the costs of lawsuits have no financial consequences for the majority of law enforcement agencies in self-insured jurisdictions); *id.* at 1205–06 ("Contrary to the assumption that insurance creates moral hazard, public entity risk pools may take greater efforts than self-insured jurisdictions to reduce liability risk. . . . [P]ublic entity risk pools can place financial pressures on law enforcement agencies that self-insured governments may be unwilling or unable to replicate.").

180. *See infra* note 181. For other efforts by academics and nonprofits to draft model rules, *see infra* notes 305–309 and accompanying text.

might use excessive force.[181] Although Lexipol's California state master policy manual contains some of these concepts,[182] Lexipol has issued a series of public statements critical of these recently issued model use of force policies because language in these policies restricts officers' discretion in ways that could expose them to legal liability.

Soon after several prominent law enforcement groups issued a National Consensus Policy on Use of Force, Lexipol's founding partner, Bruce Praet, posted an article to Lexipol's website titled *National Consensus Policy on Use of Force Should Not Trigger Changes to Agency Policies*.[183] Praet cautioned law enforcement agencies against adopting several of the model policies because they used the word "shall." Although the model policies' use of "shall" was presumably geared to constrain officer discretion, Praet discouraged agencies from adopting that language because plaintiffs' attorneys would "highlight" that type of language as a way of showing that officers had violated policy.[184] According to Praet, the need to shield officers from liability is "why Lexipol policy clearly defines the difference between 'shall' and 'should' and cautions against the unnecessary use of 'shall.'"[185] Lexipol posted an article by a police chief offering a similar admonition against adopting a model use of force policy recommended by PERF that prohibited shooting at moving vehicles. His argument against the model policy was also based on limiting legal liability: "Policy language that definitively prohibits an action will inevitably result in a situation where an officer violates the policy under reasonable circumstances, which in turn can create issues that must be dealt with if litigation results."[186]

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181. *See, e.g.*, NATIONAL CONSENSUS POLICY ON USE OF FORCE 3–4 (2017), http://www.theiacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf [https://perma.cc/SS9A-QFE3] [hereinafter NATIONAL CONSENSUS] (requiring that officers use de-escalation when possible, prevent other officers' use of excessive force, and refrain from shooting at moving vehicles); POLICE EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 40–41, 44, 74–75 (2016), http://www.policeforum.org/assets/30%20guiding%20principles.pdf [https://perma.cc/RH4L-D8Y3] [hereinafter PERF GUIDING PRINCIPLES] (same); *Limit Use of Force*, CAMPAIGN ZERO, https://www.joincampaignzero.org/force/ [https://perma.cc/6G82-29JA] (advocating for police policies that would ban shooting at moving vehicles and require de-escalation before use of force).

182. *See, e.g.*, CALIFORNIA STATE MASTER POLICE DEPARTMENT: POLICY MANUAL, *supra* note 61, at 44, 48 (Policy 300.2.1 "Duty to Intercede," Policy 300.4.1 "Shooting at or From Moving Vehicles"). Lexipol does not appear to include a policy of de-escalation, though it alludes to the concept in its policy manual as a benefit of kinetic energy projectiles, *see id.* at 61, and one of the skills of a Crisis Negotiation Team, *see id.* at 279.

183. Bruce D. Praet, *National Consensus Policy on Use of Force Should Not Trigger Changes to Agency Policies*, LEXIPOL (Jan. 25, 2017), http://www.lexipol.com/news/use-caution-when-changing-use-of-force-policy-language/ [https://perma.cc/UR2T-DUH2].

184. *Id.*

185. *Id.*

186. Michael D. Ranalli, *Counsel's Corner: Adding Perspective to the PERF Guiding Principles on Use of Force: What Police Administrators Should Consider*, N.Y. ST. CHIEF'S CHRON., June 2016, at 7, 11, *as reprinted in* Michael Ranalli, *Why PERF's Prohibition on Shooting at Vehicles Sells Agencies Short*, LEXIPOL (Dec. 7, 2016), http://www.lexipol

Bruce Praet has additionally criticized PERF for recommending that use of force policies "go beyond the legal standard of 'objective reasonableness' outlined in the 1989 United States Supreme Court decision *Graham v. Connor*."[187] PERF's recommendation was motivated by an interest in limiting officers' discretion to use lethal force. As PERF explained:

> [The *Graham*] decision should be seen as "necessary but not sufficient," because it does not provide police with sufficient guidance on use of force. . . . Agencies should adopt policies and training to hold themselves to a higher standard, based on sound tactics, consideration of whether the use of force was proportional to the threat, and the sanctity of human life.[188]

PERF's position is consistent with decades of scholarship about the limitations of court opinions as a guide for police policymaking. Those who advocate for improved police policies are generally skeptical of the ability of courts to provide needed guidance to agencies creating police policies.[189] Judicial decisions do play a critically important role in police policies, as they create a floor that cannot be violated.[190] Because courts are focused on the constitutionality of officer behavior, their decisions will, by definition, articulate the bare minimum that officers must do to avoid violating the Constitution.[191] However, due to their "case-by-case and relatively intuition-laden" approach, courts are not necessarily well-situated to articulate best practices.[192] As a result, most experts agree that police policymaking should draw from multiple sources, including input from local community members regarding their experiences with police, best practices recommended by

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.com/news/why-perfs-prohibition-on-shooting-at-vehicles-sells-agencies-short [https://perma.cc/AZQ8-V6U2] [hereinafter Ranalli, *Shooting at Vehicles*].

187. Praet, *supra* note 183; *see* POLICE EXEC. RESEARCH FORUM, 30 GUIDING PRINCIPLES 1 (2016), http://www.policeforum.org/assets/30guidingprinciples.pdf [https://perma.cc/3ZD2-UNCQ] (discussing *Graham v. Connor*, 490 U.S. 386 (1989), a seminal Supreme Court opinion that defines what force is unreasonable and in violation of the Fourth Amendment).

188. POLICE EXEC. RESEARCH FORUM, *supra* note 187, at 1.

189. *See, e.g.*, Friedman & Ponomarenko, *supra* note 19, at 1832, 1865 (describing courts as "completely inadequate" for the task of regulating police behavior). An insightful recent article by Anna Lvovsky provides additional historical context for the inadequacies of courts in this arena: the longstanding deference to "police expertise" that has made courts presume that police decisions are necessarily based on reliable "expert" knowledge. *See generally* Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017).

190. For example, the Warren Court's criminal procedure decisions, such as *Mapp* and *Miranda*, arguably "initiated" police rulemaking by addressing "previously unregulated aspects of routine police procedures" related to searches and interrogations. Walker, *supra* note 16, at 12, 15.

191. As administrative law scholar Kenneth Culp Davis asked decades ago: "If the Supreme Court has stated the minimum requirements of the Constitution, how can the police change anything unless they are willing to go above the minimum?" Davis, *supra* note 18, at 712.

192. Slobogin, *supra* note 17, at 117.

policing experts, research about the impact of various policies, and analyses of the costs and benefits of different approaches.[193]

In contrast to decades of scholarship on the subject, Praet has criticized the notion that police use of force policies should "go beyond" the requirements announced by the Supreme Court in *Graham*. He writes:

> Several years ago, our forefathers decided that there would be nine of the finest legal minds in the country who would interpret the law of the land. For almost 30 years, law enforcement has learned to function under the guidance of the Supreme Court's "objective reasonableness" standard. What would happen if each of the 18,000+ law enforcement agencies in the United States formulated their own standard "beyond" *Graham*?[194]

To be sure, Lexipol's policies are not solely guided by court decisions. Lexipol makes clear in its promotional materials that some of its policies are inspired by what it calls "best practices" that are not mandated by statutes or court decisions.[195] But use of force policies raise a different question for policymakers: When there is a court decision or statute that prohibits certain officer behavior, and expert opinion that recommends additional restrictions on officer behavior, should the policy conform to the court decision or to the higher standard recommended by experts? Statements by Praet and other Lexipol spokespeople about use of force suggest that Lexipol's focus on liability risk management may cause it to draft policies that maximize officer discretion and hew closely to court decisions when such decisions exist—and that those inclinations may conflict with experts' views on best practices.

Lexipol's focus on liability risk management may influence its product design in other ways. For example, Lexipol promotes its officer DTB training program as focused on "high-risk, low-frequency behaviors" including use of force, use of electronic control devices, vehicle and foot pursuits, and crisis intervention incidents.[196] According to Lexipol, its DTB trainings are

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193. Barry Friedman and Maria Ponomarenko describe the need for additional information to supplement judicial decisions in this way:

> [F]ew believe it makes sense for courts to be the primary supervisors of police agencies, particularly because judicial review is almost exclusively about constitutionality. Governing policing involves a host of prior questions: Are policing policies and procedures properly vetted? Are they efficacious? What harms do they impose? Do they make sense from a cost-benefit perspective? In short, largely neglected by courts and constitutional law are the very questions that concern us most with regard to the work of other agencies.

Friedman & Ponomarenko, *supra* note 19, at 1832.

194. Praet, *supra* note 183.

195. *See, e.g.*, *Law Enforcement: Custom Policy Content*, LEXIPOL, http://www.lexipol.com/law-enforcement [https://perma.cc/GQ83-EEAH] (describing Lexipol's policy content as "based on federal and state statutes, case law and law enforcement best practices").

196. *See, e.g.*, Ranalli, *Shooting at Vehicles*, *supra* note 186; *see also* Letter from Dan Merkle, *supra* note 98, at 2 ("The primary focus of the DTBs are those high/risk, low/frequency events that can get an agency and/or an officer into trouble.").

designed to be "a cost effective training delivery method that serves as a substantial safety net" against lawsuits.[197] Yet, although low-risk, high-frequency events—such as traffic stops and searches—are less likely to result in litigation,[198] such events threaten other risks, including risks to community safety and trust in the police. As John Rappaport has observed, a focus on reducing liability risk may shortchange other important areas of police activity.[199]

Lexipol's focus on liability risk management may also cause it to design products that reduce the frequency with which plaintiffs sue or the amount they recover without reducing the occurrence of the underlying harms. For example, Lexipol has designed its policy and training software so that officers can "acknowledge" that they received updated policies and participated in Lexipol's trainings.[200] According to the company, this acknowledgement protocol can help in litigation, as it provides evidence that officers were informed and trained on the policies.[201] Yet we found no corresponding marketing materials suggesting that Lexipol designs its trainings to improve officer understanding of harmful practices by drilling down on these challenging topics, or that the two-minute training format is well-suited to achieve these goals.

Finally, Lexipol's focus on risk management appears to influence the ways in which the company evaluates the efficacy of its policies. Lexipol consistently promotes its policies as reducing the frequency of lawsuits and the cost of settlements and judgments. The marketing materials we obtained make specific claims about the reduction in such costs enjoyed by

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197. Dan Merkle, CEO, Lexipol Daily Training Bulletins (DTBs): Request for California POST Certification 2 (undated) (on file with authors).

198. In one important exception, the Center for Constitutional Rights brought a federal class action lawsuit against the City of New York challenging the New York Police Department's stop-and-frisk practices as unconstitutionally relying on racial profiling. *See* Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). For additional background on the *Floyd* litigation, see Sunita Patel, *Policing the Police: The Potential of Public Law Injunctions* (manuscript on file with authors).

199. *See* John Rappaport, *An Insurance-Based Typology of Police Misconduct*, 2016 U. CHI. LEGAL F. 369, 375–83, 399–404 (2016) (describing how financial risk prompts municipal liability insurers to focus on reducing "high-dollar, short-tail" claims, like excessive force, while overlooking "low-dollar" claims—like investigatory stops and racial profiling claims—and "long-tail" claims—like wrongful convictions).

200. *See, e.g.*, *How It Works*, LEXIPOL, http://www.lexipol.com/how-it-works/ [https://perma.cc/X6KY-6K5L] ("Lexipol's Knowledge Management System (KMS) is easy to use and allows your agency to customize policy content to fit your needs. Features include easy editing of policies, electronic policy acknowledgement, and reports that quickly enable you to document whether officers have completed training and reviewed new or updated policies.").

201. *See, e.g.*, *FAQs*, LEXIPOL, http://www.lexipol.com/law-enforcement/law-enforcement-faqs/ [https://perma.cc/APU7-KE7D] ("Lexipol recommends that all personnel take every DTB, as it links to the policy manual, encourages continuous training and serves as a record of training for potential litigation."); *see also* Letter from John Fitisemanu, Client Servs. Representative, Lexipol, to Tammie Stilinovich, Officer, Long Beach Police Dep't (Feb. 28, 2014) (noting that DTB reports are archived and that these records can be used for litigation).

subscribers.[202] But Lexipol does not make any claims about whether its products advance other important policing goals, such as enhanced trust within communities or fewer deaths of persons stopped by the police.[203] Also notably absent is any claim about whether Lexipol's products reduce the frequency with which police officers engage in unconstitutional conduct that does not frequently result in litigation.[204] Lexipol's decision to focus on liability risk management makes sense; it certainly has been an effective marketing strategy with local governments. Nevertheless, this focus threatens to crowd out other values that can be advanced through police policies.

Because Lexipol does not publicly disclose information about its drafting process, it is impossible to know the extent to which liability risk management interests have influenced drafting choices for individual policies, decisions about which trainings to develop, or assessments of policy efficacy. Nonetheless, the evidence we have collected suggests that Lexipol's policies and trainings may differ in meaningful ways from those proposed by policing experts and researchers and that Lexipol's focus on liability risk management may explain at least some of those differences.

B. Secret Policymaking

Proponents of police reform have long recommended that police policies be created through a transparent, quasi-administrative process. Beginning in the 1950s and 1960s, commentators advocated for an administrative rulemaking process whereby proposed policies would be subject to notice and comment by the public.[205] As President Johnson's 1967 Commission explained, "the people who will be affected by these decisions—the public—have a right to be apprised in advance, rather than ex post facto, what police policy is."[206] Ideally, policies would also be evaluated after enactment by law enforcement officials, researchers, and the public.[207]

Today, scholars are again calling for an administrative rulemaking process that encourages police to develop detailed policies that are subject to

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202. *See, e.g.*, *supra* Figure 3; *see also supra* notes 144-148 and accompanying text.

203. For New York City's efforts to measure community trust in its police department, see Al Baker, *Updated N.Y.P.D. Anti-Crime System to Ask: 'How We Doing?'*, N.Y. TIMES (May 8, 2017), https://www.nytimes.com/2017/05/08/nyregion/nypd-compstat-crime-mapping.html [https://perma.cc/36XR-2MBS].

204. *See* Rappaport, *supra* note 199, at 385–91 (observing that insurers can help improve policing but will be focused only on those types of behaviors deemed liability risks).

205. *See, e.g.*, Caplan, *supra* note 18, at 509 (supporting "openness" and "public examination" of proposed police department policies which "invites publicity and community reaction and insures that policy can be easily challenged in the courts," which will "promote the production of sophisticated, balanced policy positions"); *see also supra* note 18 and sources cited therein.

206. CRIME IN A FREE SOCIETY, *supra* note 171, at 104–05.

207. *Id.*; Amsterdam, *supra* note 18, at 423, 427; Caplan, *supra* note 18, at 509; Davis, *supra* note 18, at 717.

notice and comment and some manner of judicial review.[208] Contemporary commentators have also emphasized—perhaps even more forcefully than their predecessors—that any administrative police rulemaking process should directly engage community members and that policies should be tailored to the particular circumstances and interests of the community.[209] Advocates for these more democratic processes contend that they can lead to more effective policies and enhance the perceived legitimacy of policing.[210] Increasingly, police departments are incorporating these democratic ideals into their policymaking processes: In 2015, several law enforcement leaders signed on to a Statement of Democratic Principles, organized by New York University (NYU) School of Law's Policing Project, which included a commitment to a rulemaking process that incorporates robust community engagement.[211]

Lexipol's policymaking process departs considerably from the transparent, quasi-administrative policymaking processes recommended by scholars and policing experts and adopted by some law enforcement agencies. Instead of policies crafted locally and with community input,

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208. *See supra* note 19 and sources cited therein.

209. *See, e.g.*, PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT 20 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [https://perma.cc/BC9G-P4VA] (recommending that law enforcement agencies "should collaborate with community members to develop policies and strategies in communities and neighborhoods disproportionately affected by crime" and emphasizing that community members need to be included in these discussions because "what works in one neighborhood might not be equally successful in every other one"); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 2 (2009) (contending that when departments provide "inadequate training and policy guidance to officers" and fail to incorporate "public feedback," they facilitate or encourage misconduct); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1120 (2000) ("Empowering citizens through access to government information and by giving them a voice in the decisionmaking process is not only more democratic, but has the potential to establish a basis for trust in otherwise distrusting communities."); Miller, *supra* note 19, at 525 (promoting giving "local communities and disadvantaged individuals a more meaningful voice in evaluating and checking local police policy"); Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 794, 796, 802 (2016) (highlighting the benefits of community engagement in police policymaking as a reform strategy); Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 409 (2010) (explaining that community engagement in police policymaking on the front end "may create not only better substantive reforms, but may also increase the legitimacy of the ultimate police reforms implemented in a particular jurisdiction"); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 407 (2016) (revealing how copwatching is a form of civic engagement in which "groups of lay people come together to contest police practices through observation, recording, and dialogue"); *cf.* Bell, *supra* note 28, at 2144 (arguing that administrative rulemaking procedures will not on their own "unsettle legal estrangement in the communities that are most affected" by police abuse and that such processes should therefore be combined "with other democracy-enhancing reforms" such as providing more transparency on police practices).

210. *See* sources cited *supra* note 209.

211. POLICING PROJECT: NYU SCH. OF LAW, STATEMENT OF PRINCIPLES ON DEMOCRATIC POLICING 3 (2015), https://policingproject.org/wp-content/uploads/2016/05/Policing-Principles.pdf [https://perma.cc/YLC8-PJ58].

policies created by Lexipol are based on a uniform state template. Lexipol's standardization of policymaking is one of the reasons that the private service has been so commercially successful. But its approach runs contrary to that recommended by experts and embraced by some law enforcement agencies.

Lexipol does not preclude local jurisdictions from seeking out the types of community engagement and deliberation that scholars and experts recommend, or tailoring Lexipol policies to reflect local values and interests. In this Article, we have not examined the extent to which local jurisdictions modify Lexipol's standard policies to reflect local values and interests, or whether jurisdictions are engaging community members in the customization process.[212] But several aspects of Lexipol's structure make us wary of simply assuming that jurisdictions will seek public input or modify policies based on their own needs once they have made the decision to give the policymaking job to Lexipol. First, Lexipol provides local jurisdictions with little information about the reasons for its policy choices, which makes it difficult for subscribers to make informed decisions about whether to adopt Lexipol's policies. Lexipol's statewide master manual does identify whether a policy is required by law, a best practice, or discretionary.[213] But the manual contains no explanation of what evidence Lexipol considers when designing its policies, why Lexipol makes particular drafting decisions, or whether there are other plausible alternative policies.

The other materials Lexipol provides to its customers are similarly unilluminating. We used the Public Records Act to request all information that the California agencies had regarding their relationship with Lexipol. What we typically obtained was Lexipol's standard police manual, a contract, and evidence of payment. Many jurisdictions also had marketing information that they received from Lexipol, e-mail exchanges, and PowerPoint presentations from Lexipol executives. Some had internal memoranda justifying local jurisdictions' decisions to purchase Lexipol's service rather than continue to write their own policy manuals. Some had materials from Lexipol that described amended policies and the rationale for the amendments (generally a change in the law). But none of the departments produced materials from Lexipol that described the evidentiary basis for policies, drafting decisions by the company, or the existence of alternative approaches.

The Lexipol executives with whom we spoke reported that, since 2008, jurisdictions have also had access to policy guides that offer general background information about policies. Yet the fact that no jurisdictions

212. Lexipol executives provided us with data suggesting that approximately 60% of customers change less than 20% of their Lexipol policy manuals. SECOND LEXIPOL POWERPOINT, *supra* note 9, at 16. The remaining 40% of customers change 20% or more of Lexipol's manuals. *Id.* But Lexipol has not examined the extent to which its customers' modifications are cosmetic—changing the name of the law enforcement agency, for example—or more substantive.

213. *See supra* Figure 1 and accompanying text.

provided us with such guides—and a detective from one jurisdiction, when asked about the policy guide, said he had never seen or heard of it—confirms one Lexipol vice president's view that these guides are "well-kept secrets" and difficult for departments to access online.[214] Moreover, we are skeptical that these guides—even if widely available—would provide much information to agencies about Lexipol's policy decisions. Lexipol declined to provide us with a copy of its policy guide, but it did provide us with a single page of the guide regarding body camera video, and that page provided little basis by which a Lexipol customer could assess the sensibility of Lexipol's policy choices in this area.[215]

Even when local jurisdictions seek out information from Lexipol about the bases for its policy-drafting decisions, Lexipol reveals scant information about its choices. For example, a sergeant at the Irvine Police Department e-mailed Lexipol, seeking information about several aspects of Lexipol's use of force policy, including:

> 1. Where did the definition of Force come from? Has it changed over time? I know there is not one agreed upon definition as it applies to UoF policy, but was wondering where your definition came from.
> 2. Is the lethal force policy verbiage based on federal standards? It varies slightly from ours, primarily because it includes the word imminent. The definition of imminent is broadly defined to include preventing a crime. Was the Lexipol wording derived from case law that includes "imminent" as it is defined in your policy?[216]

The sergeant explained in his message that the Irvine Police Department has its own policy manual but uses Lexipol to "augment" its policies, and that he was reviewing Lexipol's policies to see whether and how they should adjust their own manual.[217] The Lexipol representative responded quickly to the sergeant's questions but offered no specifics about its use of force policy choices, writing only: "The force definitions are based on federal guidelines as well as the deadly force section. This policy has changed over time with the changes in laws and case decisions. The 'imminent' wording again is based on the federal guidelines."[218] Although the sergeant took this laudable step to discover additional information about Lexipol's standardized policy, the company offered him minimal guidance.

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214. *See supra* notes 86–87.

215. *See infra* notes 259–261 and accompanying text (describing the substance of the page we received).

216. E-mail from Barry Miller, Sergeant, Irvine Police Dep't, to Greg Maciha, Lexipol (Aug. 4, 2015, 11:22 AM) (on file with authors).

217. *Id.*

218. E-mail from Greg Maciha, Lexipol, to Barry Miller, Sergeant, Irvine Police Dep't (Aug. 4, 2015, 1:41 PM) (on file with authors).

Our research uncovered similar concerns regarding the claims that Lexipol makes about its DTB trainings. Although Lexipol promises that its two-minute trainings and "every day is training day" philosophy will save subscribers money and reduce exposure to lawsuits, we found no empirical support for these claims. Indeed, citing a litany of concerns, California's Commission on Peace Officer Standards and Training (POST) twice declined to certify Lexipol's DTBs as sufficient to satisfy their minimum standards for state law enforcement training.[219] Among other concerns, the Commission cited a "[l]ack of evidence or feedback to indicate the information [in Lexipol's DTBs] is understood or can be applied."[220] According to the Commission staff, the true/false format of the extremely brief DTBs provides no "proof of learning" or "degree of assurance that the information would be applied in a unique situation, i.e., beyond the single scenario included in the DTB."[221] Moreover, the DTBs do not include clear "learning objectives," do not ensure that students will actually read the information contained in the DTBs, are entirely "stand-alone trainings" not supported by "the assistance or guidance of an instructor," and fail to provide opportunities for "practice or feedback."[222] The fact that the DTBs are "part of a wholly proprietary subscription service" and distributed by a "private, for-profit company" also weighed heavily in the Commission's decision to decline certification of the trainings.[223] In particular, the Commission found it troubling that it would have no "oversight" over Lexipol's privatized "content, instructional methodology, instructor competence, or effectiveness" and that non-subscribing agencies would not have access to the proprietary, fee-based trainings.[224]

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219. POST LEXIPOL REPORT, *supra* note 102, at 2–3 (reviewing the history of Lexipol's unsuccessful attempts to gain state certification from the Commission for its DTBs, beginning informally in 2004, and later resulting in two formal denials in 2006 and 2009). Lexipol appealed this decision pursuant to Commission Regulation 1058 but lost the appeal. *See* Letter from Paul A. Cappitelli, Executive Director, Commission on Peace Officer Standards and Training, to Dan Merkle, CEO, Lexipol (July 27, 2009) (on file with authors) ("It is the decision of the Commission to deny your appeal and affirm the actions of POST staff and the Executive Director to deny certification of the Daily Training Bulletin.").

220. POST LEXIPOL REPORT, *supra* note 102, at 3.

221. Letter from Paul A. Cappitelli, Executive Director, Commission on Peace Officer Standards and Training, to Steve Peeler, Training Director (Apr. 20, 2009) (on file with authors); *see also* POST LEXIPOL REPORT, *supra* note 102, at 9 ("The single true/false question at the end of each DTB assesses only whether the student is able to read the questions but does not, by itself, assess whether the concept is understood or can be applied. Whether or not the student has read the DTB, the chance of selecting the correct answer is 50/50. If the incorrect answer is selected online, no corrective feedback or remediation is necessary because the correct answer is obvious. True/false questions are widely determined to be inherently unsound as a stand-alone assessment.").

222. POST LEXIPOL REPORT, *supra* note 102, at 2–3, 7–9.

223. Letter from Paul A. Cappitelli, *supra* note 221.

224. Letter from Michael C. DiMiceli, Assistant Exec. Dir., Cal. Comm'n on Peace Officer Standards and Training, to Steve Foster, Lexipol LLC (May 2006) (on file with authors); POST LEXIPOL REPORT, *supra* note 102, at 10 ("[T]he DTB program is a wholly proprietary, fee-based

In sum, based on the information we have been able to collect, we do not believe that Lexipol provides subscribing agencies with sufficient information for them to be able to understand what evidence Lexipol has consulted when crafting its policies and trainings, the rationale for its drafting decisions, or whether there are diverging opinions about best practices in a given area. Even if a jurisdiction tries to deviate from the standard-issue Lexipol policies or trainings, it must address structural aspects of Lexipol's products that make it burdensome to customize. For example, Lexipol's update service automatically overrides client customization. The Lexipol policy manual updates repeatedly caution subscribers that "[e]ach time you accept an update the new content will automatically replace your current content for that section/subsection of your manual," meaning that "if you have customized the section/subsection being updated you will lose your specific changes."[225] The fact that Lexipol's DTB trainings are all based on the standard policies is another impediment to customization. Jurisdictions wishing to deviate from Lexipol's standard trainings would need to invest in creating their own training programs.

Finally, Lexipol's subscribers purchase Lexipol's products in part because they do not have the money or time to engage in their own rulemaking processes. Lexipol markets its service as a cost-saving tool, emphasizing that it costs less to adopt the Lexipol manual than to pay internal staff to research and develop policies on their own. And Lexipol subscribers applaud the service because it eliminates the need for police chiefs and other government officials to develop policies themselves.[226] If a subscriber

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subscription service of Lexipol. It is directly connected to their foundational policy manual service. Certification of the DTB limits training credit solely to Lexipol customers and, if certified, the training would not be available to non-subscribing officers and agencies. Limiting training and credit to subscribers of a proprietary service is a significant departure from long-standing Commission policy.").

225. LEXIPOL, CALIFORNIA LE POLICY MANUAL UPDATES 2 (Nov. 2016) (provided by the Modesto Police Department) (on file with authors). These update instructions also inform clients that:

> If you wish to preserve your custom content, you should select "Edit ←" to manually merge the new content with your modified content. If you select "Reject Update" your customized content will not be changed. If the update is to delete an entire section/subsection and you choose "Reject Delete" the content will no longer be supported by Lexipol and the section/subsection will be shown as agency-authored content.

Id.; *see also* LEXIPOL, LEXIPOL POLICY MANUAL UPDATE, RELEASE NOTES 1 (June 2013) (provided by the Folsom Police Department) (on file with authors) ("**Important**: Each time you accept an update the new content will automatically replace your current content for that section of your manual.") (emphasis in original).

226. *See, e.g.*, Press Release, Lexipol, Lexipol Launches LE Policy Manual & Daily Training Bulletin Service in Missouri (Nov. 28, 2011), *reprinted in Lexipol Launches LE Policy Manual & Daily Training Bulletin Service in Missouri*, LAW OFFICER (Dec. 1, 2011), http://lawofficer.com/archive/lexipol-launches-le-policy-manual-daily-training-bulletin-service-in-missouri/ [https://perma.cc/5PRE-QM8A]. Gregory Mills, Police Chief in Riverside, Missouri, explains Lexipol's benefits:

wanted to modify Lexipol's standard policies, it would need to identify alternative policy language, consider the strengths and limitations of that alternative, and seek community input. Most jurisdictions that contract with Lexipol are unlikely to dedicate the time and money necessary to this project, particularly given Lexipol's assurances that its policies reduce litigation and litigation costs so dramatically.

In this Article, we do not examine the substance of Lexipol's policies or compare its policies to those created through the transparent, quasi-administrative processes recommended by scholars and experts and adopted by some progressive agencies. But we defer to their view that there are democratic and perhaps substantive benefits to customization and community engagement in police policymaking. We are concerned that Lexipol's lack of transparency about its policy decisions, the difficulty of modifying Lexipol's manual, and the financial pressures faced by agencies that decide to purchase Lexipol's services discourage local agencies from evaluating the sensibility of Lexipol's policy choices, seeking community input, or modifying policies to reflect local priorities.

C. Policymaking for Profit

Those who have promoted police policymaking over the past several decades never considered the possibility that a private, for-profit enterprise might play such a dominant role in the creation and dissemination of police policies. Yet perhaps the rise of Lexipol should come as no surprise. Private entities have long engaged in police functions.[227] Private companies have also drafted government policies, standards, and regulations.[228] And more

> Like most chiefs, I do not have the luxury of having a staff that can research policy issues from the legal and best practices perspectives and then translate the information into an understandable written policy . . . . But with Lexipol I don't need to, because they do it all. Lexipol's policy manual is complete and its updates are timely. There are many things in police management to worry about. Fortunately for me, not having up-to-date policies is no longer one of those.

Id.

227. *See generally* Sklansky, *supra* note 27. For a discussion of the ways in which private business is playing a role in policing technologies, see Elizabeth E. Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. REV. ONLINE 101 (2017). Joh's examination of private surveillance technologies raises similar concerns to those we have raised here, including the dominance of one company's policy choices and secrecy about technology decisions.

228. *See, e.g.*, Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291, 292–93 (2005) (describing copyrighted standards that are incorporated into substantive law); Nina A. Mendelson, *Taking Public Access to the Law Seriously: The Problem of Private Control over the Availability of Federal Standards*, 45 ENVTL. L. REP. 10776, 10776 (2015) (reporting that federal agencies have incorporated privately drafted standards into federal regulations); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 596 (1995) (describing the work of ALI and other private entities that create restatements); Peter L. Strauss, *Private Standards*

generally, private–public partnerships and hybrids have become the rule, rather than the exception.[229] The growth of Lexipol and other private agencies involved in police policymaking is consistent with the privatization of law enforcement functions and the increasing privatization of government policies, standards, and regulation more generally.

Privatization scholars tend, in varying degrees, to applaud privatization as more effective and efficient than government action and to despair that privatization compromises democratic principles.[230] Our study of Lexipol offers evidence to support both views. In this Article, we have not compared Lexipol's policies with those drafted by agencies and so cannot reach any firm conclusions about whether Lexipol's policies are more "effective"—by whatever metric one might use—than policies drafted by local agencies. But Lexipol subscribers quoted on Lexipol's website appear to believe that the company's policies are of higher quality than they could create on their own.[231] Lexipol's dramatic expansion over the past fifteen years suggests a widespread belief that the company is better situated than local law enforcement agencies to perform the police policymaking function and can do so at reduced cost.

Yet our study of Lexipol also offers anecdotal support for common criticisms of privatization. As we have argued, Lexipol appears to prioritize liability risk management over other interests, and the secrecy with which it drafts its policies makes it difficult for law enforcement to understand the bases for Lexipol's policy decisions. These observations echo concerns by privatization scholars that private companies overvalue efficiency interests and lack transparency.[232] In addition, Lexipol's interest in making a profit creates unorthodox relationships between the policymaking company and the public police agencies that subscribe to its services.

For example, Lexipol's standard contract with subscribers contains an indemnification clause providing that the company "shall have no responsibility or liability" to any subscriber for its products.[233] According to

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Organizations and Public Law, 22 WM. & MARY BILL RTS. J. 497, 502 (2013) (describing standards created by private standard-setting organizations that are incorporated into public laws).

229. *See generally* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000).

230. *See supra* notes 26–27 and accompanying text.

231. *See supra* note 157 and accompanying text.

232. *See supra* note 27.

233. *See, e.g.*, Lexipol, Contract with the Long Beach Police Dep't (2013) (on file with authors); Lexipol, Contract with the City of Orange Police Dep't (Feb. 21, 2004) (on file with authors); Lexipol, Contract with the Walnut Creek Police Dep't (Apr. 12, 2011) (on file with authors); Lexipol, Contract with the San Ramon Police Dep't (Aug. 13, 2006) (on file with authors); Lexipol, Contract with the Cty. of Napa (approved by Board of Supervisors Apr. 12, 2005) (on file with authors). Similarly, Lexipol has required jurisdictions to waive standard provisions in their contracts requiring vendors to pay any settlements and judgments arising out of their contract performance. *See, e.g.*, Agreement between Lexipol and the City of Chula Vista for Use of Subscription Material (July 1, 2015) (on file with authors) (waiving the standard provision in a

Lexipol, an indemnification term is necessitated by its business model: As Lexipol explained in a memorandum to customers, removing the indemnification clause would mean that subscription prices would increase "dramatically" to account for the possibility of litigation.[234] Nevertheless, Lexipol has also assured its subscribers that "Lexipol's content has been published for agency use for over 10 years," and "[w]e are unaware of any case in which Lexipol provided content was found faulty by a court. . . . Consider that track record against any alternative."[235]

Although Lexipol's indemnification clause may make business sense for the company and for its subscribers, it creates the potential for a liability shell game when policies are faulty. A plaintiff can sue a city or county if she suffered a constitutional harm that resulted from official police policy.[236] Presumably as a means of avoiding liability under this legal theory, Lexipol has repeatedly made clear that "Lexipol will never assume the position as any agency's 'policy-maker.'"[237] In negotiations with one jurisdiction over the indemnification issue, Lexipol offered the curious rationale that it only "suggests" content and does not actually "control" the policies adopted by the agency:

> We only suggest content. The agency has total control of their actual policies. The Chief will adopt the Policy Manual before it is deployed and certify that he is the Policy Maker as defined by federal

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vendor contract for Lexipol, which requires city vendors to indemnify and hold harmless the city). Other localities similarly had to request waivers of their normal indemnification terms in order to accommodate Lexipol's refusal to agree to this term. Agenda Item, Office of the Sheriff–Coroner, Cty. of Tulare, Approve Agreement Between the County of Tulare and Lexipol (Aug. 23, 2006) (on file with authors) (requesting that the Board approve an agreement between the County of Tulare and Lexipol, "which includes payment in advance and waiver of [the county's] indemnification provisions").

234. Lexipol's Position on Contractual Indemnification, *supra* note 162.

235. *Id.*

236. *See generally* Monell v. Dep't of Soc. Serv., 436 U.S. 658 (1978) (allowing municipal liability for an unconstitutional policy that causes harm).

237. Lexipol's Position on Contractual Indemnification, *supra* note 162; *see also* Second Addendum to Agreement Between City of Fresno and Lexipol, LLC (July 23, 2015) (on file with authors) (containing an acknowledgment by the city that "neither Lexipol nor any of its agents, employees or representatives shall be considered 'policy makers' in any legal or other sense and that the chief executive of City will, for all purposes, be considered the 'policy maker' with regard to each and every such policy and Daily Training Bulletin").

We could find only one case in which Lexipol was named as a defendant in a civil rights suit against a law enforcement agency or officer. That case alleged that Thomas Schrock died after Ontario Police, following a Lexipol policy, shot him twice with a Taser. Schrock v. Taser Int'l, Inc., No. ED CV 14–02142–AB (DTBx), 2014 WL 7332112 (C.D. Cal. Dec. 19, 2014). Lexipol was voluntarily dismissed from the case after moving for summary judgment. *See* Defendant, Lexipol, LLC's Ex Parte Application to Dismiss Lexipol, LLC and for Entry of Judgment at 3, Schrock v. Taser Int'l, Inc., No. CIVDS 1408556 (Cal. Super. Ct. Apr. 28, 2016) (Bloomberg, Litigation & Dockets) (requesting Lexipol be dismissed from the case because it was not named in plaintiffs' amended complaint). In this Article we have repeatedly relied on Bruce Praet's deposition in that case. *See supra* note 31.

> requirements. Certainly the agency would not ask us to indemnify what we do not control.[238]

In addition, when Lexipol issues a policy update, it cautions its subscribers "to carefully review all content and updates for applicability to your agency, and check with your agency's legal advisor for appropriate legal review before changing or adopting any policy."[239] These disclaimers about Lexipol's policymaking role sit in stark contrast with the broader messaging by Lexipol to jurisdictions—that its policies are "legally defensible" and designed to help jurisdictions avoid litigation that will result from out-of-date policies. Indeed Lexipol markets its policies as a cost-savings because agencies can adopt them without modification.[240]

Lexipol, LLC's vigorous use of copyright law to protect its business interests is another troubling outgrowth of its for-profit status. Under a standard term found in all Lexipol contracts, Lexipol, rather than the contracting agency, holds the copyright to all policies.[241] Even when a law enforcement agency that contracts with Lexipol amends Lexipol's model policies, Lexipol regards the resulting amended policy as covered by Lexipol's copyright.[242] The manuals used by Lexipol subscribers have the Lexipol copyright on each page, even when the subscriber has added original content to the page.[243]

Lexipol has a sensible business argument for copyrighting its policies and preventing its policies from being adopted by other agencies without paying Lexipol. As Lexipol's CEO explained in correspondence to a customer in our study, "if we do not correct/defend any and all known violations we risk losing the copyright and by extension we risk our ability to do business."[244] Yet this copyright position may inhibit improvements to

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238. INDEMNIFICATION RATIONALE, *supra* note 142.

239. LEXIPOL, POLICY MANUAL UPDATE: RELEASE NOTES 1 (Dec. 2013) (provided by Cathedral City) (on file with authors).

240. *See supra* note 78 and accompanying text.

241. *See, e.g.*, Lexipol, Contract with the Long Beach Police Dep't (2013) (on file with authors). The contract provides that:

> Agency further agrees that any content within an Agency Policy Manual prepared by Agency, based in whole or in part on content created by Lexipol, or based on any Supplemental Policy Publications and/or Procedure Manuals, and Daily Training Bulletins copyrighted by Lexipol shall be derivative works subject to the copyright of Lexipol.

Id.

242. *See, e.g.*, E-mail from Ron Wilkerson, CEO, Lexipol, to Scott Jordan, Chief, Tustin Police Dep't (Apr. 1, 2013, 9:32 AM) ("Lexipol copyright needs to be added to any content authored by Lexipol whether in total or a derivative of content authored by Lexipol.").

243. We did find eight jurisdictions that consulted with Lexipol but did not officially adopt Lexipol's policies. Their manuals did not have Lexipol's copyright stamp on their policies. *See infra* note 253 and accompanying text.

244. E-mail from Ron Wilkerson, *supra* note 242.

Lexipol's policies and stunt development of policies and best practices more generally.

Police policymaking is often viewed as a collective enterprise among advocacy groups, community leaders, and other experts. For example, the Immigrant Legal Resource Center (ILRC), a nonprofit organization that advocates for the rights of immigrants, has published a guide featuring policies from several jurisdictions that protect immigrants from federal immigration enforcement.[245] As part of this project, ILRC also publishes an interactive national map that includes links to local policing policies that disentangle local law enforcement from federal deportation efforts.[246] Campaign Zero, a nonprofit organization dedicated to ending police-caused deaths, has crafted a model use of force policy from components of policies adopted by departments in a number of jurisdictions including Philadelphia, Denver, Seattle, Cleveland, New York City, Los Angeles, Las Vegas, and Milwaukee, all of which are made available to the public on Campaign Zero's web page.[247]

The basic idea behind these efforts is that sharing, evaluating, and modifying policies from different jurisdictions will improve police policies overall. Groups like ILRC and Campaign Zero can identify the strengths and weaknesses of policies from different jurisdictions and analyze the ways in which these policies impact discretionary decisionmaking. This information can then be used by other jurisdictions to make informed decisions about which policies to adopt.

Lexipol's copyrighted policies can only play a limited role in this evaluative process. Lexipol subscribers can make their policies public and sometimes post their policies online.[248] But Lexipol's copyright stamp must be included on each page of those policies. And it is Lexipol's position that other jurisdictions cannot adopt language from Lexipol policies—even policies that have been modified by their subscribers—without first paying Lexipol. When Lexipol learned that the Tustin Police Department—a Lexipol

245. LENA GRABER, ANGIE JUNCK & NIKKI MARQUEZ, LOCAL OPTIONS FOR PROTECTING IMMIGRANTS: A COLLECTION OF CITY & COUNTY POLICIES TO PROTECT IMMIGRANTS FROM DISCRIMINATION AND DEPORTATION (2016), https://www.ilrc.org/sites/default/files/resources/local_options_final.pdf [https://perma.cc/W9KP-GFG3].

246. *National Map of Local Entanglement with ICE*, IMMIGRANT LEGAL RESOURCE CTR. (Dec. 19, 2016), https://www.ilrc.org/local-enforcement-map [https://perma.cc/F9PW-KBFN].

247. *Limit Use of Force*, CAMPAIGN ZERO, https://www.joincampaignzero.org/force/ [https://perma.cc/U4RZ-DQQ7].

248. For examples of agencies posting their Lexipol-authored policy manuals online see AUSTIN POLICE DEP'T, POLICY MANUAL (2015), https://www.documentcloud.org/documents/2661319-Austin-Police-Department-Policy-Manual-2015.html [https://perma.cc/RAQ3-QR5N]; PALO ALTO POLICE DEP'T, POLICY MANUAL (2013), https://www.cityofpaloalto.org/civicax/filebank/documents/38381 [https://perma.cc/Z2VR-VY2L]; RIVERSIDE POLICE DEP'T, RIVERSIDE P.D. POLICY MANUAL (2017), https://riversideca.gov/rpd/ChiefOfc/manual.pdf [https://perma.cc/B36R-FW25].

subscriber—did not have a Lexipol copyright stamp on its policy manual's pages and had distributed its manual online and shared portions of its manual with other agencies, then-CEO Ron Wilkerson contacted the Tustin Police Chief with the company's copyright concerns. Wilkerson explained to the chief that "if your manual is posted on any web site or forum such as the [International Association of Chiefs of Police] site and others use that content not knowing it is copyrighted material a much more serious problem takes shape."[249] Wilkerson also asked that the chief identify any agencies that might be using the policies so that he could "work to correct the problem."[250] Lexipol's approach allows the company to preserve its copyright and the associated financial benefits but is contrary to a collaborative policymaking approach.

One jurisdiction in our study—the City and County of San Francisco Sheriff's Department—concluded that Lexipol's insistence on a copyright provision was a deal breaker. The sheriff had retained Lexipol to consult with them on developing a new use of force policy. But Lexipol insisted that the resulting policy would belong to Lexipol, not the sheriff. As the San Francisco City Attorney's Office advised Lexipol in a memorandum terminating the relationship, "Lexipol's ownership of copyrighted material and related derivative works language was unacceptable."[251] Other jurisdictions have also struggled with the copyright issue. For example, the City of Orange raised the copyright issue with us in response to our public records request, lamenting that although they "have revised many of [their] policies without Lexipol input" since the time of their initial Lexipol contract in 2004, "[t]he policies maintain the Lexipol trademark stamp as we did not wish to fight with them about whether they were still their intellectual property."[252]

Eight of the departments in our study have what we call hybrid contractual arrangements, whereby they subscribe to Lexipol's manual service to stay updated on policy development but do not adopt the Lexipol manual for their department.[253] Instead, they have continued using their own manual, which carries no Lexipol copyright stamp.

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249. E-mail from Ron Wilkerson, *supra* note 242.

250. *Id.*

251. Memorandum from Michael Renoux, Dir. Contracts, Lexipol, to Carl Fabbri, Lieutenant, S.F. Police Dep't (Jan. 25, 2016) (on file with authors).

252. E-mail from Denah Hoard, City of Orange, to Ingrid Eagly (Dec. 14, 2016, 7:43 AM) (on file with authors).

253. The eight hybrid departments are the Oceanside Police Department, the Solano County Sheriff's Office, the Kern County Sheriff's Office, the Davis Police Department, the Riverside County Sheriff's Department, the Irvine Police Department, the Burbank Police Department, and the Butte County Sheriff's Office. *See* E-mail from Patti Czaiko, Admin. Sec'y, City of Oceanside, to Ingrid Eagly (Sept. 20, 2017, 7:37 AM) ("I confirmed with Oceanside Police Department that the Lexipol website is utilized for research when developing language for the OPD internal manual. They are not using Lexipol as the Policy and Procedure Manual, it is simply a resource."); E-mail

In this Article, we have not examined the practices of all private companies engaged in police policymaking. It is certainly possible that the practices of other private policymaking groups would not prompt the same concerns that we have observed about Lexipol. Yet Lexipol is—and is well-positioned to remain—the dominant private actor in the police policymaking market, and we find that Lexipol's privatized approach raises significant substance and process concerns. More fundamentally, our study raises questions as to what role Lexipol can and should play in efforts to improve police policymaking more generally. This is the topic to which we turn in Part III.

III. Moving Forward

In this Part, we offer several recommendations about how to move forward. Our goal with these recommendations is to enable local governments to be more fully engaged in the creation of their policies and trainings, while recognizing the financial and time constraints that have made it difficult for local governments to craft comprehensive policy manuals and trainings on their own. First, we recommend that Lexipol be more transparent about its policymaking process so that adopting jurisdictions can more easily make informed decisions about whether to modify or adopt wholesale Lexipol's proposed policies. Second, we encourage states and local jurisdictions to promulgate model policies and foster independent policymaking processes. Third, we urge nonprofits and scholars interested in

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from Kimberley G. Glover, Solano Cty. Counsel, to Ingrid Eagly (Sept. 16, 2017, 4:02 PM) (on file with authors) ("[A]lthough the Sheriff's Office does have a Lexipol contract, I have been advised that they do not use it very often and have not adopted the Lexipo[]l 'policy manual.'"); E-mail from Jennifer Moran, Police Records Manager, Burbank Police Dep't, to Ingrid Eagly (May 11, 2017, 3:24 PM) (on file with authors) ("We use the Lexipol policies as a reference. We read the policies and edit them to fit our needs. Some polic[i]es require very little changes and others are heavily edited. We customize the policies so they are in line with the BPD[']s business practices and with our existing procedures. Lexipol assists with the legal mandate verbiage. Once we make the edits, the policy becomes ours and it is not a Lexipol policy."); Letter from Virginia L. Gingery, Deputy Cty. Counsel, Butte Cty., Cal., to authors (Dec. 6, 2016) (on file with authors) ("I am informed that the Department does not use Lexipol's policies and procedures verbatim, but rather, uses Lexipol as a resource when developing its own policies and departmental orders. The contractual relationship with Lexipol is in the form of a yearly subscription."); Letter from Donny Youngblood, Sheriff–Coroner, Kern Cty., Cal., to Ingrid Eagly (Dec. 2, 2016) (on file with authors) ("The Commander in charge of the Human Resources unit believes that the Sheriff's office has been using Lexipol for years but has never used or adopted Lexipol information to formulate any policy or procedures. The Commander periodically receives e-mails from Lexipol LLC with the latest updates in case law [a]ffecting law enforcement which coincides with notifications received from other services about the same issues."); Letter from David Delaini, Deputy Police Chief, Davis Police Dep't, to authors (Nov. 14, 2016) (reporting that the Davis Police Department is a member of the Yolo County Public Agency Risk Management Insurance Company (YCPARMIA), that the Department has access to Lexipol's policies as part of its contract with YCPARMIA, and that, "[w]hile the Department has used the Lexipol policies as a guide, the Department has not adopted the Lexipol policy manual as its own and does not communicate with Lexipol regarding the Department's policy manual."); *see also* Appendix.

improving police policies to take steps to more effectively compete in the increasingly privatized police policymaking space and view Lexipol as a critically important audience.

A. Understanding Lexipol

Lexipol should be more transparent about its policymaking process. Currently, Lexipol provides no information to its subscribers about the identity of experts who draft their model policies, the evidence upon which it relies when crafting policies and trainings, the policy interests that animate its drafting choices, the availability of alternative policy formulations, or the impact of its policies on local jurisdictions' practices.

Lexipol's lack of transparency about its employees and policymaking process threatens local governments' policymaking efforts in two ways. First, local jurisdictions deciding whether to purchase Lexipol's services have little information with which to assess the quality of Lexipol's products or the ways in which those products might influence police practices. Second, Lexipol's lack of transparency makes it difficult for subscribers to decide which of Lexipol's proposed policies to adopt. Lexipol customers are faced with an uncomfortable choice—adopt each of Lexipol's model policies on the untested assumption that the policies are sound or spend scarce time and money to independently evaluate those policies.

Lexipol could make this choice less stark by providing its customers with additional information about the rationale for its policy choices and available policy alternatives. Armed with more knowledge about the considerations relevant to Lexipol's policy rationales, subscribers could make better informed decisions about whether and how to modify Lexipol's standard policy language.

Body camera policies are just one arena in which more transparency by Lexipol would benefit its customers. There is a great deal of disagreement about whether police officers should be able to review body camera video before writing up reports about use of force incidents.[254] The United States Department of Justice's Community Oriented Policing Services and the Police Executive Research Forum recommend allowing officers to review video footage before making a statement about an incident because "[r]eviewing footage will help officers remember the incident more clearly, which leads to more accurate documentation of events" and "[r]eal-time recording of the event is considered best evidence."[255] In contrast, the ACLU

254. N.Y.C. POLICE DEP'T, NYPD RESPONSE TO PUBLIC AND OFFICER INPUT ON THE DEPARTMENT'S PROPOSED BODY-WORN CAMERA POLICY 16–17 (2017), https://policingproject.org/wp-content/uploads/2017/04/NYPD_BWC-Response-to-Officer-and-Public-Input.pdf [https://perma.cc/TDM9-XG7D] [hereinafter NYPD BODY CAMERA REPORT].

255. U.S. DEP'T OF JUSTICE CMTY. ORIENTED POLICING SERVS. & POLICE EXEC. RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS

opposes policies that allow officers to review video before writing up reports, arguing that the practice enables lying, undermines the legitimacy of investigations, and allows for cross-contamination of evidence.[256] Several police departments, including Atlanta, Oakland, San Francisco, San Jose, and Washington, D.C., prohibit their officers from viewing video footage prior to making a statement.[257]

Lexipol adopted a model policy that allows officers to review body camera footage before making a statement to investigators.[258] But Lexipol's policy manual includes no guidance about the rationale supporting its policy decision, alternative policies adopted by other jurisdictions, or the reasons it rejected those alternative approaches. Lexipol was willing to share with us their policy "guide sheet" for this policy,[259] but it contained nothing by way of guidance for agencies other than to note that the issue is "hotly debated . . . when it comes to officer-involved shootings."[260] Moreover, the guide "recommends" that agencies adopt the Lexipol policy language without providing additional information with which agencies can make their own assessment.[261] Finally, Lexipol executives who read a draft of this Article pointed us to a webinar available on its website about the decision to allow officers to view video footage before offering a statement.[262] We do not know how many agencies review this and other webinars produced by Lexipol, but note that the webinar did not include information about alternative policy

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LEARNED 45 (2014), https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf [https://perma.cc/799X-RM29].

256. *See* Jay Stanley & Peter Bibring, *Should Officers Be Permitted to View Body Camera Footage Before Writing Their Reports?*, ACLU (Jan. 13, 2015), https://www.aclu.org/blog/free-future/should-officers-be-permitted-view-body-camera-footage-writing-their-reports [https://perma.cc/8FWS-DKBG].

257. NYPD BODY CAMERA REPORT, *supra* note 254, at 16. A recent report by the Stanford Criminal Justice Center (SCJC) recommends that law enforcement agencies should not investigate their own cases involving officer shootings. Such an approach, according to SCJC, would help to minimize conflicts of interest and enhance the accountability of police. AMARI L. HAMMONDS ET AL., STANFORD CRIMINAL JUSTICE CTR., AT ARM'S LENGTH: IMPROVING CRIMINAL INVESTIGATIONS OF POLICE SHOOTINGS 16 (2016), https://law.stanford.edu/wp-content/uploads/2016/09/At-Arms-Length-Oct-2016.pdf [https://perma.cc/JSC6-L22J].

258. *See, e.g.*, ELK GROVE POLICE DEP'T, POLICY MANUAL (2017) (adopting Lexipol Policy 310.8, Audio and Video Recordings, which explains that "[a]ny officer involved in a shooting or death may be permitted to review available Mobile Audio/Video (MAV), body-worn video, or other video or audio recordings prior to providing a recorded statement or completing reports").

259. For a description of policy guide sheets, see *supra* notes 83–88 and accompanying text. As we have discussed, these policy guide sheets do not appear to be used by many Lexipol customers. *See supra* notes 214–215 and accompanying text.

260. SECOND LEXIPOL POWERPOINT, *supra* note 9, at 17 (presenting a sample Lexipol policy guide sheet for officer-involved shootings in California).

261. *Id.*

262. *See* Grant Fredericks, Laura Scarry & Ken Wallentine, *Point/Counterpoint: The Debate over Officer Viewing of BWC Video Footage*, LEXIPOL (Dec. 12, 2016), https://register.gotowebinar.com/register/2776677462342353 96 [https://perma.cc/M9M6-SHCA] (Lexipol webinar).

approaches adopted by other agencies or supported by those groups advocating for restrictions on video review by officers.[263]

Lexipol's presentation of its body camera policy stands in contrast to that of the New York City Police Department, which similarly allows officers to review body camera footage before making a statement. When New York City adopted this policy, it issued a lengthy report describing public and police views about various policy options and the rationale supporting its decision.[264] Were Lexipol to provide agencies with more information about the rationale underlying its policy decisions regarding body camera footage and other areas of debate and disagreement, subscribing jurisdictions would be able to make independent, informed decisions about whether to adopt or modify Lexipol's standard policies.

Assuming that Lexipol stands by its process and content, it should welcome additional transparency. Lexipol makes clear that it should not be viewed as police departments' policymaker and that local jurisdictions should assess proposed policies and decide on their own whether to adopt them. According to the fine print in Lexipol contracts, the local jurisdictions (not Lexipol LLC) are the policymakers, and local law enforcement (not Lexipol LLC) will be held liable if those policies are found to be constitutionally unsound. It is, therefore, consistent with Lexipol's proclaimed advisory role to provide agencies with background information about Lexipol's policy decisions so that they can be more engaged in the creation of their policies.

B. Regulating Lexipol

Our second recommendation is that governments become more actively engaged with police policymaking as a mechanism to narrow the gap between policymaking ideals and current practices. Lexipol's influence could be subject to greater public oversight if states and cities were to take a greater interest in both the process by which important policing policies are created and the content of the resulting policies. In addition, courts could play a role by requiring local governments to engage in transparent policymaking.

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263. The three participants in the video are two Lexipol employees and an instructor at the FBI National Academy who is a forensic video analyst. *Id.* The webinar identified arguments for and against allowing officers to review video before making a statement but ultimately recommended that officers be allowed to view video before making a statement.

264. *See generally* NYPD BODY CAMERA REPORT, *supra* note 254. In another example that deviates from the Lexipol model, the City Council in Berkeley, California, recently worked with the SCJC to provide detailed advice in a published report regarding the benefits and drawbacks of arming the Berkeley Police Department with Electronic Control Weapons. *See generally* JENA NEUSCHELER & AKIVA FREIDLIN, STANFORD CRIMINAL JUSTICE CTR., REPORT ON ELECTRONIC CONTROL WEAPONS (ECWS) SUBMITTED TO THE CITY OF BERKELEY (2015), https://www-cdn.law.stanford.edu/wp-content/uploads/2015/10/ECW-Final-Draft-2.pdf [https://perma.cc/2VCD-6CVD].

First, state and local policing agencies that subscribe to Lexipol should customize Lexipol's model policies to reflect their particular needs and community values.[265] When making the decision to purchase a Lexipol contract, localities should account for the agency time that is necessary to review and customize the policies. Indeed, the agency does remain the "policymaker" under the standard Lexipol contract and must take this obligation seriously.

This is precisely how a major California municipal insurer hopes its subscribers will use Lexipol. California Joint Powers Insurance Authority (CJPIA), a municipal self-insurance pool with more than 100 members, provides Lexipol subscriptions to its insureds.[266] However, in a recent newsletter, CJPIA encouraged its members to view sample policies from Lexipol and other sources as "a [s]tarting [p]oint; [n]ot an [e]nding [p]oint."[267] Acknowledging that "[s]uch policies are often well-researched, well-written, and legally compliant" and "can provide an excellent starting point for drafting," CJPIA warned readers that "all too often, the drafter simply takes the policy, changes the names and titles and voilá—a policy has been born! Yet, using another's policy can be a trap for the unwary."[268] Among the concerns identified by the CJPIA are that the model policy "does not alleviate the agency of the responsibility for the content of the policy" and that different public agencies may have different needs and practices.[269] Although this type of localization will take some time and money, it will be far less expensive than creating entirely new policies and trainings. And if Lexipol is more transparent about its policymaking process, it will be less burdensome for local jurisdictions to benefit from—without overly relying upon—Lexipol.

Second, local governments should be encouraged to write their own policies, and develop procedures for implementing them, without subscribing to Lexipol. At the local level, some jurisdictions have taken steps to create their own formalized system for police rulemaking, akin to what has been advocated by scholars. The Los Angeles Board of Police Commissioners is one such example. This five-member civilian body functions "like a

265. While determining the extent to which jurisdictions customize their manuals is beyond the scope of this project, the manuals that we did receive in public records requests appear highly standardized. *See supra* notes 89–90 and accompanying text.

266. Mellor, *supra* note 134 (reporting that in January 2009, Lexipol and CJPIA entered a "strategic business partnership . . . whereby the California JPIA funds the cost of a member's participation in the Law Enforcement Policy Manual Update and Daily Training Bulletin subscriptions").

267. Kelly A. Trainer, *Risk Solutions: One Size Rarely Fits All: Proper Use of Sample Policies*, CAL. JPIA, Dec. 2016, https://cjpia.org/news/newsletter/newsletter-article/2016/12/15/december-2016—issue-58#seven [https://perma.cc/TAK4-TC9E].

268. *Id.*

269. *Id.*

corporate board of directors" for the Los Angeles Police Department,[270] taking on roles that include developing and analyzing police policies and monitoring policy implementation.[271] Importantly, all of its meetings are open to the public and the group provides opportunities for public comment.[272]

The Chief of the Washington, D.C. Metropolitan Police Department is responsible for policymaking,[273] with internal institutional support and input from outside constituencies. The Chief has a dedicated Policy and Standards Branch, which develops and publishes department policy and directives.[274] The Chief also consults with the Citizens Advisory Council, a group of community members that provide community feedback on policy issues.[275] To further increase transparency, the D.C. Official Code requires all written policy directives to be available to the public online.[276]

Other jurisdictions have involved community members in piloting new policy initiatives. The Camden County Police Department partnered with NYU School of Law's Policing Project to seek community input on their

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270. *Police Commission*, L.A. POLICE DEP'T, http://www.lapdonline.org/police_commission [https://perma.cc/C7EZ-WPTE]. The Board's five civilian members are appointed by the Mayor and confirmed by the Los Angeles City Council. *The Function and Role of the Board of Police Commissioners*, L.A. POLICE DEP'T, http://www.lapdonline.org/police_commission/content_basic_view/900 [https://perma.cc/BP23-3PPJ].

271. *The Function and Role of the Board of Police Commissioners*, L.A. POLICE DEP'T, http://www.lapdonline.org/police_commission/content_basic_view/900 [https://perma.cc/BP23-3PPJ] (including a detailed description of the various arms of the Commission, including the policy group that "assists the Board in developing and analyzing policy, monitoring the progress of policy implementation, and reviewing proposed Department actions" and "also provides overall research and analytical support to the Commission, and facilitates the transfer and coordination of information").

272. *Id.* Other major cities have also adopted a Police Commission model similar to that of Los Angeles. *See, e.g.*, *Police Commission*, S.F. POLICE, http://sanfranciscopolice.org/police-commission [https://perma.cc/9AVN-EKPR]; *About the Fire and Police Commission*, CITY.MILWAUKEE.GOV, http://city.milwaukee.gov/fpc/About#.WXaL39Pytn5 [https://perma.cc/36XN-XUPH]; *Police Commissioners History*, DETROITMI.GOV, http://www.detroitmi.gov/How-Do-I/Find-Detroit-Archives/Police-Commissioners-History [https://perma.cc/Q8A6-VNUL]; *Community Police Commission: About Us*, SEATTLE.GOV, https://www.seattle.gov/community-police-commission/about-us [https://perma.cc/8BM6-QRTJ]; *Board of Police Commissioners: St. Louis County Police Department*, STLOUISCO.COM, http://www.stlouisco.com/LawandPublicSafety/PoliceDepartment/AboutUs/BoardofPoliceCommissioners [https://perma.cc/CUA9-EK7P].

273. METROPOLITAN POLICE DEP'T, D.C., GO-OMA-101.00, DIRECTIVES SYSTEM 1 (June 3, 2016), https://go.mpdconline.com/GO/GO_101_00.pdf [https://perma.cc/V2Z3-K9YL] ("The Chief of Police makes 'orders, rules, and regulations governing conduct and controlling police activity.'").

274. *Policy and Standards Branch*, METROPOLITAN POLICE DEP'T, D.C., https://mpdc.dc.gov/page/policy-and-standards-branch [https://perma.cc/LQL6-MZTP].

275. *Citizens Advisory Councils*, METROPOLITAN POLICE DEP'T, D.C., https://mpdc.dc.gov/page/citizens-advisory-councils-cac [https://perma.cc/8UGE-4KBT].

276. D.C. CODE § 2-536 (2012).

department's body-worn-camera policy.[277] The department posted a draft policy on its website and sought feedback through an online questionnaire, in two community forums, and from focus groups made up of Camden police officers who had been using body cameras as part of a pilot project.[278] In response to this feedback, the department made several adjustments to its draft policy and published a report describing the community feedback the department received and the changes to the draft policy inspired by that feedback.[279]

While not all jurisdictions will have the resources to support a full commission process like that in operation in Los Angeles, most larger departments could follow Camden's example and involve community members in the ongoing development and revision of police policies. Moreover, jurisdictions that create their own policies could do more to disseminate their resulting policies to the public free of cost so that other agencies, particularly smaller ones, can adopt them. Local engagement in the development and revision of police policies is particularly important in jurisdictions that have been investigated or sued for civil rights abuses. Public rulemaking processes and advisory councils like that adopted in Washington, D.C., can be used to address the unique problems faced by departments and can strengthen community trust damaged as a result of those problems. Instead, several departments in our study appear to have adopted Lexipol policies after facing these types of suits and investigations without public engagement or input about the content of those policies.[280]

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277. *Camden*, POLICING PROJECT: N.Y.U. SCH. L., https://policingproject.org/our-work/developing-accountability/camden/ [https://perma.cc/T8BP-7S32].

278. *Id.*

279. *Id.*

280. For example, when the Oakland City Council approved a settlement of a multitude of constitutional violations by police officers, the court monitor approved a Lexipol contract rather than requiring the city to revise its own policies in collaboration with community members. *See* Oakland City Council, Resolution No. 85356 (Dec. 4, 2014) (on file with authors) (indicating that Lexipol was the sole respondent to a request for proposals from outside vendors); E-mail from Kristin Burgess to Danielle Cortijo (Mar. 26, 2015, 2:37 PM) (on file with authors) (indicating that approval for Lexipol was obtained from the monitor). Similarly, the Bakersfield Police Department became a Lexipol subscriber immediately after the Department of Justice recommended a series of reforms to their department's written police policies. Joe Mullins, Sergeant, Bakersfield Police Dep't, Approval of Lexipol's Subscription Agreement (July 6, 2006) (on file with authors) (laying out the terms and conditions of the subscription agreement); Letter from Shanetta Y. Cutlar, Chief, Special Litig. Section, U.S. Dep't of Justice, to Virginia Gennaro, City Attorney, City of Bakersfield (Apr. 12, 2004), https://www.justice.gov/sites/default/files/crt/legacy/2011/04/14/bakersfield_ta_letter.pdf [https://perma.cc/GG2S-R39E] (recommending a series of reforms to the department's written policies at a preliminary stage of investigation). The Inglewood Police Department also adopted Lexipol policies after public outcry over repeated shootings of unarmed suspects by the department's officers. *See* Jack Leonard & Victoria Kim, *Inglewood Police Have Repeatedly Resorted to Deadly Force*, L.A. TIMES (Dec. 28, 2008), http://www.latimes.com/local/la-me-inglewood28-2008dec28-story.html [https://perma.cc/H2KU-DLDU] (detailing the Inglewood Police Department's pattern of using unnecessary force against suspects).

Third, state legislatures could more actively shape the content of the Lexipol policies that their law enforcement departments adopt. It was, after all, a 1959 California law designed to encourage police departments to adopt policies governing police pursuits that provided the foundation for starting Lexipol.[281] Since then, additional state reforms have further shaped the content of police pursuit policy in California. For example, in 1993, the state required the Commission on Peace Officer Standards and Training to establish further guidelines and training on vehicle pursuits, involving more than 120 law enforcement agencies, legal advisors, and public representatives in the development of the guidelines.[282] Other states around the country have similarly passed laws that require departments to adopt policy content. For example, a number of states require that police administer lineups with safeguards that research has shown reduce the possibility of misidentification.[283] Wisconsin's state law on eyewitness identification procedures specifically requires that law enforcement agencies "adopt written policies" that are "designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases."[284] Moreover, the law requires that agencies "consider model policies and policies adopted by other jurisdictions" when developing and revising their own eyewitness identification policies.[285]

States could do more to regulate the content of police policies of public import—they could require Lexipol and its law enforcement agency clients to be more transparent about their policy choices. States could also require that Lexipol and its subscribers seek community input about proposed policies. The California legislature recently passed the TRUTH Act, which requires law enforcement agencies to hold community forums before allowing officials from Immigration and Customs Enforcement (ICE) to interview detainees.[286] This legislation requires all jurisdictions that

281. CAL. VEH. CODE § 17004.7 (West 2007) (benefitting jurisdictions that adopt a "written policy" on police pursuits that meets a number of "minimum standards" and requires that "all peace officers of the public agency certify in writing that they have received, read, and understand the policy"); *see also supra* notes 31–34 and accompanying text (discussing the founding of Lexipol).

282. S.B. 601, 1993–1994 Leg. Sess. (Cal. 1993). This law and other subsequent legal amendments are codified in § 13519.8 of California's Penal Code. CAL. PENAL CODE § 13519.8 (West 2012); *see generally* CAL. COMM'N ON PEACE OFFICER STANDARDS & TRAINING, CALIFORNIA LAW ENFORCEMENT VEHICLE PURSUIT GUIDELINES 2006 (rev. ed. 2007), http://lib.post.ca.gov/Publications/vp_guidelines.pdf [https://perma.cc/MP62-XMXQ].

283. Mark Hansen, *Show Me Your ID: Cops, Courts Re-evaluate Their Use of Eyewitnesses*, ABA J. (May 2012), http://www.abajournal.com/magazine/article/show_me_your_id_cops_courts_re-evaluate_their_use_of_eyewitnesses/ [https://perma.cc/B46G-M33S].

284. WIS. STAT. § 175.50(2) (2017).

285. *Id.* § 175.50(4).

286. *See* Assemb. B 2792, 2015–2016 Leg., Reg. Sess. (Cal. 2016). *See generally* Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12 (2017) (discussing California's adoption of new laws designed to disentangle state law enforcement from federal deportation efforts).

cooperate with ICE in the state to solicit community input. Perhaps a similar requirement could be legislated for agencies that subscribe to Lexipol or other private policymaking entities, requiring them to seek public comment on their police policies.

States and localities could also facilitate public rulemaking by establishing a rulemaking body for the police. Since 1953, California's Ralph M. Brown Act (Brown Act) has required that all meetings by the governing body of a local agency be open to the public and allow for public participation.[287] The Brown Act provides a ready-made framework to facilitate public participation in police policymaking.[288] As far as we are aware, California jurisdictions using Lexipol have not followed the Brown Act provisions.[289] However, they could start doing so by requiring that a governmental committee or commission approve local police policies, including those written by Lexipol, thereby bringing the process of reviewing and customizing Lexipol policies squarely into the purview of the state's open-meeting requirements.[290] A simple additional improvement would be to require that police departments make copies of their policy manuals and training materials available to the public on the Internet. This would be a first, modest step toward improving transparency and facilitating public engagement on policymaking.

Finally, courts could assume a more active role in the substance and process of police policymaking. Courts will always serve an important function in identifying the baseline—a constitutional floor under which police conduct may not pass. That alone will continue to inform police policy, particularly the type of "legally defensible" policies that Lexipol promotes. But courts have often proven themselves ill-suited or unwilling to articulate

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287. Ralph M. Brown Act, CAL. GOV'T CODE §§ 54950–63 (West 2017) (providing that meetings of public bodies in California must be "open and public" and that action taken in violation of open-meetings laws may be voided). The Act provides details regarding which entities are covered and how to properly run public meetings (including requirements for when and how agendas are posted, how to broadcast meetings, and how to track the minutes of the meetings). *Id.*; *see also* Int'l Longshoremen's & Warehousemen's Union v. L.A. Exp. Terminal, Inc., 69 Cal. App. 4th 287, 293 (1999) (noting that the Brown Act "serves to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation of public bodies").

288. Several local jurisdictions in California—including San Francisco, Contra Costa County, and Oakland—require even greater public transparency through local "Sunshine" ordinances. *E.g.*, S.F., CAL., S.F. ADMIN. CODE § 67.1 (1999), http://sfgov.org/sunshine/provisions-sunshine-ordinance-section-67 [https://perma.cc/9MYN-E2MB]; CONTRA COSTA CTY., CAL., ORDINANCE CODE tit. 2 div. 25 (1995); OAKLAND, CAL., CODE OF ORDINANCE tit. 2 ch. 2.20 (1997).

289. Our research did reveal one unsuccessful suit challenging a Lexipol police policy that alleged that meetings between the police chief, his lieutenant, and officials from Lexipol concerning proposed police policies were subject to the Brown Act. Jiaqing v. City of Albany, No. RG06254229, 2008 WL 7864330 (Cal. Super. Ct. Sept. 29, 2008).

290. Under the Brown Act, "legislative body" includes any "commission, committee, board, or other body of a local agency," including one "that governs a private corporation." CAL. GOV'T CODE § 54952 (West 2003).

the detailed and comprehensive rules necessary to guide police discretion.[291] Andrew Manuel Crespo has argued that if courts took better advantage of the voluminous facts at their disposal about the criminal justice system, they would gain a greater "institutional awareness of the criminal justice systems over which they preside."[292] Doing so, according to Crespo, could bring the institutional advantages of courts—including their ability to "safeguard minority interests that may be ignored or abused in the political process"—to bear on the substance of police policy.[293] Courts could also, as Barry Friedman and Maria Ponomarenko advocate, require localities to adopt democratic processes for police policymaking. Courts could require that local governments create police policies through an administrative rulemaking process and "refuse to defer to policing actions that lack a sufficient democratic pedigree."[294]

Indeed, courts have already played an important role in helping to get major United States cities to democratize their policymaking process. For example, in 2001, the United States Department of Justice entered into a civil rights consent decree with the Los Angeles Police Department following a corruption scandal in the 1990s.[295] The court-enforced consent decree, which was ended by the federal court in 2013,[296] provided guidelines for creating new policies and procedures designed to remedy past abuses[297] and, among other reforms, resulted in the creation of an Office of Constitutional Policing to address issues of police policy.[298] These kinds of court-ordered remedies

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291. *See supra* notes 189–192 and accompanying text (describing these critiques).

292. Crespo, *supra* note 19, at 2065.

293. *Id.* at 2063.

294. Friedman & Ponomarenko, *supra* note 19, at 1836; *see also* BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 113 (2017) (suggesting that courts could refuse "to allow the police to act without [democratic] authorization" or "reward the police for obtaining public approval" for their policing rules before they are adopted).

295. For background on the Rampart corruption scandal, see Lou Cannon, *One Bad Cop*, N.Y. TIMES MAG. (Oct. 1, 2000), http://www.nytimes.com/2000/10/01/magazine/one-bad-cop.html, and Anne-Marie O'Connor, *Rampart Set Up Latinos to Be Deported, INS Says*, L.A. TIMES (Feb. 24, 2000), http://articles.latimes.com/2000/feb/24/news/mn-2075 [https://perma.cc/98TP-MFFR].

296. Joel Rubin, *Federal Judge Lifts LAPD Consent Decree*, L.A. TIMES (May 16, 2013), http://articles.latimes.com/2013/may/16/local/la-me-lapd-consent-decree-20130517 [https://perma.cc/3PSG-JYG2].

297. *See generally Quarterly Reports of the Independent Monitor*, L.A. POLICE DEP'T, http://www.lapdonline.org/office_of_constitutional_policing_and_policy/content_basic_view/9010 [https://perma.cc/97TX-9848] (containing reports from the Independent Monitor hired to ensure effective and timely implementation of the LAPD consent decree).

298. *Office of Constitutional Policing and Policy*, L.A. POLICE DEP'T, www.lapdonline.org/office_of_constitutional_policing_and_policy [https://perma.cc/3SPQ-FPJR]. *See generally* ALEXANDER A. BUSTAMANTE, OFFICE OF THE INSPECTOR GEN., L.A. POLICE COMM'N, REVIEW OF NATIONAL BEST PRACTICES (2017), http://www.lapdpolicecom.lacity.org/050217/BPC_17-0169.pdf [https://perma.cc/PX8E-DAEM] (analyzing the Los Angeles Police Department's implementation of national best practice recommendations).

through consent decrees are, however, labor intensive and therefore have tended to focus on the largest police departments.[299]

Finally, we believe that judges could take a more active role in understanding and overseeing Lexipol's products and people when they appear in court. Lexipol employees regularly serve as defense experts in constitutional litigation against law enforcement agencies and rely on their association with Lexipol as a credential when establishing their expertise.[300] At least one expert has relied on the fact that a policy was written by Lexipol as proof that it was constitutionally sound.[301] Courts assessing police policies

299. *See generally* Bell, *supra* note 28, at 2130 (arguing that litigation reform strategies risk allowing abuses to continue undetected, especially since litigation "is rarely initiated before tragedy occurs"); Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 44 (2012) (explaining that "the Department of Justice cannot achieve national reform by suing every department with a pattern of widespread constitutional violations"); Patel, *supra* note 209, at 812–14 (describing the "increasing strength" of the DOJ's use of consent decrees under recent administrations and citing the perceived positive outcomes in three major police departments but noting the "vulnerab[ility] to bias and political maneuvering" of consent decrees). The viability of the Department of Justice in this role is also dependent on the priorities of the president. *See* David A. Graham, *Can Trump's Justice Department Undo Police Reform?*, ATLANTIC (Apr. 4, 2017) (describing efforts by Attorney General Jeff Sessions to reverse police reform advances made by the Department of Justice under President Obama).

300. *See, e.g.*, Rebuttal by James Sida to Jeffrey A. Schwartz at 6, Parenti v. County of Monterey, No. 14-CV-05481, 2017 WL 2958801 (N.D. Cal. Jan. 17, 2017) ("I have written jail policies as a practitioner and division commander of a large jail system. In addition, I was the lead consultant in the development of a jail policy manual for Lexipol, Inc., a risk management firm, that provides a jail manual throughout the United States."); Expert Opinion of Use of Force of Robert Glen Carpenter, Durden-Bosley v. Shepherd, No. 2:15-CV-00798MJP, 2016 WL 9281044 (W.D. Wash. Feb. 23, 2016) ("I was the Use of Force subject matter expert (SME) used to develop and implement the present Lexipol policy manual currently used by my department."); Report of Kenneth R. Wallentine at 8, 12, Christiansen v. West Valley City, No. 2:14cv00025, 2015 WL 11439375 (D. Utah July 15, 2015) ("My qualifications as an expert in this subject matter include the following: . . . I am Vice-President and Senior Legal Advisor for Lexipol, Inc., the nations [sic] largest provider of policy formulation and revision for public safety agencies and policy-based training, responsible for reviewing and editing the work of legal staff in creation of policy manuals for law enforcement agencies."); Interim Report of Expert Witness Jeffrey A. Martin at 1, Jaramillo v. City of San Mateo, 76 F. Supp. 3d 905 (N.D. Cal. 2015) (No. C 13-00441 NC), 2015 WL 11253330 ("I also worked as an author of 'Daily Training Bulletins' for Lexipol, LLC, regarding various practices including the use of force, search and seizure, and other police practices."); Defendant's Expert Witness Report - R. Scot Haug, Towry v. Bonner Cty., No. 10-CV-292, 2011 WL 11733377 (D. Idaho June 14, 2011) ("I was selected to serve as a representative of the Statewide Lexipol Model Policy Board where I assisted ICRMP and Lexipol in developing a statewide model policy for the State of Idaho."); Report of Bruce D. Praet at 1, Mitz v. City of Grand Rapids, No. 1:09-cv-365, 2009 WL 6849914 (W.D. Mich. Oct. 21, 2009) (describing his role in the formation of Lexipol as among his expert qualifications).

301. *See, e.g.*, Interim Report of Expert Witness Jeffrey A. Martin at 1, Jaramillo v. City of San Mateo, 76 F. Supp. 3d 905 (N.D. Cal. 2015) (No. C 13-00441 NC), 2015 WL 11253330, at *1 ("The San Mateo Police Department's policy manual is provided by Lexipol, LLC, a private company. Lexipol provides standardized policy manuals for well over 500 law enforcement agencies in California and reflects current statutory authorizations and constitutional limitations on the use of force by peace officers. This makes the policy very sound.").

have also taken notice when policies are created by Lexipol.[302] And when the Department of Justice entered into a court-monitored consent decree with the New Orleans Police Department, New Orleans and Lexipol entered into a $295,000 contract to develop those policies.[303] Although we do not know how courts evaluate experts associated with Lexipol, or policies produced by Lexipol, the repeated invocation of the Lexipol brand suggests it may be treated as a signal of excellence. Yet, as we have shown, very little is actually known about the expertise of Lexipol's employees or the constitutionality or effectiveness of its products. We encourage courts to more rigorously evaluate the credentials of Lexipol experts and the constitutionality of Lexipol policies and trainings without being influenced by its untested marketing claims or its market dominance. The fact that virtually every California law enforcement agency has the same use of force policy should not be viewed as evidence that that policy language is reasonable—it is merely evidence that 95% of California law enforcement agencies subscribe to Lexipol.

C. Competing with Lexipol

Our third recommendation is that nongovernmental groups interested in making their own police policy recommendations adjust their approaches in light of Lexipol's commercial success. Specifically, groups developing model policies should make it easier for jurisdictions to adopt those policies. And groups advocating for policy changes should view Lexipol as a critically important audience.

Several nonprofits and government groups have developed model police policies in recent years.[304] For example, NYU School of Law's Policing Project solicits public involvement when crafting policing policies and also invites social scientists and other experts to weigh in on best practices.[305] The American Law Institute's project on police investigations has drafted template policies with detailed commentary that can be considered and

302. *See, e.g.*, Kong Meng Xiong v. City of Merced, Nos. 1:13–cv–00083–SKO, 1:13–cv–00111–SKO2015, WL 4598861, at *5 (E.D. Cal. July 29, 2015) (noting that "[a]t the time of the incident, MPD used policies developed by Lexipol").

303. Charles Maldonado, *Paying for the Consent Decree*, GAMBIT (Aug. 14, 2012), https://www.bestofneworleans.com/gambit/reform-at-a-cost/Content?oid=2057022 [https://perma.cc/KUU2-2KRP].

304. These initiatives are similar to policy drafting initiatives undertaken in the 1960s. *See* Kenneth Culp Davis, *Police Rulemaking on Selective Enforcement: A Reply*, 125 U. PA. L. REV. 1167, 1170 (1977) (describing rulemaking initiatives in the 1960s by the International Association of Chiefs of Police and the National Advisory Commission on Criminal Justice Standards and Goals).

305. *See generally Our Mission*, POLICING PROJECT: N.Y.U. SCH. L., https://policingproject.org/about-us/our-mission/ [https://perma.cc/WC4V-X8MC].

adopted by law enforcement agencies.[306] The Municipal Research and Services Center, a nonprofit organization that focuses on helping local governments in Washington State with policy issues, publishes information about how local jurisdictions should develop their policy manuals and provides access to the full policy manuals of four major police departments in the state.[307] In a similar vein, the ACLU has launched a "Freedom Cities" campaign to promote nine model state and local law enforcement policies that protect immigrants from the Trump Administration's deportation agenda.[308] And the International Association of Chiefs of Police's Policy Center publishes model policies with accompanying explanations for its drafting choices, including related studies and other information.[309]

Each of these groups makes policies available to the public without copyright restrictions—and many are free. Yet our research suggests that Lexipol's model policies are adopted by more jurisdictions than the model policies developed by these groups. Lexipol provides policies for almost every police department and sheriff's department in California. Beyond the small handful of jurisdictions that choose to create their policies themselves, Lexipol is practically the only game in town.

Why has Lexipol dominated the markets in California and other states despite the fact that its policies cost more than those made available by nonprofits? We think that part of the answer is that Lexipol has created products that allow departments—particularly smaller departments—to develop and update police policies and trainings quickly and affordably. Lexipol delivers policies and trainings online and makes it easy for jurisdictions to update their policies to reflect changes in the law. Lexipol also allows its subscribers to track which employees have reviewed manual updates and completed trainings. And as Lexipol emphasizes in its marketing

306. *See* Am. Law Inst., *Principles of the Law: Policing*, ALI ADVISOR, http://www.thealiadviser.org/policing/ [https://perma.cc/V2U5-AG72] (proposing policies related to—among other things—search and seizure, the use of force, and evidence gathering); *Model Rules and Policies*, POLICING PROJECT: N.Y.U. SCH. L., https://policingproject.org/our-work/writing-rules/ [https://perma.cc/UN4D-ZXWD] (stating that the American Law Institute's draft policies "can serve as a template for legislative bodies, communities, and courts").

307. *Police and Law Enforcement Services Policy and Procedure Manuals*, MUN. RES. & SERVS. CTR., http://mrsc.org/Home/Explore-Topics/Public-Safety/Law-Enforcement/Police-and-Law-Enforcement-Services-Policy-and-Pro.aspx [https://perma.cc/V97Y-KBVS].

308. *See* ACLU, *Freedom Cities*, PEOPLE POWER, https://peoplepower.org/freedom-cities.html [https://perma.cc/U4XX-QZKH] (describing the ACLU's "Freedom Cities" campaign); *see also* Faiz Shakir & Ronald Newman, *How People Power Activists Are Driving Change*, ACLU (July 19, 2017), https://www.aclu.org/blog/how-people-power-activists-are-driving-change [https://perma.cc/8YCE-2NUP] (summarizing the efforts of People Power Activists to encourage municipalities to adopt the ACLU's nine model policies).

309. For example, the International Association of Chiefs of Police includes on its web page a model body-worn cameras policy as well as a "concepts and issues" paper, videos of presentations and workshops related to best practices, and a list of general principles to guide departments in developing effective policies regarding use of technology. *Body-Worn Cameras*, INT'L ASS'N CHIEFS POLICE (Apr. 2014), http://www.theiacp.org/MPBodyWornCameras.

materials, it charges far less than it would cost local police departments to replicate these services on their own.

Moving forward, advocacy groups and think tanks need to recognize Lexipol's role as their most successful competitor in the marketplace of policymaking ideas. Nonprofit groups hoping to convince law enforcement to favor their policies over Lexipol's could take steps to make their proposed policies easier to integrate into existing policy manuals of both Lexipol and independent jurisdictions. In working with Lexipol clients, advocacy organizations could stress why Lexipol's existing master policy on a given topic is inadequate and propose alternative policy language that follows Lexipol's basic style guide. Nonprofit competitors could also do more to compete with Lexipol by offering policy updates to reflect changes in the law and best practices, thereby reassuring jurisdictions that these alternative policies would, to borrow Lexipol's language, remain "up-to-date" and "defensible."[310]

Another possible reason that Lexipol has dominated the market, despite the availability of free or less expensive alternatives, is that Lexipol makes such powerful claims about the excellence of its policies and the ability of its services to reduce liability risk. Competitors in the private marketplace often question the merits of their rivals' claims about their products. Groups drafting alternative model police policies could similarly examine the bases for Lexipol's claims about its products.

Our recommendations that other organizations more effectively compete with Lexipol's policymaking approach are not offered solely for these organizations' benefit. Instead, it is our view that Lexipol's growing dominance in the policymaking market has serious drawbacks. With more and more departments adopting Lexipol's policies, there is mass standardization of police policies across jurisdictions and less opportunity to assess the efficacy of different approaches. Lexipol's domination of the market may also inhibit transparency. Lexipol promotes itself as "the sole source provider" of its risk management tools.[311] Jurisdictions that agree and designate Lexipol as the sole source provider may forego the formal bidding process generally associated with city contracts. As a result, Lexipol does not have to compete for contracts or explain why its products are better than those

310. *Why Partner With Lexipol?*, LEXIPOL, http://www.lexipol.com/law-enforcement/law-enforcement-why-lexipol/ [https://perma.cc/2A2B-A7HK].

311. *See* Lexipol, Contract with the City of Austin (Aug. 23, 2012), http://www.austintexas.gov/edims/document.cfm?id=179747 [https://perma.cc/72NB-BQLL] (Lexipol explains the following in Exhibit A of the contract: "The comprehensive Lexipol service is not available through any other public or private resources or organizations. There is no other system that offers the following integration into one package; therefore we are the sole source provider of the following package . . . .").

offered by its competitors.[312] One way to counteract this standardization and secrecy is by nurturing policymaking competition.

We additionally recommend that groups engaged in advocacy on police policymaking focus their efforts more directly on Lexipol. The company's policy decisions have an oversized influence on American policing. As a

312. *See, e.g.*, City of Fremont, Sole Source Justification (undated) (on file with authors) ("This is the only known entity providing this service on the west coast. . . . Since there are no other services of this type available they are the sole source for this type of resource."); Memorandum from Lili Hadsell, Chief of Police, City of Baldwin Park, to the Mayor and Members of the City Council, City of Baldwin Park (June 3, 2010) (on file with authors) ("Lexipol LLC is a sole source vender, as they are the only company that authors a policy manual specific to the agency, but also updates and maintains the policy manual as case law or interpretations change."); Memorandum from Greg Hebert, Commander, Oxnard Police Dep't, to Irma Coughlin, Purchasing, Oxnard Police Dep't (Oct. 3, 2016) (on file with authors) ("LEXIPOL LLC is the only known provider of these online policy services and is led by industry leaders in risk management and policy development for law enforcement."); Irvine Police Dep't, Sole Source Request: Lexipol (undated) (on file with authors) (seeking approval of a "sole source request with Lexipol" to maintain the department's policy manual and noting that "Public Safety staff conducted a web-based search and could not identify another firm that provides the breadth and expertise of services offered by Lexipol"); Interoffice Memorandum from Raymond W. King, Police Captain, San Bernardino Police Dep't, to Deborah Morrow, Purchasing Manager, San Bernardino Police Dep't (Feb. 28, 2012) (on file with authors) ("The service that Lexipol LLC provides is unique and is not available through any other public or private resources or organizations."); City of Long Beach, Purchasing Div., Informal Bid Quote Form (Mar. 19, 2014) (on file with authors) (noting that Lexipol's service is "not available through any other public or private resources or organizations"); Memorandum from Margaret Mims, Sheriff–Coroner, Cty. of Fresno to Bd. of Supervisors, Cty. of Fresno (Feb. 24, 2015) (on file with authors) ("The Department requests your Board waive the competitive bidding process . . . [because] Lexipol is the only vendor uniquely qualified to provide these services."); City of Modesto, Justification for Sole Source/Sole Brand (Sept. 26, 2013) (on file with authors) ("Sole Source: Item is available from only one vendor."); Oakland City Council, Resolution No. 85356 (Jan. 6, 2015) (on file with authors) (referring to Lexipol as "the sole respondent to a competitive solicitation process (Request for Proposals/Qualifications)"); Sole Source Request from the City Manager, City of Richmond (Mar. 6, 2015) (on file with authors) ("There are competing vendors that provide policy manual management services but Lexipol LLC is the sole vendor that will update the existing manual."). We also found sole source purchase requests online from other states. *See, e.g.*, Memorandum from Jason Batalden, Internal Servs. Adm'r, to Richard A. Nahrstadt, Vill. Manager, Vill. of Northbrook, Ill. (Aug. 8, 2017), northbrookil.iqm2.com/Citizens/FileOpen.aspx?Type=30&ID=8325 [https://perma.cc/23ZX-CDXE] (recommending renewal of the sole source contract with Lexipol LLC); Executive/Council Approval Form from Snohomish Cty., Wash., Sheriff, to Council Chairperson, Snohomish Cty. Council (Apr. 29, 2008), http://snohomish.granicus.com/MetaViewer.php?view_id=2&clip_id=270&meta_id=22726 [https://perma.cc/JMB9-M3CV] (requesting permission to award "a sole source purchase order to Lexipol, LLC for the purchase of Policy Manual Services"); Nathan L., *County to Appoint Members to Mental Health Committee*, BAKER CITY HERALD (Nov. 25, 2008), http://www.bakercityherald.com/localnews/4132524-151/county-to-appoint-members-to-mental-health-committee [https://perma.cc/Q395-BUB8] (describing a request for a sole source contract between Lexipol and Baker County, Oregon); Letter from Jimmy Liles, Nixa, Mo., Police Dep't, to Cindy Robbins, City Council, Nixa, Mo., Brian Bingle, City Council, Nixa, Mo., and Mayor Steel, Nixa, Mo. (July 16, 2015), http://nixa.com/home/showdocument?id=4429 [https://perma.cc/4HKE-MWKD] (requesting funds for a subscription agreement with Lexipol and describing Lexipol as a sole source provider); Minutes of the Regular Meeting of the Moore, Okla., City Council (July 18, 2016) (requesting sole source approval of Lexipol's products based on the City Attorney's determination that "it qualified as a sole source purchase due to the unique services offered by Lexipol").

result, changing Lexipol's policies can influence the practices of thousands of law enforcement agencies at once. Lexipol reports that it reviews publications from government and nonprofit organizations—including the Department of Justice and the ACLU—when crafting its model policies.[313] But these groups should also take their message directly to Lexipol.

There are some recent examples of advocacy groups doing just this: engaging Lexipol about its policies. For example, a coalition of community advocacy groups in California discovered that police departments in a number of cities had adopted "ready-made policies" from Lexipol on immigration enforcement that, in their view, are "unconstitutional and otherwise illegal, and can lead to improper detentions and erroneous arrests."[314] The group shared the policies at issue with the press and sent a letter to Lexipol "demanding that it eliminate illegal and unclear directives that can lead to racial profiling and harassment of immigrants."[315] Ken Wallentine, a senior legal advisor for Lexipol, told the *Los Angeles Times* that departments adopting its policies "should consider their local demographics and circumstances before turning those [model Lexipol] policies into practice."[316] Nonetheless, he maintained that the Lexipol immigration-enforcement policy that came under fire—which allows officers to consider a "lack of English proficiency" as a criteria in making a police stop—was legally defensible.[317] In a private letter sent to attorneys at the ACLU, Bruce Praet was even more defensive: "Falsely publicizing that our policies are 'illegal' and 'unconstitutional' appears intended to interfere with our ability to conduct business and to generate media attention. . . . Lexipol policies are legally sound and do not advocate any illegal or unconstitutional conduct by law enforcement officers."[318] However, we have since learned that after the public advocacy around the policy, at least one California department repealed the problematic Lexipol policy.[319] Following this

313. Lexipol February Conference Call, *supra* note 59.

314. *ACLU Demands Change to Unlawful Pre-Packaged Police Policies*, ACLU N. CAL. (Apr. 12, 2017), https://www.aclunc.org/news/aclu-demands-change-unlawful-pre-packaged-police-policies.

315. *Id.*; *see also* Letter from Representatives of the ACLU, Nat'l Day Laborer Org. Network, All. San Diego, Advancing Justice—Asian Law Caucus, Cal. Immigrant Policy Ctr., and Immigrant Legal Res. Ctr. to Bruce Praet, Chairman, Lexipol (Apr. 12, 2017) (on file with authors) ("We strongly urge you to revise the Policy so that it comports with current law, and to promptly rescind and replace the products you have already provided to law enforcement agencies in this state.").

316. James Queally, *Police Departments Say They Don't Enforce Immigration Laws. But Their Manuals Say Something Different*, L.A. TIMES (Apr. 12, 2017), http://www.latimes.com/local/lanow/la-me-ln-california-police-immigration-enforcement-20170412-story.html (quoting Lexipol senior legal advisor Ken Wallentine).

317. *Id.*

318. Letter from Bruce D. Praet, Attorney at Law, to Adrienna Wong, Attorney at Law, ACLU, and Jennie Pasquarella, Attorney at Law, ACLU (Apr. 13, 2017) (on file with authors).

319. Letter from Pamela Healy, Records Manager, Dep't of Pub. Safety, City of Sunnyvale, to authors (July 11, 2017) (on file with authors) (noting that Policy Section 415 on "Immigration

example, groups focused on changing policies on use of force, racial profiling, body cameras, and other aspects of law enforcement practice should view Lexipol, as well as Lexipol's clients, as a crucial audience.

Each of these suggestions is aimed at encouraging local jurisdictions to play a greater role in deciding what policies should guide their law enforcement agencies. Standardized policies, like those offered by Lexipol, are one possible source of information for jurisdictions creating or updating their police policies. Yet Lexipol needs to provide its subscribers with more information about its policymaking process so that governments can make more informed decisions about whether to subscribe to the service and, if they do, whether to customize Lexipol's policy language. Moreover, Lexipol should not be the only resource consulted during local governments' police policy development. Local governments should also seek out sources that are not as focused on liability risk reduction, tailor policies to fit the particular needs of their jurisdictions, and engage community members about their policies. State governments, advocacy groups, courts, and policing organizations also have important roles to play in drafting and regulating policing policy.

Conclusion

This Article is the first to identify and analyze the significance of Lexipol to American policing. We have documented the quiet emergence of Lexipol as a corporate answer to the challenge of creating internal police policies that guide officer discretion. Surprisingly, this growing practice of privatizing the police policymaking function has gone unnoticed in the academic literature.

As we have shown, Lexipol's policies are reshaping both the process by which police policies are created and the content of the resulting policies. This, in turn, has enormous impact on the institution of policing, particularly in a state like California where nearly every law enforcement agency has adopted Lexipol's policies.

Our goal in this project is to begin an important conversation about some of the concerns raised by this new era of reliance on a corporate legal entity to establish national standards for local policing. These concerns include a focus on liability risk management as the baseline standard for law enforcement behavior, a rulemaking process that proceeds in private with no public participation, and a profit-making model that reduces accountability and disrupts norms of sharing across agencies. We have also begun to sketch a way forward—a path that recognizes possible causes for the increasing privatization of police policymaking while encouraging greater transparency, oversight, and competition.

Violations" was redacted from their policy manual "as the policy is currently under revision and the available material no longer reflective of current practice").

Appendix

This Appendix describes our methodology for collecting public records of police and sheriff policymaking practices in California. In October and November of 2016, we submitted public records requests to the 200 largest police and sheriff's departments in California, requesting their policy manuals as well as any records reflecting their negotiations and contractual relationships with Lexipol LLC. We completed our collection of records from all 200 departments in October of 2017.

We identified the 200 largest police and sheriff's departments in California by consulting a census of law enforcement agencies published by the Bureau of Justice Statistics (BJS).[320] The BJS census reports on the number of sworn officers in state and local law enforcement agencies as of 2008. Because our focus is on police and sheriff policies, we first removed state law enforcement agencies, university- and school-based law enforcement agencies, and airport, public transportation, and park police from the list of California agencies. In total, the BJS data included 406 police and sheriff's departments in California. Of these, we selected the 200 agencies with the most full-time sworn officers for our public records requests. Our study therefore captures the policymaking practices of almost half of police and sheriff's departments in the state.

The table that follows summarizes the agencies we surveyed and their policy type. It contains the name of the department (column two), the number of sworn officers employed in the department, as reported by the BJS (column three), the city and county in which the department is located (columns four and five), and the policy type, as revealed by their responses to our public records requests (column six). If a jurisdiction authored its own policy manual and had no current relationship with Lexipol, we designated the policy type as "independent." If a jurisdiction adopted the Lexipol policy manual, we designated the policy type as "Lexipol." Finally, if a jurisdiction subscribed to the Lexipol service but continued to publish its own policy manual (without a Lexipol copyright stamp), we designated the department's policy type as "hybrid." Overall, we found that 26 agencies were independent, 166 adopted Lexipol, and 8 had hybrid policy manuals.

320. Bureau of Justice Statistics, *Census of State and Local Law Enforcement Agencies (CSLLEA)*, NAT'L ARCHIVE CRIM. JUST. DATA (2008), http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/27681 [http://perma.cc/2XJZ-M92U].

	Agency	Sworn Officers	City	County	Policy Type
1	Los Angeles Police Department	9,727	Los Angeles	Los Angeles	Independent
2	Los Angeles County Sheriff's Office	9,461	Los Angeles	Los Angeles	Independent
3	Riverside County Sheriff's Office	2,147	Riverside	Riverside	Hybrid
4	San Diego Police Department	1,951	San Diego	San Diego	Independent
5	San Francisco Police Department	1,940	San Francisco	San Francisco	Independent
6	San Bernardino County Sheriff's Office	1,797	San Bernardino	San Bernardino	Independent
7	Orange County Sheriff-Coroner Department	1,794	Santa Ana	Orange	Lexipol
8	Sacramento County Sheriff's Office	1,409	Sacramento	Sacramento	Independent
9	San Jose Police Department	1,382	San Jose	Santa Clara	Independent
10	San Diego County Sheriff's Office	1,322	San Diego	San Diego	Independent
11	Long Beach Police Department	968	Long Beach	Los Angeles	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
12	Alameda County Sheriff's Office	928	Oakland	Alameda	Independent
13	San Francisco Sheriff's Department	838	San Francisco	San Francisco	Independent
14	Fresno Police Department	828	Fresno	Fresno	Lexipol
15	Oakland Police Department	773	Oakland	Alameda	Lexipol
16	Ventura County Sheriff's Office	755	Ventura	Ventura	Lexipol
17	Sacramento Police Department	701	Sacramento	Sacramento	Independent
18	Contra Costa County Sheriff's Office	679	Martinez	Contra Costa	Independent
19	Tulare County Sheriff's Office	513	Visalia	Tulare	Lexipol
20	Kern County Sheriff's Office	512	Bakersfield	Kern	Hybrid
21	Fresno County Sheriff's Office	461	Fresno	Fresno	Hybrid
22	Santa Clara County Sheriff's Office	450	San Jose	Santa Clara	Independent
23	Stockton Police Department	415	Stockton	San Joaquin	Independent

	Agency	Sworn Officers	City	County	Policy Type
24	Anaheim Police Department	398	Anaheim	Orange	Lexipol
25	Riverside Police Department	385	Riverside	Riverside	Lexipol
26	Santa Ana Police Department	369	Santa Ana	Orange	Lexipol
27	Bakersfield Police Department	348	Bakersfield	Kern	Lexipol
28	San Bernardino Police Department	345	San Bernardino	San Bernardino	Lexipol
29	San Mateo County Sheriff's Office	334	Redwood City	San Mateo	Lexipol
30	Monterey County Sheriff's Office	315	Salinas	Monterey	Lexipol
31	Santa Barbara County Sheriff's Office	294	Santa Barbara	Santa Barbara	Lexipol
32	San Joaquin County Sheriff's Office	280	French Camp	San Joaquin	Lexipol
33	Glendale Police Department	264	Glendale	Los Angeles	Lexipol
34	Modesto Police Department	262	Modesto	Stanislaus	Lexipol
35	Sonoma County Sheriff's Office	251	Santa Rosa	Sonoma	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
36	Pasadena Police Department	246	Pasadena	Los Angeles	Lexipol
37	Chula Vista Police Department	244	Chula Vista	San Diego	Lexipol
38	Torrance Police Department	235	Torrance	Los Angeles	Independent
39	Stanislaus County Sheriff's Office	230	Modesto	Stanislaus	Lexipol
40	Ontario Police Department	230	Ontario	San Bernardino	Lexipol
41	Oxnard Police Department	228	Oxnard	Ventura	Lexipol
42	Placer County Sheriff's Office	228	Auburn	Placer	Independent
43	Huntington Beach Police Department	223	Huntington Beach	Orange	Lexipol
44	Sunnyvale Department of Public Safety	210	Sunnyvale	Santa Clara	Lexipol
45	Oceanside Police Department	210	Oceanside	San Diego	Hybrid
46	Santa Monica Police Department	205	Santa Monica	Los Angeles	Lexipol
47	Marin County Sheriff's Office	202	San Rafael	Marin	Independent
48	Irvine Police Department	197	Irvine	Orange	Hybrid

	Agency	Sworn Officers	City	County	Policy Type
49	Inglewood Police Department	187	Inglewood	Los Angeles	Lexipol[321]
50	Berkeley Police Department	186	Berkeley	Alameda	Lexipol
51	Hayward Police Department	185	Hayward	Alameda	Lexipol
52	Fontana Police Department	184	Fontana	San Bernardino	Lexipol
53	Pomona Police Department	182	Pomona	Los Angeles	Lexipol
54	Fremont Police Department	182	Fremont	Alameda	Lexipol
55	El Dorado County Sheriff's Office	179	Placerville	El Dorado	Lexipol
56	Corona Police Department	179	Corona	Riverside	Lexipol
57	Santa Rosa Police Department	179	Santa Rosa	Sonoma	Lexipol
58	Salinas Police Department	177	Salinas	Monterey	Lexipol
59	Orange Police Department	167	Orange	Orange	Lexipol
60	Garden Grove Police Department	166	Garden Grove	Orange	Independent
61	Richmond Police Department	165	Richmond	Contra Costa	Lexipol

321. The Inglewood Police Department never responded to our public records request. However, officials at Lexipol informed us that Inglewood is one of their clients. Email from Tim Kensok to Ingrid Eagly & Joanna Schwartz (Sept. 13, 2013) (on file with authors).

	Agency	Sworn Officers	City	County	Policy Type
62	Burbank Police Department	164	Burbank	Los Angeles	Hybrid
63	Escondido Police Department	163	Escondido	San Diego	Independent
64	Concord Police Department	161	Concord	Contra Costa	Independent
65	Fullerton Police Department	159	Fullerton	Orange	Lexipol
66	Costa Mesa Police Department	158	Costa Mesa	Orange	Lexipol
67	San Luis Obispo County Sheriff's Office	156	San Luis Obispo	San Luis Obispo	Lexipol
68	Shasta County Sheriff's Office	154	Redding	Shasta	Lexipol
69	Santa Cruz County Sheriff's Office	149	Santa Cruz	Santa Cruz	Lexipol
70	El Monte Police Department	145	El Monte	Los Angeles	Lexipol
71	Santa Clara Police Department	141	Santa Clara	Santa Clara	Independent
72	Newport Beach Police Department	140	Newport Beach	Orange	Lexipol
73	San Diego Harbor Police	139	San Diego	San Diego	Lexipol
74	Beverly Hills Police Department	137	Beverly Hills	Los Angeles	Independent

	Agency	Sworn Officers	City	County	Policy Type
75	Visalia Department of Public Safety	136	Visalia	Tulare	Lexipol
76	Santa Barbara Police Department	136	Santa Barbara	Santa Barbara	Lexipol
77	Ventura Police Department	134	Ventura	Ventura	Lexipol
78	Port of Los Angeles Police	133	San Pedro	Los Angeles	Lexipol
79	Whittier Police Department	127	Whittier	Los Angeles	Lexipol
80	Simi Valley Police Department	127	Simi Valley	Ventura	Lexipol
81	Roseville Police Department	126	Roseville	Placer	Lexipol
82	Elk Grove Police Department	126	Elk Grove	Sacramento	Lexipol
83	Fairfield Police Department	124	Fairfield	Solano	Lexipol
84	El Cajon Police Department	120	El Cajon	San Diego	Independent
85	Antioch Police Department	120	Antioch	Contra Costa	Lexipol
86	West Covina Police Department	119	West Covina	Los Angeles	Lexipol
87	Vallejo Police Department	116	Vallejo	Solano	Lexipol
88	Carlsbad Police Department	114	Carlsbad	San Diego	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
89	Solano County Sheriff's Office	113	Fairfield	Solano	Hybrid
90	Daly City Police Department	113	Daly City	San Mateo	Lexipol
91	Merced County Sheriff's Office	112	Merced	Merced	Lexipol
92	Vacaville Police Department	111	Vacaville	Solano	Lexipol
93	Butte County Sheriff's Office	110	Oroville	Butte	Hybrid
94	Rialto Police Department	109	Rialto	San Bernardino	Lexipol
95	Downey Police Department	109	Downey	Los Angeles	Lexipol
96	Imperial County Sheriff's Office	109	El Centro	Imperial	Lexipol
97	Santa Maria Police Department	108	Santa Maria	Santa Barbara	Lexipol
98	San Mateo Police Department	108	San Mateo	San Mateo	Lexipol
99	Culver City Police Department	106	Culver City	Los Angeles	Lexipol
100	Sutter County Sheriff's Office	105	Yuba City	Sutter	Independent
101	Merced Police Department	105	Merced	Merced	Lexipol
102	Clovis Police Department	105	Clovis	Fresno	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
103	Brea Police Department	103	Brea	Orange	Lexipol
104	Westminster Police Department	100	Westminster	Orange	Lexipol
105	South Gate Police Department	99	South Gate	Los Angeles	Lexipol
106	Redondo Beach Police Department	99	Redondo Beach	Los Angeles	Lexipol
107	Napa County Sheriff's Office	98	Napa	Napa	Lexipol
108	Mountain View Police Department	97	Mountain View	Santa Clara	Lexipol
109	Redwood City Police Department	96	Redwood City	San Mateo	Lexipol
110	Hawthorne Police Department	96	Hawthorne	Los Angeles	Lexipol
111	Chino Police Department	96	Chino	San Bernardino	Lexipol
112	San Leandro Police Department	95	San Leandro	Alameda	Lexipol
113	Santa Cruz Police Department	95	Santa Cruz	Santa Cruz	Lexipol
114	Tustin Police Department	95	Tustin	Orange	Lexipol
115	Alameda Police Department	94	Alameda	Alameda	Lexipol
116	Buena Park Police Department	94	Buena Park	Orange	Lexipol
117	Livermore Police Department	94	Livermore	Alameda	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
118	Palm Springs Police Department	93	Palm Springs	Riverside	Lexipol
119	Palo Alto Police Department	93	Palo Alto	Santa Clara	Lexipol
120	Gardena Police Department	91	Gardena	Los Angeles	Lexipol
121	Humboldt County Sheriff's Office	91	Eureka	Humboldt	Lexipol
122	Tracy Police Department	90	Tracy	San Joaquin	Lexipol
123	National City Police Department	90	National City	San Diego	Lexipol
124	Murrieta Police Department	90	Murrieta	Riverside	Lexipol
125	Chico Police Department	88	Chico	Butte	Lexipol
126	Folsom Police Department	88	Folsom	Sacramento	Lexipol
127	Milpitas Police Department	86	Milpitas	Santa Clara	Lexipol
128	Pleasanton Police Department	85	Pleasanton	Alameda	Lexipol
129	Redlands Police Department	84	Redlands	San Bernardino	Lexipol
130	Citrus Heights Police Department	83	Citrus Heights	Sacramento	Lexipol
131	Alhambra Police Department	83	Alhambra	Los Angeles	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
132	Yolo County Sheriff's Office	82	Woodland	Yolo	Lexipol
133	Hemet Police Department	82	Hemet	Riverside	Lexipol
134	Upland Police Department	81	Upland	San Bernardino	Independent
135	Union City Police Department	81	Union City	Alameda	Lexipol
136	Montebello Police Department	81	Montebello	Los Angeles	Lexipol
137	Turlock Police Department	80	Turlock	Stanislaus	Lexipol
138	Kings County Sheriff's Office	79	Hanford	Kings	Independent
139	South San Francisco Police Department	79	San Francisco	San Francisco	Lexipol
140	Rohnert Park Department of Public Safety	78	Rohnert Park	Sonoma	Lexipol
141	Madera County Sheriff's Office	78	Madera	Madera	Lexipol
142	Mendocino County Sheriff's Office	77	Ukiah	Mendocino	Lexipol
143	Lodi Police Department	76	Lodi	San Joaquin	Lexipol
144	Manteca Police Department	76	Manteca	San Joaquin	Lexipol
145	Pittsburg Police Department	76	Pittsburg	Contra Costa	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
146	Monterey Park Police Department	75	Monterey Park	Los Angeles	Lexipol
147	Nevada County Sheriff's Office	74	Nevada City	Nevada	Lexipol
148	San Rafael Police Department	74	San Rafael	Marin	Lexipol
149	Walnut Creek Police Department	73	Walnut Creek	Contra Costa	Lexipol
150	Indio Police Department	73	Indio	Riverside	Independent
151	Napa Police Department	72	Napa	Napa	Lexipol
152	Tulare Police Department	71	Tulare	Tulare	Lexipol
153	Colton Police Department	71	Colton	San Bernardino	Lexipol
154	West Sacramento Police Department	70	West Sacramento	Yolo	Lexipol
155	Baldwin Park Police Department	69	Baldwin Park	Los Angeles	Lexipol
156	Petaluma Police Department	68	Petaluma	Sonoma	Lexipol
157	El Segundo Police Department	68	El Segundo	Los Angeles	Independent
158	Huntington Park Police Department	68	Huntington Park	Los Angeles	Lexipol
159	La Habra Police Department	68	La Habra	Orange	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
160	Yuba County Sheriff's Office	66	Marysville	Yuba	Lexipol
161	Yuba City Police Department	65	Yuba City	Sutter	Lexipol
162	Woodland Police Department	65	Woodland	Yolo	Lexipol
163	Arcadia Police Department	65	Arcadia	Los Angeles	Lexipol
164	San Luis Obispo Police Department	64	San Luis Obispo	San Luis Obispo	Lexipol
165	Watsonville Police Department	64	Watsonville	Santa Cruz	Lexipol
166	Manhattan Beach Police Department	64	Manhattan Beach	Los Angeles	Lexipol
167	Azusa Police Department	63	Azusa	Los Angeles	Lexipol
168	La Mesa Police Department	63	La Mesa	San Diego	Independent
169	Siskiyou County Sheriff's Office	62	Yreka	Siskiyou	Lexipol
170	Tuolumne County Sheriff's Office	61	Sonora	Tuolumne	Lexipol
171	Fountain Valley Police Department	61	Fountain Valley	Orange	Lexipol
172	Lake County Sheriff's Office	61	Lakeport	Lake	Lexipol
173	Porterville Police Department	60	Porterville	Tulare	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
174	Covina Police Department	60	Covina	Los Angeles	Lexipol
175	Madera Police Department	60	Madera	Madera	Lexipol
176	Brentwood Police Department	60	Brentwood	Contra Costa	Lexipol
177	Gilroy Police Department	60	Gilroy	Santa Clara	Lexipol
178	Calaveras County Sheriff's Office	59	San Andreas	Calaveras	Lexipol
179	Novato Police Department	59	Novato	Marin	Lexipol
180	Davis Police Department	59	Davis	Yolo	Hybrid
181	Montclair Police Department	58	Montclair	San Bernardino	Lexipol
182	San Pablo Police Department	57	San Pablo	Contra Costa	Lexipol
183	Cypress Police Department	56	Cypress	Orange	Lexipol
184	Cathedral City Police Department	56	Cathedral City	Riverside	Lexipol
185	San Ramon Police Department	56	San Ramon	Contra Costa	Lexipol
186	Monrovia Police Department	55	Monrovia	Los Angeles	Lexipol
187	Monterey Police Department	54	Monterey	Monterey	Lexipol
188	Rocklin Police Department	54	Rocklin	Placer	Lexipol

	Agency	Sworn Officers	City	County	Policy Type
189	El Centro Police Department	54	El Centro	Imperial	Lexipol
190	Beaumont Police Department	54	Beaumont	Riverside	Lexipol
191	San Gabriel Police Department	54	San Gabriel	Los Angeles	Lexipol
192	Newark Police Department	54	Newark	Alameda	Lexipol
193	Glendora Police Department	53	Glendora	Los Angeles	Lexipol
194	Vernon Police Department	53	Vernon	Los Angeles	Lexipol
195	Bell Gardens Police Department	51	Bell Gardens	Los Angeles	Lexipol
196	Menlo Park Police Department	50	Menlo Park	San Mateo	Lexipol
197	Hanford Police Department	50	Hanford	Kings	Lexipol
198	Lompoc Police Department	49	Lompoc	Santa Barbara	Lexipol
199	Seaside Police Department	48	Seaside	Monterey	Lexipol
200	Los Banos Police Department	48	Los Banos	Merced	Lexipol

* * *

As-Applied Nondelegation

Ilan Wurman*

The nondelegation doctrine is powerful—so powerful that the Supreme Court is afraid to use it. The doctrine holds that Congress cannot delegate its legislative power to agencies. If the Court were to enforce the doctrine, entire statutory provisions—and perhaps entire statutory schemes—would be at risk of invalidation.

Yet there is no need for such a powerful, facial doctrine. Nondelegation can be refashioned to be as-applied. An as-applied nondelegation doctrine would work by treating statutory ambiguities, just as Chevron *does, as implicit delegations—each of which can be independently assessed for a nondelegation violation. This approach would explain the so-called "major questions" exception to* Chevron*, but without any of the existing doctrine's flaws.*

The implications of an as-applied nondelegation doctrine are numerous and highly attractive. It would replace the major questions doctrine, which the literature has rightly rejected, with a rigorous and coherent theory. It would better serve nondelegation interests by dramatically reducing any adverse consequences from finding a violation of the nondelegation doctrine. Finally, an as-applied nondelegation doctrine could be determinative in a handful of upcoming and important cases.

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Introduction

Modern litigants have primarily two ways to challenge administrative regulations on structural grounds. A governing statute could be so broad or vague as to constitute an unconstitutional delegation of legislative power. The Supreme Court, however, has only invoked the nondelegation doctrine to strike down two statutory provisions in all its history, and both in 1935.[1] Although lower federal courts have occasionally continued to strike down statutory provisions on nondelegation grounds, such attempts are rebuffed by the Court.[2] More commonly, litigants must assume the statute is valid, however broad and vague it may be. The question then becomes one of *Chevron* deference: assuming the statute does not expressly speak to the issue at hand, is this regulation a plausible—even if not the best—reading of the ambiguous statute?[3]

These doctrines have engendered a puzzle. So much is at stake by finding a statute in violation of the nondelegation doctrine that the Court simply does not enforce it; and it is often said it is impossible to administer

1. Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

2. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328 (discussing Whitman v. American Trucking, 531 U.S. 457 (2001)).

3. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); *infra* Part I.B.

the line between permissible and impermissible delegations. Yet at times—in the so-called "major questions" cases[4]—the Court appears to make *Chevron* do the work of nondelegation by finding that statutes clearly and unambiguously preclude certain agency actions that implicate nondelegation concerns, even though the statutes are probably ambiguous and the agency actions probably reasonable. In these cases, the Court not only has to misinterpret statutes to reach its preferred result, but it does not even have to explain why it's doing so—it does not have to explain why there's a nondelegation problem.

The nondelegation doctrine could be refashioned to avoid this problem and to become workable—it could be fashioned into an as-applied doctrine. The doctrine would not challenge statutory language that in most applications creates no nondelegation concerns, but rather would treat particular *ambiguities* created by that statutory language just as *Chevron* does—as implicit delegations of authority—and then assess those implicit delegations for nondelegation violations. For example, the Food, Drug, and Cosmetic Act's definitions of "drug" and "drug device" may create no nondelegation problem because in most applications it will be perfectly clear what drugs the Food and Drug Administration is permitted to regulate. But if an ambiguity were subsequently discovered that seemed implicitly to delegate to the agency the authority to decide whether, to what ends, and how tobacco shall be regulated,[5] then an as-applied doctrine would ask whether *that* implicit delegation—and not the statutory language as a whole—violates the nondelegation doctrine.

Generalizing from this example, one can imagine, under the modern doctrine's intelligible principle standard,[6] broad statutory provisions that survive facial nondelegation challenges and in almost all of their applications give agencies reasonably clear guidance, but under which later-discovered ambiguities give the agency *insufficient* guidance for its regulations.[7] Under a theory of nondelegation maintaining that Congress cannot delegate to agencies authority to create primary rules of private conduct,[8] a broad grant of authority might encompass completely valid implicit delegations—for example, to create rules for official conduct—but also invalid ones authorizing the creation of primary rules of private conduct. An as-applied

4. *See infra* Part I.C.

5. *See* FDA v. Brown & Williamson Corp., 529 U.S. 120 (2000).

6. *See* Part I.A.

7. *See infra* text accompanying notes 148–159.

8. *See, e.g.*, Dep't of Transp. v. Ass'n of Am. Railroads, 135 S. Ct. 1225, 1242 (2015) (Thomas, J., concurring in the judgment):

> The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power. By corollary, the discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct.

nondelegation doctrine would treat each specific delegation of authority to the agency to resolve the particular question at hand as if that authority were explicitly delegated to the agency in a statute. If Congress would violate the nondelegation doctrine by explicitly delegating such power, then Congress cannot delegate that same power implicitly through broad statutory language.

This approach is consistent with prevailing theories of judicial review and may even be more justified by them than the existing doctrine. For example, if *Chevron*'s core assumption is that statutory ambiguities in broad statutes are implicit delegations of authority to agencies to resolve those ambiguities,[9] then there is no reason why these implicit delegations cannot be assessed for nondelegation violations. The approach is also consistent with the Court's existing preference for as-applied challenges generally,[10] and is invited by Richard Fallon's exceptionally clear account of that preference. As Fallon has argued, even if "rights" are rights against "rules," which must be challenged facially,[11] as-applied challenges are merely challenges to *subrules*; a statute is but a series of subrules, some of which might be valid and others invalid; and the invalid ones can usually be separated from the valid ones.[12] To draw the parallel, broad statutory language delegating authority to an agency can be considered a series of narrower subdelegations (or subrules) delegating authority to decide particular statutory ambiguities. Some of these subdelegations may be valid, others not; but the invalid ones usually can be separated from the valid ones.

This Article makes the case for an as-applied nondelegation doctrine as follows. Part I explains the prevailing doctrine: it shows how all accounts of the nondelegation doctrine are theories of facial unconstitutionality and briefly describes *Chevron* deference. It then examines two so-called major questions cases—*FDA v. Brown & Williamson Tobacco Corp.*[13] and *MCI Telecommunications Corp. v. AT&T Co.*[14]—to illustrate how the Court has used the *Chevron* doctrine to do the work of nondelegation, but that this approach cannot work under the modern doctrinal framework. Part II makes the case for an as-applied nondelegation doctrine, which better explains the major questions cases and which is invited by prevailing theories of judicial review, such as the *Chevron* doctrine and Richard Fallon's account of as-applied challenges generally.

Part III applies it to a handful of new and old cases. It first adopts *a* theory of impermissible delegation so that it can proceed with the analysis;

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9. *See infra* Part I.B., Part III.A.

10. *See infra* notes 115–19 and accompanying text.

11. *See* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 157 (1998); *infra* Part III.B.

12. Richard H. Fallon, Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1327–41 (2000); *infra* Part III.B.

13. 529 U.S. 120 (2000).

14. 512 U.S. 218 (1994).

but it is important to be clear that an as-applied nondelegation doctrine does not depend on any *particular* theory of what constitutes an impermissible delegation of legislative power, so long as one has *a* theory of what does. Indeed, one of the virtues of an as-applied doctrine would be to minimize the consequences of finding a violation of the nondelegation doctrine, thereby allowing courts to begin developing a theory of nondelegation on a case-by-case basis.[15] This Part then examines *Massachusetts v. EPA*[16] and *Chevron*[17] itself to assess how those cases could be analyzed under an as-applied nondelegation doctrine. It concludes with an examination of the FCC net neutrality litigation in the D.C. Circuit,[18] and demonstrates how an as-applied nondelegation doctrine provides the most theoretically satisfying framework for resolving the case. Part IV concludes.

I. Delegation and Deference

This Part briefly describes the modern nondelegation doctrine and the *Chevron* deference framework for analyzing particular regulations. It describes how the Court applied this framework to two of the so-called major questions cases, *Brown & Williamson* and *MCI*, and concludes along with the existing literature that this framework cannot account for the result in these cases. That is because the Court has sought to use the *Chevron* framework to do the work of nondelegation, but *Chevron* is ill-equipped for the task. An as-applied nondelegation doctrine, on the other hand, would make sense of these cases, would be normatively superior, and could have wide applicability to similar problems.

A. Nondelegation in the Courts

The standard account of the modern nondelegation doctrine begins with *J.W. Hampton, Jr. & Co. v. United States*.[19] In that case, the Court confronted the President's power (delegated from Congress) to set tariff rates.[20] Article I, section 8 of the Constitution grants Congress, not the President, the power to lay and collect taxes and duties.[21] The "flexible tariff provision" of the Tariff Act of September 21, 1922, authorized the President to amend the tariff schedule established by Congress if the President determined there were differences in the "costs of production" for particular articles in the U.S. compared to the costs of production for those articles in the principal

15. And if there is no coherent theory available, then an as-applied nondelegation doctrine would help us discover that, too.

16. 549 U.S. 497 (2007).

17. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

18. U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), *petition for cert. filed*, No. 17-504 (U.S. Sept. 28, 2017).

19. 276 U.S. 394 (1928).

20. *Id.* at 404.

21. U.S. CONST. art. I, § 8.

competing foreign country.[22] The provision authorized the President to amend the tariff to equalize such differences, if the rate established by Congress did not already do so.[23]

The Court in that case established the "intelligible principle" test: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[24] The Court upheld the flexible tariff provision of the 1922 Act. On its face, this principle has nothing to do with the kind of power being exercised or the impact of exercising the delegated authority. It is entirely a question of discretion: are there sufficient standards in the statute to guide the executive officer in the exercise of her discretion? Further, this standard appears to require a facial approach to nondelegation—either there is sufficient guidance in the statute, or there is not. This was the standard used to strike down the only two statutory provisions ever to be invalidated on nondelegation grounds.[25]

The Court's modern cases confirm this approach. In *Whitman v. American Trucking Ass'ns*,[26] the nondelegation question concerned Congress's delegation of authority to the EPA under the Clean Air Act to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria [documents of

22. *J.W. Hampton*, 276 U.S. at 400–01 (quoting Tariff Act of 1922, ch. 356, tit. 3, § 315(a), 42 Stat. 858, 941–42 (repealed 1930)).

23. *Id.* at 401.

24. *Id.* at 409.

25. In *Panama Refining Co. v. Ryan*, the Court struck down section 9(c) of the National Industrial Recovery Act, which "authorized" the President to prohibit the interstate transportation of petroleum and petroleum products "in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation." 293 U.S. 388, 406 (1935) (quoting ch. 90, § 9(c), 48 Stat. 195, 200 (1933)). The Court held that this section provided almost no guidance for the President's discretion:

> Section 9(c) does not state whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in section 9(c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.

Id. at 415. In *A.L.A. Schechter Poultry Corp. v. United States*, the Court struck down the section of the National Industrial Recovery Act authorizing the President to issue "codes of fair competition" for different industries. 295 U.S. 495, 521–22 & n.4 (1935) (quoting ch. 90, § 3, 48 Stat. 195, 196–97 (1933)). The Court reasoned: "Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. . . . In view of the scope of that broad declaration . . . , the discretion of the President in approving or prescribing codes . . . is virtually unfettered." *Id.* at 541–42.

26. 531 U.S. 457 (2001).

§ 108] and allowing an adequate margin of safety, are requisite to protect the public health."[27] Writing for a unanimous Court, Justice Scalia held:

> The scope of discretion [this provision] allows is in fact well within the outer limits of our nondelegation precedents. In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition."[28]

Nondelegation's guiding principle is therefore discretion, and a statute either confers the requisite intelligible principle or it does not.[29] The doctrine is exceedingly difficult to administer, which partly explains why the Court has only invoked the doctrine twice in its history.[30] As the Court explained in *American Trucking*, "we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"[31] Thus, "[i]t is often said that the nondelegation doctrine is dead."[32]

B. Chevron *Deference*

If a statute passes muster under the nondelegation doctrine (as most do), the next step is to assess the validity of the regulation promulgated under that statute. The analysis is governed by *Chevron*'s two-part deference framework: If Congress speaks clearly on a particular question, any agency regulation or interpretation to the contrary is invalid. If, however, the statute

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27. *Id.* at 472 (alterations in original) (quoting 42 U.S.C. § 7409(b)(1)).

28. *Id.* at 474 (citing *Pan Ref.*, 293 U.S. 388; *Schechter Poultry*, 295 U.S. 495).

29. The scholarly literature generally agrees that the nondelegation doctrine centers on whether a statute on its face confers too much discretion. *See, e.g.*, John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 241–42 ("[E]nforcements of the nondelegation doctrine necessarily reduces to the question whether a statute confers too much discretion.").

30. *Id.* at 258 ("The administrability problem arises because there is no reliable metric for identifying a constitutionally excessive delegation."); Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 321 (2000) ("Because the relevant questions are ones of degree, the nondelegation doctrine could not be administered in anything like a rule-bound way, and hence the nondelegation doctrine is likely, in practice, to violate its own aspirations to discretion-free law."). *But see* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 395 (2002):

> The charge that no workable standard for judging delegations can be formulated is . . . false. It is true that application of the Constitution's nondelegation principle requires judgment on occasions, but that is an inescapable feature of much of law. Drawing a line between execution and lawmaking is no harder, and indeed is probably considerably easier, than drawing a line between reasonable and unreasonable searches and seizures.

31. 531 U.S. at 474–75 (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

32. Sunstein, *supra* note 30, at 315 (citing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 132–33 (1980)).

is ambiguous, then the courts give deference to authoritative agency interpretations of the statute the agency administers so long as the interpretation is reasonable.[33] (Determining whether Congress has clearly spoken or the statute is ambiguous is often referred to as "*Chevron* Step One." The analysis of reasonableness under an ambiguous provision is often referred to as "*Chevron* Step Two."[34]) The theory of this approach is that ambiguities in statutes are implicit delegations of authority to the agency to decide the issue in question.[35]

Proponents of the doctrine argue that deference is owed to reasonable agency interpretations even if the courts might otherwise conclude those are not the best interpretations because the agency is assumed to have technical expertise in administering its organic statute that courts lack.[36] And recent scholarship by Kent Barnett and Christopher Walker reveals that deference makes a difference—that in the vast majority of cases in which *Chevron* is invoked in the circuit courts, the regulation is upheld.[37] However, some have argued that *Chevron* deference has no historical basis.[38] Whatever its merits,

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33. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984):

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. (footnotes omitted); United States v. Mead Corp., 533 U.S. 218, 229 (2001); Cass Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 190–91 (2006).

34. *See, e.g.*, Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 613 (2009).

35. *Chevron*, 467 U.S. at 843–44; *Mead*, 533 U.S. at 229; John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 623 (1996):

> Although *Chevron* recognized the relationship between binding deference and delegation, the decision did not break new ground in that respect. Rather, *Chevron*'s importance lay in its adoption of a *categorical* presumption that silence or ambiguity in an agency-administered statute should be understood as an implicit delegation of authority to the agency.

Id. (footnote omitted); Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN L. REV. 593, 608 & n.62 (2008) (citing authorities).

36. Sunstein, *supra* note 33, at 196–97 (describing the agency-expertise rationale).

37. Kent H. Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 30 & fig.1 (2017).

38. *E.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 998–1000 (2017).

Chevron's status is "now[ ]canonical,"[39] and it is not the intent here to support or oppose it.

We now turn to an important set of cases in which the Court has sought to vindicate nondelegation concerns through the *Chevron* framework—the "major questions" cases. This approach does not work because it requires the Court to misinterpret broad statutory language without giving any nondelegation reasoning for doing so.

C. The Major Questions Cases

In *FDA v. Brown & Williamson* and *MCI v. AT&T*, the Court analyzed the agency regulations under the modern framework, holding under *Chevron* Step One that the organic statute prohibited the regulations—in the former case, rulemakings asserting jurisdiction over and regulating tobacco, and in the latter case, rulemakings deregulating an industry subject to an existing regulatory scheme. These cases are inexplicable under *Chevron* Step One: in both cases, the broad statutory language did not clearly prohibit the regulations, and indeed may have supported them. Neither are these cases explicable under *Chevron* Step Two: because the statutory language was likely ambiguous, the agency's regulations should have received deference. But these cases do point to a different intuition altogether: that some implicit delegations of authority in broad statutes to resolve ambiguities may be impermissible for another reason. These implicit delegations may violate nondelegation principles. These cases point to something like an as-applied nondelegation doctrine.

1. Brown & Williamson.—After decades of disclaiming authority to regulate tobacco products, in 1996 the Food and Drug Administration (FDA) asserted jurisdiction over such products and promulgated numerous regulations governing their sale and marketing.[40] The authority by which the agency asserted jurisdiction was the language of the 1938 Food, Drug, and Cosmetic Act (FDCA) defining "drug" as "articles (other than food) intended to affect the structure or any function of the body,"[41] and "device" as "an instrument, apparatus, implement, machine, [or] contrivance . . . intended to affect the structure or any function of the body."[42] The FDA determined that nicotine is a drug and cigarettes are "drug delivery devices" and thus that the FDA had jurisdiction over them.[43] Both the five Justices in the majority as

39. City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013); Sunstein, *supra* note 33, at 188.

40. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125, 128–29 (2000) (citing Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (Aug. 28, 1996)).

41. *Id.* at 126 (quoting 21 U.S.C. § 321(g)(1)(C)).

42. *Id.* (quoting 21 U.S.C. § 321(h)(3)).

43. *Id.* at 127 (citing 61 Fed. Reg. at 44,397, 44,402).

well as the four in dissent agreed that *Chevron* governed the analysis.[44] The majority, however, stopped the analysis at *Chevron* Step One—it concluded that "[i]n this case, . . . Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products."[45] The dissent concluded that nicotine was clearly a drug under the statutory definition and cigarettes clearly drug-delivery devices,[46] and because the agency's finding that cigarette manufacturers objectively "intended" their products to have therapeutic effects on consumers was reasonable, the agency's interpretation was entitled to deference.[47]

Whichever of these readings one finds more persuasive, a strong case can be made that the statute was ambiguous, particularly if both the majority's and dissent's readings were plausible. If that's the case, then *Chevron* Step Two should have determined the outcome. Consider the various pieces of textual and contextual evidence that both sides marshaled in support of their positions. The majority found that:

- The FDCA requires a "reasonable assurance of the safety and effectiveness of the device,"[48] which assurance could not be provided for cigarettes, and thus cigarettes would have to be removed from the market contrary to clear congressional intent in other statutes;[49]
- The FDCA provides that a product is "misbranded" if "it is dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof,"[50] and accordingly tobacco products would all be misbranded and require removal from the market;[51]
- The fundamental purpose of the FDCA is that any regulated product not banned must be safe for its intended use, and tobacco products were not safe for their intended use;[52]
- Several post-FDCA, tobacco-specific pieces of legislation implied that Congress reserved for itself the power to regulate tobacco, or they ratified FDA's decades-long insistence that it

44. *Id.* at 125–26; *id.* at 170–71 (Breyer, J., dissenting).
45. *Id.* at 126 (majority opinion).
46. *Id.* at 162 (Breyer, J., dissenting).
47. *Id.* at 170–71.
48. 21 U.S.C. §§ 360c(a)(1)(A)(i), (B), (C) (2012).
49. *Brown & Williamson*, 529 U.S. at 134–41.
50. 21 U.S.C. § 352(j).
51. *Brown & Williamson*, 529 U.S. at 141.
52. *Id.* at 142.

had no jurisdiction over tobacco without therapeutic claims on the part of manufacturers;[53] and

- Congress considered and rejected several proposals to give FDA authority to regulate tobacco.[54]

The dissent, however, pointed out the following:

- Tobacco literally fell within the statutory definition of "drug," and tobacco products literally fell within the statutory definition of "devices";[55]
- The statute's basic purpose is the protection of public health, which supports the regulation of tobacco;[56]
- The enacting Congress fully intended the Act to reach as broadly as the literal language suggested;[57]
- The subsequent congressional statutes did not intend to resolve the question of FDA's jurisdiction, and indeed the only explicit statement in any of these was that the statute shall *not* be construed to affect the question of FDA's jurisdiction;[58]
- FDA regulates other addiction, sedation, stimulation, and weight-loss products, which are difficult to distinguish from tobacco;[59]
- FDA's determination (necessary to invoke jurisdiction) that cigarette manufacturers "intended" their product to have therapeutic effects was based on the reasonable, objective, ordinary meaning of "intent," both in that manufacturers historically made such claims and in that FDA discovered the manufacturers always knew about its purported therapeutic effects, as did their consumers;[60] and
- FDA did not necessarily need to ban an unsafe device because numerous remedial provisions provided that the Secretary "may," but is not required to, ban unreasonably dangerous devices.[61]

It does not matter for present purposes which of these readings is more persuasive. At a minimum, there is significant evidence on both sides of the

53. *Id.* at 143–47, 156.

54. *Id.* at 147.

55. *Id.* at 162 (Breyer, J., dissenting).

56. *Id.*

57. *Id.* at 164–66.

58. *Id.* at 163, 184 (citing Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, § 422, 111 Stat. 2296, 2380 (codified at 21 U.S.C. § 321 note (2012) (Regulation of Tobacco))).

59. *Id.* at 169.

60. *Id.* at 171–73, 186–88.

61. *Id.* at 176 (citing 21 U.S.C. §§ 360f(a), 360h(a), (b)).

question. This is, in other words, a likely case of ambiguity. Given ambiguity, *Chevron* counsels deferring to the agency's interpretation—and thus FDA's assertion of jurisdiction.[62] Yet something *feels* right about the majority's position—the decision *whether* to regulate tobacco has huge ramifications for the national economy, with major consequences for private actors. Shouldn't Congress be the one to decide such important political issues in our representative system?

Something like that intuition was clearly driving the Court. In the final subsection of its rather lengthy opinion, the majority added that its "inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented."[63] *Chevron* deference is "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[64] "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[65] Here, the majority was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[66]

This analysis has led scholars to consider *Brown & Williamson* as a "major questions" case, which might be taken for the proposition that only Congress should decide questions of major political and economic significance.[67] Unsurprisingly, these scholars tend to reject "majorness" as a plausible principle for deciding these cases. Cass Sunstein has written that "the difference between interstitial and major questions is extremely difficult to administer."[68] He questions whether the rulemaking in *Chevron* itself regarding the definition of "stationary source" under the Clean Air Act—an issue to which we return later—was less major or significant than the rulemakings involved in *Brown & Williamson*.[69] Additionally, Sunstein

62. The Court recently explained that there is no difference for *Chevron* purposes between jurisdictional and nonjurisdictional questions. City of Arlington v. FCC, 569 U.S. 290, 296–301 (2013).

63. *Brown & Williamson*, 529 U.S. at 159.

64. *Id.*

65. *Id.* (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.")).

66. *Id.* at 160.

67. Moncrieff, *supra* note 35, at 594, 598, 611–13; Sunstein, *supra* note 33, at 240–42.

68. Sunstein, *supra* note 33, at 243; *see also* Moncrieff, *supra* note 35, at 611.

69. Sunstein, *supra* note 30, at 243, 245–46; *see also* Moncrieff, *supra* note 35, at 611 & n.74 (referring to EPA's "simple reinterpretation" at issue in *Chevron* as having "enormous practical consequences"). For a discussion of *Chevron* itself, see *infra* notes 211–18 and accompanying text.

writes, agency expertise and accountability "are highly relevant to the resolution of major questions."[70]

These scholars therefore conclude that something like a nondelegation concern may have been driving the Court.[71] Sunstein argues that the Court may have been using a kind of clear-statement rule as a "nondelegation canon"—the Court will not read *ambiguity* as conferring discretion on agencies to decide major questions.[72] John Manning argues that *Brown & Williamson* may be seen as an example of the Court's using the canon of constitutional avoidance to narrow statutes to avoid grave constitutional (here, nondelegation) concerns.[73] Abigail Moncrieff agrees that "as a positive matter [the nondelegation principle] might explain the major questions cases."[74]

These scholars all reject this account of the Court's subtle and implicit invocation of the nondelegation doctrine—and rightly so. Manning writes that narrowing a statute despite rather clear textual permissibility of the agency's interpretation "threatens to unsettle the legislative choice implicit in adopting a broadly worded statute" and that "to rewrite the terms of a duly enacted statute cannot be said to serve the interests of [the nondelegation] doctrine."[75] He adds that an "administrability problem arises because there is no reliable metric for identifying a constitutionally excessive delegation," and "there is no better way to identify whether a statute presents a sufficiently serious nondelegation question to trigger the canon of avoidance."[76]

Moncrieff argues that the problem with the nondelegation view "is that it is impossible to apply in practice" because "the line between excessive and appropriate delegations is notoriously difficult to draw."[77] Sunstein argues that the same problems plaguing an assessment of "majorness" affect a nondelegation principle: the nondelegation approach fails because "the distinction between major questions and non-major ones lacks a metric"[78] and because "expertise and accountability are entirely relevant to questions

70. Sunstein, *supra* note 33, at 243.

71. Manning, *supra* note 29, at 236–37, 242–43; Moncrieff, *supra* note 35, at 616–18; Sunstein, *supra* note 30, at 244–45.

72. Sunstein, *supra* note 30, at 244–45; *see also* Sunstein, *supra* note 30, at 330–37 (describing various other clear-statement requirements motivated by nondelegation concerns).

73. Manning, *supra* note 29, at 242 ("Despite the Court's apparent refusal to enforce the nondelegation doctrine directly, cases such as *Brown & Williamson* illustrate the Court's modern strategy of using the canon of avoidance to promote nondelegation interests.").

74. Moncrieff, *supra* note 35, at 617.

75. Manning, *supra* note 29, at 228; *see also id.* at 247–57 (arguing that employing the nondelegation doctrine as an avoidance canon undermines legislative supremacy and contradicts the Court's turn toward textualism).

76. Manning, *supra* note 29, at 258.

77. Moncrieff, *supra* note 35, at 618.

78. Sunstein, *supra* note 33, at 245.

about contraction or expansion of statutory provisions."[79] Moncrieff concludes: "the existing literature has almost unanimously concluded that the *Brown & Williamson* rule lacks a coherent justification."[80]

There are, indeed, serious problems with using a "major questions" principle to give effect to the nondelegation doctrine. Put most simply, if the Court was trying in *Brown & Williamson* to enforce nondelegation on the margins or as a canon of avoidance, then to do so it had both to assume a likely nondelegation problem *without actually deciding* whether the nondelegation doctrine was in fact violated and to *misconstrue a validly enacted congressional statute* in order to accommodate this vague (and unproven) intuition.

2. MCI v. AT&T.—Another "major questions" case is *MCI Telecommunications Corp. v. AT&T Co.*[81] We need not belabor the analysis to show that the same doctrinal problem obtains in this case. Section 203(a) of the Communications Act of 1934, the so-called tariff-filing provision, requires that "[e]very common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges . . . ."[82] Section 203(b)(2) then provides that the Commission "may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions . . . ."[83]

At issue in *MCI* was a series of rules promulgated under the authority of section 203(b)(2) exempting all nondominant carriers—that is, everyone but AT&T—from the tariff-filing requirement of section 203(a).[84] The majority held that the requirement to file rates was the "centerpiece of the Act's regulatory scheme"[85] and that the FCC could not alter this centerpiece under its authority to "modify" requirements. The Court held that the word "modify," similar to other words with the root *mod* like "moderate," "modest," or "modicum," "has a connotation of increment or limitation," that is, to change "moderately or in minor fashion."[86] Because the FCC's

79. *Id.* at 246.

80. Moncrieff, *supra* note 35, at 607.

81. 512 U.S. 218 (1994).

82. *Id.* at 224 (quoting 47 U.S.C. § 203(a)).

83. *Id.* (quoting 47 U.S.C. § 203(b)(2)).

84. *Id.* at 221–23 (citing Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 F.C.C.2d 1 (1980); Second Report and Order, 91 F.C.C.2d 59 (1982); Fourth Report and Order, 95 F.C.C.2d 554 (1983); Fifth Report and Order, 98 F.C.C.2d 1191 (1984)).

85. *Id.* at 220.

86. *Id.* at 225.

regulation went "beyond the meaning that the statute can bear," it was not entitled to *Chevron* deference.[87] Thus, on the surface, this was a *Chevron* Step One case. As with *Brown & Williamson*, the Court noted that "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."[88]

The dissent complicates this simple picture. First, it noted that the purpose of the Act was to give the FCC "unusually broad discretion to meet new and unanticipated problems in order to fulfill its sweeping mandate 'to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges.'"[89] In light of this purpose "to constrain monopoly power, the Commission's decision to exempt nondominant carriers is a rational and 'measured' adjustment to novel circumstances . . . ."[90] More still, the word "modify" includes the meaning "to limit or reduce in extent or degree," and the "permissive detariffing policy fits comfortably within this common understanding of the term."[91]

At minimum, it appears again that the statute is not so clear as the majority would have us believe. It appears sufficiently ambiguous to trigger *Chevron* deference, making it a difficult Step One decision. The majority seems to have sought to vindicate nondelegation values through the *Chevron* framework but could not do so in a rigorous and coherent way. The intuition in both this case and *Brown & Williamson* seems proper, but the Court did not have the proper doctrinal tool for assessing these cases.

II. The Case for As-Applied Nondelegation

An as-applied nondelegation doctrine would satisfactorily resolve these cases by permitting the Court properly to accept the existence of statutory ambiguity and to give proper nondelegation reasons for its holdings. So long as the majority were willing to conclude that Congress could not *explicitly* grant the FCC discretion regarding both whether and how a major portion of an industry shall be regulated, then an as-applied nondelegation challenge would work to prevent an agency regulation from capitalizing on statutory ambiguity—on an *implicit* delegation—to obtain the same result. Similarly, if Congress cannot *explicitly* delegate to the FDA the authority to decide

87. *Id.* at 229.

88. *Id.* at 231.

89. *Id.* at 235 (Stevens, J., dissenting) (quoting 47 U.S.C. § 151).

90. *Id.* at 241; *see also id.* at 225 (majority opinion) (tracing the root *mod* to the Latin for "measure").

91. *Id.* at 242 (Stevens, J., dissenting).

whether, to what ends, and how tobacco shall be regulated, then Congress cannot make that same delegation *implicitly* through statutory ambiguities.

An as-applied nondelegation doctrine would not challenge the key statutory language at issue in these cases on its face. After all, in almost all applications, the agencies had reasonably clear guidance on what the terms "modify" or "drug" required. It simply turned out that down the line a latent ambiguity was discovered. This ambiguity could have been created by the unique factual circumstances of the issue at hand, competing statutory provisions that cast doubt on the meaning of the statutes' central provisions, or some combination of the two. Either way, the statutory language does not violate the nondelegation doctrine, but the *implicit* delegation created by a particular ambiguity perhaps does. An as-applied nondelegation doctrine would resolve these cases by assessing whether such an implicit delegation would be unlawful if made *explicitly* by Congress in clear statutory language. If such a delegation would be impermissible, then Congress cannot make that same delegation implicitly through statutory ambiguities.

This Part assesses an as-applied nondelegation doctrine under prevailing theories of judicial review. It claims that such a doctrine would be more theoretically satisfying and conceptually attractive under several existing theories. First, the very theory of *Chevron* is rooted in the notion that Congress implicitly delegates authority to agencies in statutory ambiguities. It thus makes conceptual sense to conceive broad statutory language as a series of narrower, implicit delegations to the agency, each of which must be assessed for a nondelegation violation. This Part will consider two statutes—one hypothetical and one real—that, under different understandings of impermissible delegation, would contain within statutory ambiguities both valid and invalid implicit delegations.

Second, as-applied challenges are generally favored in the law, and there appears to be no clear doctrinal reason prohibiting such challenges in the context of nondelegation. Indeed, Richard Fallon's account of as-applied and facial challenges[92]—where as-applied challenges are merely facial challenges to subrules, and a statute is a series of subrules each of which may be separable from the others—maps neatly onto the concept of treating a broad statute as a series of subdelegations.

Third, an as-applied doctrine makes sense from the perspective of the Constitution's text. Perhaps Congress does not violate the nondelegation doctrine when it enacts any particular broad statute—but the President must still ensure that the executive branch only executes the law and does not exercise legislative power. In other words, just as an agency regulation can still violate *other* constitutional provisions (such as the First, Fifth, or Fourteenth Amendments) even though it passes muster under *Chevron* and

92. Fallon, *supra* note 12.

its organic statute is otherwise valid, that regulation *might also* violate the Vesting Clause of Article II. This Part concludes with a discussion of the various constitutional—and litigation—values served by an as-applied doctrine.

A. Chevron *and Implicit Delegations*

As-applied nondelegation makes sense under *Chevron* itself. Indeed, its core justification invites an as-applied nondelegation doctrine. One of the foundational justifications for *Chevron* is that statutory ambiguities in broad statutes are assumed to be implicit, but intentional, delegations of power to agencies to resolve any existing ambiguities.[93] As the Court said in *Brown & Williamson*: *Chevron* deference is "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[94] If that is the theory, then there is no difference between Congress's passing a broad statute with numerous ambiguities for an agency to resolve, or a series of narrower statutes each explicitly delegating to the agency authority to resolve those particular questions.

All this theory requires is that one have *some* definition of or standard for determining an impermissible delegation of legislative power. So long as one has *a* theory of what constitutes an unconstitutional delegation of power, one could always conceive of a statutory provision most of whose applications create no nondelegation concern at all because the guidance to the agency is perfectly clear. But it could be that ambiguities exist, and that some of these create unconstitutional implicit delegations of authority. The FDCA's definition of "drug" and "device" may be just such a statutory provision, and section 203(b)(2) of the Communications Act may be as well. Consider now two further examples.

1. Establishing Post Roads.—The Constitution grants Congress the power to establish post roads. This power is given explicitly and specifically: "The Congress shall have Power . . . To establish Post Offices and Post Roads[.]"[95] A committee of the Second Congress introduced a bill for the establishment of the Post Office and post roads that specified in great detail where the post roads would be.[96] Mr. Sedgwick introduced an amendment to

93. *See* sources cited *supra* note 35.

94. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

95. U.S. CONST. art. I, § 8, cl. 7.

96. The statute enacted in its very first section:

> That from and after the first day of June next, the following roads be established as post roads, namely: From Wisscassett in the district of Maine, to Savannah in Georgia, by the following route, to wit: Portland, Portsmouth, Newburyport, Ipswich, Salem, Boston, Worcester, Springfield, Hartford, Middletown, New Haven, Stratford, Fairfield, Norwalk, Stamford, New York, Newark, Elizabethtown, Woodbridge, Brunswick, Princeton, Trenton, Bristol, Philadelphia, Chester, Wilmington, Elkton,

strike the enumerated routes and replace them with the provision "by such route as the President of the United States shall, from time to time, cause to be established."[97]

Thus commenced one of Congress's first nondelegation debates in our Constitution's history. The upshot is that Mr. Sedgwick's amendment was rejected, with several prominent members expressing the view that it would be an impermissible delegation of legislative power.[98] Madison, for his part, argued that "there did not appear to be any necessity for alienating the powers of the House; and that if this should take place, it would be a violation of the Constitution."[99] Although the view that the amendment was unconstitutional was not unanimous,[100] it was nearly so. Congress's deliberation appears to

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> Charlestown, Havre de Grace, Hartford, Baltimore, Bladensburg, Georgetown, Alexandria, Colchester, Dumfries, Fredericksburg, Bowling Green, Hanover Court House, Richmond, Petersburg, Halifax, Tarborough, Smithfield, Fayetteville, Newbridge over Drowning creek, Cheraw Court House, Camden, Statesburg, Columbia, Cambridge and Augusta; and from thence to Savannah, and from Augusta by Washington in Wilkes county to Greenborough and from thence . . . .

Act of Feb. 20, 1792, ch. 7, § 1, 1 Stat. 232 (1792).

97. 3 ANNALS OF CONG. 229 (1791).

98. *Id.* In particular, Rep. Livermore observed:

> the Legislative body being empowered by the Constitution "to establish post offices and post roads," it is as clearly their duty to designate the roads as to establish the offices; and he did not think they could with propriety delegate that power, which they were themselves appointed to exercise.

Id. Rep. Hartley stated,

> The Constitution seems to have intended that we should exercise all the powers respecting the establishing post roads we are capable of . . . . We represent the people, we are constitutionally vested with the power of determining upon the establishment of post roads; and, as I understand at present, ought not to delegate the power to any other person.

Id. at 231. Rep. Page further added,

> If the motion before the committee succeeds, I shall make one which will save a deal of time and money, by making a short session of it; for if this House can, with propriety, leave the business of the post office to the President, it may leave to him any other business of legislation; and I may move to adjourn and leave all the objects of legislation to his sole consideration and direction. . . . I look upon the motion as unconstitutional, and if it were not so, as having a mischievous tendency . . . .

Id. at 233–34; Rep. Vining summarized,

> The Constitution has certainly given us the power of establishing posts and roads, and it is not even implied that it should be transferred to the President; his powers are well defined; we create offices, and he fills them with such persons as he approves of, with the advice of the Senate.

Id. at 235; *see also id.* at 233 (statement of Rep. White, as summarized, making "several objections on the expediency and constitutionality of the measure"). Regarding another Congressman's statements, the recorder wrote: "Mr. Gerry took a general view of most of the arguments in favor of the motion; replied to each . . . ." *Id.* at 236 (statement of Rep. Gerry, as summarized). Apparently, the recorder was getting tired. Regardless, we can surmise from this comment that Mr. Gerry likely agreed that the provision was unconstitutional.

99. *Id.* at 239 (statement of Rep. Madison, as summarized).

100. *Id.* at 232–33 (statement of Rep. Bourne, as summarized); *id.* at 235–36 (statement of Rep. Barnwell, as summarized); *id.* at 236 (statement of Rep. Benson, as summarized).

have liquidated the question whether the power to establish post roads can be delegated.[101] Such authoritative interpretations of the Constitution need not come from the courts, and early Congresses routinely took it upon themselves to interpret the scope of constitutional provisions.[102]

Suppose Congress subsequently enacted a statute providing that "the Postmaster General shall promulgate rules and regulations as he deems necessary and expedient for the purpose of efficiently delivering the mail." The statute gave further guidance to the Postmaster in exercising his discretion: "In promulgating a rule or regulation under this provision, the Postmaster General is to consider the cost of the rule to the public, the impact on delivery speed and efficiency, and the cost of the rule to the U.S. Postal Service." There is little doubt that the statute itself would survive a modern nondelegation challenge.[103]

Pursuant to this statutory authority, the Postmaster General subsequently promulgates a regulation establishing post roads, arguing that establishing the particular roads in question would improve the efficiency of

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101. *See* THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961) ("All new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."). For arguments that the concept of liquidation may coexist with an originalist interpretation of the Constitution, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 553–56, 578–84 (2003); William Baude, Constitutional Liquidation (unpublished manuscript) (on file with author).

102. DAVID P. CURRIE, 1 THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD ix–x (1997).

103. Consider the Court's description in *American Trucking* of the prior delegations it has upheld:

> In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition." We have, on the other hand, upheld the validity of § 11(b)(2) of the Public Utility Holding Company Act of 1935, which gave the Securities and Exchange Commission authority to modify the structure of holding company systems so as to ensure that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders." We have approved the wartime conferral of agency power to fix the prices of commodities at a level that "'will be generally fair and equitable and will effectuate the [in some respects conflicting] purposes of th[e] Act.'" And we have found an "intelligible principle" in various statutes authorizing regulation in the "public interest." In short, we have "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (alterations in original) (citations omitted) (first quoting Public Utility Act of 1935, ch. 687, § 11(b)(2), 49 Stat. 803, 821 (repealed 2005); then quoting Emergency Price Control Act of 1942, ch. 26, § 2(a), 56 Stat. 23, 24 (repealed 1956); and then quoting Mistretta v. United States, 488 U.S. 361, 416 (Scalia, J., dissenting)). If these examples are any guide, then the statute delegating authority to the Postmaster General to make rules and regulations on the basis of cost, delivery speed, and efficiency surely meets the nondelegation standard with flying colors. The statute includes even more detailed guidance than necessary to find an intelligible principle.

the delivery of the mail and would be cost effective. How would such a regulation be analyzed under modern doctrine? Under *Chevron* Step One, the statute certainly does not clearly prohibit the Postmaster General's action. If anything, the regulation pretty clearly follows from a natural reading of the statute's text, and thus under *Chevron* Step Two the regulation is reasonable and thus permissible. But Congress could not, if it had done so explicitly, have delegated the power to the Postmaster General to establish post roads (assuming the decision of the Second Congress on the constitutional question fixed the construction of the relevant clause). Thus, although our hypothetical statute would have been permissible in most of its applications, its implicit delegation to the Postmaster General to decide whether and where to establish post roads would have been an impermissible delegation of power.

Put another way, the statute can be considered as a series of narrower delegations: "The Postmaster General may decide with whom to contract for the delivery of the mail"; "The Postmaster General may decide whether mail shall be delivered on weekends"; "The Postmaster General may decide whether to carry abolitionist literature"; "The Postmaster General may decide whether to establish post roads"; and so on. Most of these would be perfectly permissible delegations of power. But not all necessarily would be.

2. Proceedings in Suits at Common Law.—Another example is supplied by the statute at issue in *Wayman v. Southard*,[104] the Court's first major nondelegation case.[105] The 1792 Process Act established that the practices prevailing in each respective state supreme court as of 1789, respecting "the forms of writs and executions" and the "modes of process . . . in suits at common law," would govern in federal court proceedings in those states.[106] The statute included a proviso: subject to the rules and regulations prescribed

104. 23 U.S. (10 Wheat.) 1 (1825).

105. An earlier case, *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813), in which the Court upheld Congress's conditioning of the existence of an embargo on a presidential finding of non-neutrality among foreign states, *id.* at 388, is also taken as a nondelegation case. It is not particularly controversial, however, and the Court did not give any sustained treatment to a nondelegation principle.

106. The statute enacted

> [t]hat the forms of writs, executions, and other process, except their style and the forms and modes of proceeding in suits in those of common law shall be the same as are now used in the said courts respectively in pursuance of the act, entitled, 'An act to regulate processes in the courts of the United States,' . . . except so far as may have been provided for by the act to establish the judicial courts of the United States . . . .

Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276; *see also Wayman*, 23 U.S. at 31. The statute referred to was the 1789 Act providing that "the forms of writs and executions, except their style, and modes of process . . . in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used in the supreme courts of the same." Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93; *see also Wayman*, 23 U.S. at 26–27.

by the federal courts.[107] The nondelegation question in *Wayman* (which did not even have to be decided[108]) was whether this proviso was an unconstitutional delegation of legislative power.

The facts can be simplified thus: The plaintiff sought an execution of judgment against the defendant in hard currency.[109] The defendant sought the application of a 1792 Kentucky law providing that a plaintiff must accept state paper currency in satisfaction of a judgment.[110] The Court agreed with the plaintiff that the 1792 Kentucky law did not govern in a federal court suit at common law because the federal acts provided that only those state practices established as of 1789 applied.[111] Thus, the defendant would have to pay in hard currency. Not to be deterred, the defendant pressed a nondelegation argument: the 1792 Process Act for the governing of process and suits at common law would be an unconstitutional delegation of legislative power in light of its proviso, if that proviso were interpreted to extend to matters outside of courtroom proceedings and to the manner of executions; thus Congress could not have intended for it to reach outside the courtroom to the manner in which a judgment was executed.[112]

The Court rejected this argument, holding that the law did reach to matters outside of courtroom procedures to all "proceedings at common law," including execution of judgments.[113] Chief Justice Marshall proceeded to address the nondelegation argument. The defendant had pressed that if the Process Act permitted courts to regulate proceedings outside of court, such as the nature and form of an execution, that would be an exercise of legislative power because it would determine the manner in which someone was deprived of property.[114] Indeed, a regulation requiring the acceptance of

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107. Act of May 8, 1792 § 2 (defining the proviso: ". . . subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same . . . ."); *see also Wayman*, 23 U.S. at 31.

108. *See Wayman*, 23 U.S. at 48–49:

> But the question respecting the right of the courts to alter the modes of proceeding in suits at common law, established in the Process Act, does not arise in this case. That is not the point on which the judges at the circuit were divided and which they have adjourned to this Court. The question really adjourned is whether the laws of Kentucky respecting executions, passed subsequent to the Process Act, are applicable to executions which issue on judgments rendered by the federal courts.

109. *Id.* at 2.

110. *Id.*

111. *Id.* at 32, 41.

112. *Id.* at 13–16, 42.

113. *Id.* at 44.

114. According to the reporter, defendant's counsel had argued:

> All the legislative power is vested exclusively in Congress. Supposing Congress to have power, under the clause, for making all laws necessary and proper, to make laws for executing the judicial power of the Union, it cannot delegate such power to the judiciary. The rules by which the citizen shall be deprived of his liberty or property, to

state bank notes affected not only how one would be divested of property, but also of how much property.

Marshall explained that Congress cannot delegate power that is "exclusively legislative."[115] He then assessed whether the power delegated by the proviso was an impermissible delegation, i.e., whether it fell within the class of powers that was "exclusively legislative." He began as follows:

> *Now, suppose the power to alter these modes of proceeding, which the act conveys in general terms, was specifically given.* The execution orders the officer to make the sum mentioned in the writ out of the goods and chattels of the debtor. This is completely a legislative provision, which leaves the officer to exercise his discretion respecting the notice. That the legislature may transfer this discretion to the Courts, and enable them to make rules for its regulation, will not, we presume, be questioned. So, with respect to the provision for leaving the property taken by the officer in the hands of the debtor, till the day of sale. . . . The power given to the Court to vary the mode of proceeding *in this particular*, is a power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution.[116]

Here we see some hints of the possibility of an as-applied nondelegation doctrine. Marshall *supposes* the power to issue *particular* regulations was explicitly given. In other words, he breaks down the broad (and ambiguous) provision into a series of particular, explicit delegations of power. He then proceeds on a hypothetical-regulation-by-hypothetical-regulation analysis of the constitutionality of the delegation. In the above passage, he presumed two specific regulations: The first was the delegation of authority to the officer to make good on the sum owed by taking the property of the debtor. This, Marshall argued, was a straightforward implementation of the legislative will. The second was the delegation of authority to the officer to decide where to keep the confiscated property before it is sold. This, too, Marshall argued was a straightforward execution of the law. But then Marshall proceeded to

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> enforce a judicial sentence, ought to be prescribed and known; and the power to prescribe such rules belongs exclusively to the legislative department.

Id. at 13.

115. "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself." *Id.* at 42–43. Marshall continued:

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

Id. at 43. Here, Marshall echoed Madison's discussion in the Post Office debate regarding the difficulty of distinguishing among the powers and also Madison's more extended treatment in The Federalist. *See* 3 ANNALS OF CONG. 228–29 (statement of Rep. Madison, as summarized); THE FEDERALIST NO. 37, at 226–29 (James Madison) (Clinton Rossiter ed., 1961).

116. *Wayman*, 23 U.S. at 44–45 (emphasis added).

offer a third, more difficult example: "To vary the terms on which a sale is to be made, and declare whether it shall be on credit, or for ready money, is certainly a more important exercise of the power of regulating the conduct of the officer, but is one of the same principle."[117]

For purposes of his argument, Marshall thus treats the "general" grant of power as though it were a series of specifically granted powers, and recognizes that not all of those grants necessarily must be treated equally. If the rule regulates the terms of a sale (for example, if it is to be for credit), that is a "more important exercise of the power of regulating the conduct of the officer." And perhaps that is so because, unlike the first two provisions, it has the effect of determining how much property a private party will lose.

To be sure, Marshall presumed that this particular delegation, too, would be constitutional.[118] But suppose he was wrong—after all, he said it was a more important power. Suppose, as some scholars have argued,[119] that decisions as to what kinds of property may be used in satisfaction of judgment, what kinds of property must be accepted by a judgment creditor, or what kinds of properties are to be exempted altogether (think of homestead exemptions), are matters for exclusively legislative determination. (This would also follow from Justice Thomas's view of the nondelegation doctrine.[120]) Why does it follow that the entire proviso must be struck down? The most plausible approach is instead one in which the statute is treated as a series of specifically granted powers. The answer to whether any one of these grants is an impermissible delegation of legislative power hardly answers the question whether any of the *other* grants is.

In sum, if the theory of *Chevron* is that statutory ambiguities are implicit delegations of authority to agencies to decide particular questions, then a broad statute can be conceived of as a series of narrow statutes explicitly conferring discretion to decide those questions. All that is required is that one have *a* theory—any theory—of what constitutes an impermissible delegation of legislative power. If, under that theory, those explicit statutes could each

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117. *Id.* at 45.

118. *Id.* at 45–46.

119. *E.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 393 (2014).

120. In *Department of Transportation v. Ass'n of American Railroads*, Thomas commented on Marshall's opinion in *Wayman* as follows:

> First, reflected in his discussion of "blending" permissible with impermissible discretion, is the premise that it is not the *quantity*, but the *quality*, of the discretion that determines whether an authorization is constitutional. Second, reflected in the contrast Chief Justice Marshall draws between the two types of rules, is the premise that the rules "for which the legislature must expressly and directly provide" are those regulating private conduct rather than those regulating the conduct of court officers.

135 S. Ct. 1225, 1249–50 (2015) (Thomas, J., concurring in the judgment). If the statute is construed to permit the officer, however, to decide whether the defendant must pay in hard currency or whether the plaintiff must accept bank notes, that determines private rights, and Thomas would likely view such a regulation as unconstitutional.

be challenged facially on nondelegation grounds, there is no reason in theory or logic why those delegations made implicitly in broadly worded statutes cannot be challenged as-applied. Indeed, as *Wayman v. Southard* shows, an as-applied doctrine can exist in a world without *Chevron* at all because even in such a world there would still be broadly worded delegations of power.[121]

B. Subrules and Subdelegations

An as-applied approach makes sense under *Chevron*'s theory of implicit delegation. It is also consistent with the Court's preference for as-applied challenges in constitutional litigation generally. At least when it comes to congressional legislation that infringes on rights, the Court will rarely strike down a statute as facially unconstitutional.[122] Normally it prefers "as-applied" challenges.[123] As the Court has said, it is an

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121. Thus, the most recent "major questions" case, *King v. Burwell*, 135 S. Ct. 2480 (2015), would also be a good candidate for an as-applied nondelegation challenge. There, the Court had to decide whether an IRS regulation interpreting the Affordable Care Act's term "exchange established by the state" to mean *also* an exchange established by the federal government was valid. The Court did not analyze the case under *Chevron* at all, holding that because this was a question of "deep 'economic and political significance' that is central to th[e] statutory scheme," the Court would decide the question for itself. *Id.* at 2488–89 (citation omitted). An as-applied nondelegation doctrine would still apply, however, because the relevant statutory language—an exchange established by the state—gave the agency reasonably clear guidance in most cases (indeed, in all those in which an exchange was in fact established by a state). But it was only in some cases—those in which the federal government had to establish an exchange—that various statutory provisions created an ambiguity as to whether such exchanges were covered by the tax credits. If a result of that ambiguity is that the agency gets to decide one way or another, that might violate the nondelegation doctrine. Similarly, if the *courts* get to decide such a question, that might also violate nondelegation because the courts would also be exercising legislative power in making such a choice. Indeed, the Court recognized that risk, noting, "Reliance on context and structure in statutory interpretation is a 'subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself.'" *Id.* at 2495–96 (quoting Palmer v. Massachusetts, 308 U.S. 79, 83 (1939)).

122. United States v. Salerno, 481 U.S. 739, 745 (1987):

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

Id.; United States v. Raines, 362 U.S. 17, 21 (1960) (collecting cases standing for "the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional"); *see also, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 167 (2007) (rejecting a facial challenge to abortion statute in part because challenges regarding the right to an abortion to protect a woman's health are properly brought as-applied, so that "the nature of the medical risk can be better quantified and balanced than in a facial attack"). Whether the Court has "ever actually applied such a strict standard" is disputed. Washington v. Glucksberg, 521 U.S. 702, 739–40 (1997) (O'Connor, J., concurring).

123. *See, e.g.*, Fallon, *supra* note 12, at 1321 ("Traditional thinking has long held that the normal if not exclusive mode of constitutional adjudication involves an as-applied challenge, in which a party argues that a statute cannot be applied to her because its application would violate her

> incontrovertible proposition that it "would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.[124]

Although the Court has not been clear on the question,[125] challenges to the *scope* of Congress's enumerated powers can also sometimes be as-applied.[126] There is no reason under current doctrine to except nondelegation challenges from these principles.

The Court perhaps rightly perceives that it is exceedingly difficult to determine whether Congress has facially delegated legislative power in a statute. That surely has something to do with the difficulty of discerning just what *is* an impermissible delegation of power. But it might also have something to do with the ramifications of declaring an Act of Congress to be an unlawful delegation of power: the entire regulatory scheme might be invalidated. In *Whitman v. American Trucking*, the very core of the EPA's regulatory mission—to set ambient air standards for pollutants—would have been struck down.

The Court avoids just this situation when it comes to regulations implicating First Amendment rights by assessing challenges as applied. Although statutes implicating the First Amendment *can* be struck down facially on overbreadth challenges,[127] the Court avoids these challenges because "invalidation may result in unnecessary interference with a state

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personal constitutional rights." (footnote omitted)); *id.* at 1324 ("[T]here is no single distinctive category of facial, as opposed to as-applied, litigation. Rather, all challenges to statutes arise when a particular litigant claims that a statute cannot be enforced against her."); *id.* at 1328 ("As-applied challenges are the basic building blocks of constitutional adjudication.").

124. *Raines*, 362 U.S. at 21–22 (citation omitted) (quoting Barrows v. Jackson, 346 U.S. 249, 256 (1953)).

125. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1230–35, 1273–79 (2010); *see also* Fallon, *supra* note 12, at 1323 ("[I]t is tempting to say that the Justices of the Supreme Court are not only divided, but also conflicted or even confused, about when statutes should be subject to facial invalidation.").

126. *See* Gonzalez v. Raich, 545 U.S. 1, 23 (2005) (addressing an as-applied Commerce Clause challenge); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 654 (1999) (Stevens, J., dissenting) (framing the question as whether the Patent Remedy Act's abrogation of state sovereign immunity "may be applied to willful infringement"). In *Raich*, though, the Court seemed to intuit that something was different about Commerce Clause cases, stating that where the class of activities is regulated and that class is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" of the class. 545 U.S. at 23 (quoting Perez v. United States, 402 U.S. 146, 154 (1971)). This is an odd claim, however, because presumably Congress must have had an enumerated power to enact any of the laws violative of the various provisions of the Bill of Rights. *See* cases cited *supra* note 122.

127. *Salerno*, 481 U.S. at 745; Rosenkranz, *supra* note 125, at 1250–52 & n.150 (collecting cases).

regulatory program."[128] This cautionary approach could also explain the Court's reticence in striking down an entire federal regulatory program based only on vague notions of facially excessive delegation. The courts thus ought to proceed with as-applied challenges to specific implementations of federal administrative statutes implicating nondelegation concerns, as they do with as-applied challenges to state or federal regulatory programs implicating the First Amendment.

Indeed, one of the most cogent explanations of the nature of as-applied challenges, propounded by Richard Fallon, invites the use of as-applied nondelegation challenges. Fallon argues that all constitutional challenges are effectively as-applied challenges and that facial challenges are merely outgrowths of as-applied challenges.[129] That is because

> the meaning of statutes is not always obvious, but frequently must be *specified* through case-by-case applications; the process of specification effectively divides a statutory rule into a series of *subrules*; and in most but not all cases, valid subrules can be *separated* from invalid ones, so that the former can be enforced, even if the latter cannot.[130]

Fallon's account is responsive to Matthew Adler's claim that all challenges must be facial because all rights are rights against rules, which must be challenged facially.[131] Fallon accepts that some rights are indeed rights against rules, but even if that is true, as-applied challenges are still suitable. That is because, as explained above, each statute can be considered as a series of subrules, and one can assert a right against a particular subrule and need not assert that right against any of the other subrules.

A crucial component of this account is that often the meaning of a subrule, or even its very existence, does not become clear until specified by the facts of a particular case. This explains the Court's use of narrowing or saving constructions—it can narrow a particular subrule in a statute to avoid future constitutional challenge.[132] In short, Fallon argues, "even insofar as challenges are challenges to rules, it does not follow that all challenges call upon courts to adjudicate the validity of statutory rules in their entirety; some challenges are to subrules . . . ."[133] These challenges to subrules "are, for all functional purposes, as-applied challenges that permit a court to sever a statute and separate valid from invalid subrules or applications."[134]

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128. Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).

129. *Id.* at 1324.

130. *Id.* at 1325–26 (emphasis in original) (footnote omitted).

131. *Id.* at 1328–35; Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 157 (1998).

132. Fallon, *supra* note 12, at 1333.

133. *Id.* at 1334.

134. *Id.*

The parallel to as-applied nondelegation is striking. A broad, open-ended statutory provision delegating authority to an agency is a series of subdelegations, or subrules, the precise contours of which only "emerge[] through application"[135] or are "specified only in the process of statutory application."[136] The insight is that a broad statutory delegation of authority is a series of subrules, and these subrules cannot be fully known until the agency takes an action purporting to follow one of these subrules—until it attempts to resolve a particular problem delegated to its discretion by a particular statutory ambiguity. And it follows quite naturally that "some [subdelegations] may validly be applied even if others may not."[137]

This analysis could apply to the statutory provisions at issue in *Brown & Williamson* and *MCI*. For example, the FDCA's definitions of drug and device ordinarily delegate very little discretion to the agency. Usually it is quite clear that a particular drug falls within the statutory definition (a diabetes drug, for example), what finding the agency must make (safety and effectiveness), and what follows from a lack of such finding (prohibition on marketing). By virtue of the unique factual nature of cigarettes or by virtue of other competing statutory provisions, however, the statute appears to create a subdelegation conferring discretion to decide *whether* and to what ends tobacco should be regulated. This subdelegation might violate the nondelegation doctrine even if the other subdelegations of the relevant statutory provisions do not.

To be sure, there is still room for facial challenges. If the reasoning by which a particular subrule is invalidated applies to all of the other subrules, or to a substantial number of subrules, the entire statute or provision can be struck down.[138] In our case, the entire delegation can be struck on its face. A statute or provision can be so broad as to provide (contrary to what is required under modern doctrine) no intelligible principle at all. But in most cases, as history has shown, that will not be the case. Statutory provisions will usually be broad enough to create a series of subdelegations, but not so broad as to violate the nondelegation doctrine in their entirety.

C. *Execution Challenges*

An agency can follow a statute and still violate other provisions of the Constitution. For example, a regulation can violate an individual right found elsewhere in the Constitution even though the statute does not do so on its face—or at least even where the statute is not challenged.[139] In *Rust v.*

135. *Id.* at 1333.

136. *Id.* at 1334.

137. *Id.*

138. *Id.* at 1336–39.

139. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 184–87, 192–203 (1991) (considering First and Fifth Amendment challenges to a regulation after the regulation was upheld under *Chevron*

Sullivan,[140] the Court considered regulations promulgated under Title X of the Public Health Services Act of 1970[141] clarifying that funds administered under the statute were available only for "preconceptional counseling, education, and general reproductive health care" and not "pregnancy care (including obstetric or prenatal care)."[142] The Court held the regulation to be a permissible interpretation of the statute under *Chevron*.[143] It then proceeded to consider plaintiffs' challenges to the regulations under the First and Fifth Amendment, although no one challenged the validity of the statute.[144] Numerous other cases have considered constitutional challenges to regulations but not to their organic statutes.[145]

If a regulation can violate another provision of the Constitution even though the statute does not on its face violate that provision, then a regulation could independently violate Article II, section 1, which vests the executive power in the President of the United States.[146] That section permits the president to exercise *executive* power, but not legislative power. Modern doctrine thus presumes that agencies are "executing" the law, even if certain of their functions, like rulemaking, appear "quasi legislative."[147] This understanding goes hand-in-hand with the modern nondelegation doctrine: if Congress delegates with sufficiently intelligible principles, then agencies are

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analysis); Clancy v. Office of Foreign Assets Control of U.S. Dep't of Treasury, 559 F.3d 595, 596–98, 599–602, 604–05 (7th Cir. 2009) (considering First and Fifth Amendment challenges to regulations promulgated under the authority of the International Emergency Economic Powers Act); United States v. Johnson, 159 F.3d 892, 895–96 (4th Cir. 1998) (considering a First Amendment challenge to national forest system regulation); Steffan v. Perry, 41 F.3d 677, 684–85 (D.C. Cir. 1994) (considering an equal protection challenge to military regulations); Bradley v. Austin, 841 F.2d 1288, 1296–97 (6th Cir. 1988) (considering due process and equal protection challenges to federal regulations promulgated under the Deficit Reduction Act of 1984).

140. 500 U.S. 173 (1991).

141. *See* 42 U.S.C. § 300(a) (2012) (authorizing federal funds for "family planning methods and services").

142. *Sullivan*, 500 U.S. at 179 (quoting 42 C.F.R. § 59.2 (1989) (amended 2000)).

143. *Id.* at 184–87.

144. *Id.* at 192–203.

145. *See* cases cited *supra* note 139.

146. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

147. INS v. Chadha, 462 U.S. 919, 953 n.16 (1983) ("To be sure, some administrative agency action—rule making, for example—may resemble 'lawmaking.' . . . This Court has referred to agency activity as being 'quasi-legislative' in character. Clearly, however, '[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.'" (alteration in original) (citations omitted)); City of Arlington v. FCC, 569 U.S. 290, 304 n.4 (2013) ("Agencies make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic. These activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must* be exercises of—the 'executive Power.'"); *see* M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 603 (2001) (explaining that modern legal doctrine requires delegations to be executive in nature; such delegations are "legitimate only if they [do] not represent legislation").

not making law, but are merely executing the law; if Congress delegates with *in*sufficiently intelligible principles, then the agencies' actions pursuant to the statute would be exercises of legislative power.[148]

It might be, then, that a statutory ambiguity creating an implicit delegation of authority lacks a sufficiently intelligible principle *for that particular decision*, and thus if the agency makes the decision it will be exercising legislative rather than executive power. Put another way, if it would have been impermissible for Congress to delegate this particular question explicitly, then an agency would independently violate Article II, section 1—vesting only the executive power in the federal government's administrative apparatus—by seeking to resolve that very question. This violation does not hinge on Congress's violating any of its constitutional obligations when it enacts the statute. Rather, the *Executive* has violated the Constitution by *interpreting* the statute in such a way, plausible under the statutory language, that leads to a violation of the Vesting Clause of Article II.

In a recent article, Nicholas Rosenkranz sought to elucidate the applicability of as-applied and facial challenges based on a careful grammatical analysis of the Constitution's text.[149] His view is that First Amendment challenges must be facial because the First Amendment declares that "Congress shall make no law . . . ,"[150] and therefore only Congress can violate the First Amendment and only at the moment it enacts a statute.[151] Similarly, commerce clause challenges must be facial because their basis is that Congress has exceeded its power under Article I, section 8, which grants Congress power to enact law ("Congress shall have the Power to . . . .")[152]—and thus any violation must be clear on the face of a statute that Congress enacts.[153] On the other hand, challenges to executive actions, for example under the Fourth Amendment, must be as-applied.[154]

Rosenkranz's approach, if correct, would not be fatal to the present analysis. It supports the proposition that Congress might enact a statute that on its face does not appear to delegate any legislative power—and thus a conscientious representative would have no reason to believe she was violating her oath to uphold the Constitution when she voted for the statute[155]—but in some application of that statute the *Executive* might violate

148. *See supra* notes 19–32 and accompanying text.

149. Rosenkranz, *supra* note 125, at 1230–42.

150. U.S. CONST. amend. I.

151. *Id.* at 1268–72.

152. U.S. CONST. art. I, § 8.

153. Rosenkranz, *supra* note 125, at 1275–76.

154. *Id.* at 1239–42.

155. *Cf. id.* at 1235–39 (arguing that challenges based on constitutional prohibitions directed at Congress may only succeed if the statute is invalid on its face, such that individual legislators violated the Constitution by enacting it).

some other provision of the Constitution. In Rosenkranz's terminology, "In these cases, it is the *application* of the statute that violates the Constitution. These challenges should perhaps be called 'as-executed challenges' or, better, simply 'execution challenges,' to gesture more clearly toward the President, whose duty it is to 'take Care that the Laws be faithfully *executed*.'"[156] Put simply, "[j]ust as 'facial challenges' are challenges to actions ('Acts') of Congress, *'as-applied challenges' are challenges to actions of the President*."[157]

This approach could apply to nondelegation challenges. It could be that there are no nondelegation grounds to challenge a statute on its face, i.e., Congress cannot be said to have delegated legislative power in violation of Article I, sections 1 and 7, when it enacted the statute.[158] But if a latent ambiguity creates an implicit delegation that would have been impermissible had it been made explicitly, then an agency promulgating a regulation pursuant to that implicit delegation could violate Article II, section 1, by exercising legislative rather than executive power.[159]

Ultimately, the present approach disagrees with Rosenkranz's framework because if there is a violation of the nondelegation doctrine, it is the *statute* that violates it—just not the statute as a whole. It is the statute, and more specifically one of its particular ambiguities, that creates a violation of the nondelegation doctrine when it implicitly delegates too much power. Yet if one is of the view that there is no nondelegation violation at all because a statute can only violate the nondelegation doctrine facially, then for the reasons just described the court could simply strike down the regulation for violating Article II, Section 1, which supplies an independent reason for invalidation.[160]

D. Implications

An as-applied doctrine would better support underlying constitutional values. If the nondelegation doctrine is justified on the ground that Congress

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156. *Id.* at 1242 (quoting U.S. CONST. art. II, § 3).

157. *Id.* (emphasis added).

158. *See* U.S. CONST. art. I, § 1 (vesting the legislative power in Congress); *Id.* art. I, § 7 (detailing the requirements of bicameralism and presentment).

159. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

160. Thus, this analysis does not require that *Whitman v. American Trucking* be overturned. In that case, the D.C. Circuit had found that EPA's own regulation had interpreted the Clean Air Act in such a way that the statute provided no intelligible principle and thus violated the nondelegation doctrine, but that EPA could avoid this problem by adopting a different regulation with a more restrictive construction of the statute. 531 U.S. 457, 463 (2001). Thus, the court had found that EPA's "interpretation (but not the statute itself) violated the nondelegation doctrine." *Id.* at 472. The Supreme Court disagreed with this approach, holding that "the constitutional question is whether the *statute* has delegated legislative power to the agency." *Id.* Here, it is the statute that violates the nondelegation doctrine—it merely violates the doctrine as-applied.

should make major policy decisions[161] or similarly on the ground that major policy decisions should go through bicameralism and presentment,[162] then an as-applied doctrine serves those interests. By definition, an as-applied doctrine will be easier to apply than a facial one. That makes it more likely that the Court can enforce the nondelegation doctrine at least on the margins—and require Congress to make the truly major policy decisions.

The doctrine would also be more administrable.[163] The intelligible principle standard is exceedingly hard to administer because, as many have noted, "[a]ll legislation necessarily leaves some measure of policy-making discretion to those who implement it."[164] Consider again the statute in *Wayman v. Southard*. Most of the policy-making discretion granted to the courts by the Process Act of 1792 was perfectly acceptable, but *sometimes* that discretion bordered the unacceptable.[165] A court would never conclude in such a situation that the statute itself provided no intelligible principle. An as-applied doctrine would be easier to administer because it tackles each ambiguity—each implicit delegation of authority to decide a question—on its own terms.

Indeed, an as-applied doctrine would afford the courts an opportunity to explore more earnestly exactly what is and is not a permissible delegation of legislative power.[166] The Court has declared that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred,"[167] but it has never significantly elaborated. With a more-narrowly-tailored nondelegation challenge, the Court could explore whether particular kinds of power require more or less guidance from Congress—and why so. Indeed, as explained in subpart II.B, an as-applied doctrine would serve the same values the as-applied framework serves in other areas of law. Primary among these are judicial deference and humility. "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined."[168] An as-applied nondelegation doctrine would permit the courts to be far more delicate than a facial doctrine permits.

The alternative has not worked. Although the modern nondelegation doctrine is not enforced, some scholars have suggested that it can be seen as

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161. Manning, *supra* note 29, at 228.

162. *Id.* at 238–39.

163. Recall that administrability is the key objection to the modern nondelegation doctrine. *See supra* note 30 and accompanying text.

164. Manning, *supra* note 29, at 241.

165. *See supra* text accompanying notes 104–120.

166. It bears repeating that perhaps there is simply no conceivable way to distinguish permissible from impermissible delegations. That may be, but at least the as-applied approach would give courts the opportunity to try to develop workable distinctions.

167. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001).

168. United States v. Raines, 362 U.S. 17, 22 (1960).

a doctrine of constitutional avoidance—and the Court was avoiding the nondelegation issue in *Brown & Williamson* by deciding the case under *Chevron* Step One.[169] But as we have already seen, that requires the Court both to misconstrue the statute and to intuit a nondelegation problem without actually deciding the issue or providing any reasoning.[170] An as-applied doctrine is superior because it actually requires the Court to *decide* the constitutional question and does not require it to misconstrue any statutory language at all.

III. The Framework Applied

An as-applied nondelegation doctrine is plausible, and even attractive, under the Constitution's text and under modern theories of judicial review. Its applicability to *Brown & Williamson* and *MCI* is clear. In the context of *Chevron*, it can serve as a "*Chevron* Step Three": Even if an agency regulation is a plausible interpretation of an ambiguous statute, the courts must still ask whether Congress's implicit delegation to decide that particular question would be an impermissible delegation of legislative power. And because statutory ambiguities and broad delegations exist even in the absence of *Chevron*, the as-applied nondelegation framework would apply even if *Chevron* were abolished or abrogated.

This Part applies the as-applied analysis to three additional past cases—*Massachusetts v. EPA*, *Chevron* itself, and the D.C. Circuit's decision respecting the FCC's 2015 Open Internet Order (the so-called "net neutrality" rules).[171] To deploy the framework, we need a theory of nondelegation. Again, it cannot be emphasized enough that an as-applied nondelegation doctrine does not depend on *what* theory of nondelegation one adopts, so long as one has a theory.[172] Moreover, an as-applied doctrine would afford the courts more opportunities actually to develop a theory of nondelegation over time on a case-by-case basis, without having to fear the consequences of striking down entire statutory schemes. Regardless, it is beyond the scope of this Article to establish a theory for distinguishing permissible from impermissible delegations; but to see how the framework might actually work in specific cases, we need some idea of what might constitute an unlawful delegation of power.

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169. *See supra* notes 162–69 and accompanying text.

170. *See supra* notes 70–75 and accompanying text.

171. The FCC has recently voted to repeal this order, which will likely prevent this case from reaching the Supreme Court. *See* Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. TIMES (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html [https://perma.cc/G8FH-5M4T]. It nevertheless remains a good example of when the as-applied framework would be suitable.

172. *See supra* subpart III.D.

A. Defining Delegations

The literature is divided on the very principle of nondelegation: Is too much *discretion* an impermissible delegation? That is the standard view—it is also partly why the nondelegation doctrine is understood to be unenforceable.[173] Or is an impermissible delegation of legislative power one in which the agency is granted *any* amount of discretion to determine *certain things*—such as primary rules of private conduct? That is a typical account of some formalists,[174] may be the line drawn in *Schechter Poultry* (one of the two successful nondelegation challenges),[175] and has been recently advanced by Justice Thomas.[176] Finally, some scholars advance the "important subjects" theory of nondelegation, maintaining somewhat circularly (though not necessarily wrongly) that a subject "important" enough to require congressional action cannot be delegated.[177] This appears to have been Chief Justice Marshall's view.[178]

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173. *See supra* notes 29–32 and accompanying text.

174. *See, e.g.*, HAMBURGER, *supra* note 119, at 84–85 (arguing that executive rulemaking is unconstitutional only if it is legally binding); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1310–17 (2003) (summarizing historical evidence that the Founders understood the legislative power as "the power to make rules for society").

175. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935):

> [W]e look to the statute to see whether Congress has overstepped these limitations—whether Congress in authorizing 'codes of fair competition' has itself established the *standards of legal obligation*, thus performing *its essential legislative function*, or, by the failure to enact such standards, has attempted to transfer that function to others.

(emphasis added); *see also id.* at 541:

> [The statute] supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedures. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims . . . .

176. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1242 (2015) (Thomas, J., concurring in the judgment):

> The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power. By corollary, the discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct.

See also id. at 1249–50 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825)):

> First, reflected in his discussion of 'blending' permissible with impermissible discretion, is the premise that it is not the *quantity*, but the *quality*, of the discretion that determines whether an authorization is constitutional. Second, reflected in the contrast Chief Justice Marshall draws between the two types of rules, is the premise that the rules 'for which the legislature must expressly and directly provide' are those regulating private conduct rather than those regulating the conduct of court officers.

177. *See* Lawson, *supra* note 2, at 372–78 (also citing other scholars whose views can be understood in terms of an "important subjects" theory of delegation).

178. *See Wayman*, 23 U.S. at 43 (Marshall, C.J.):

However, impermissible delegations appear to be a function of both discretion *and* content. The Court has intuited this before: "[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."[179] But the Court has never supplied us with an analysis of just how much discretion, and perhaps what *kinds* of discretion, is permitted for what kinds of power.[180] My tentative view is that the more a delegation of power grants discretion, *and* the more that discretion contemplates determining primary rules of private conduct (or some other explicitly legislative task such as establishing post roads), the more likely the delegation is to be unconstitutional.[181] The early history does indeed demonstrate very broad delegations of power[182]—but power to direct official

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> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

179. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001).

180. Interestingly, the Court in the only two successful nondelegation challenges—*Schechter Poultry* and *Panama Refining*—understood that delegation of legislative power must be considered both in terms of discretion and in terms of content. As the Court explained in *Schechter*, the issue in *Panama Refining* was whether the President was given too much discretion to decide *whether* to exercise his authority to prohibit a well-defined act. *Schechter*, 295 U.S. at 530:

> There [in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)] the subject of the statutory prohibition was defined. That subject was the transportation in interstate and foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. The question was with respect to the *range of discretion* given to the President in prohibiting that transportation.

Id. (emphasis added) (citation omitted). In contrast, in *Schechter* itself, "the question [was] more fundamental"—viz., "whether there is any adequate definition of the subject to which the codes are to be addressed." *Id.* at 530–31.

181. Ron Cass makes a similar argument in a recent article. *See* Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 177 (2017):

> [I]dentifying an improper delegation of power requires understanding the power's *nature* rather than its scope. With this in mind, a broad authorization for exercise of a relatively minor power that *is* properly associated with the work of another branch does not fail simply because it is broad. By the same token, a narrow authorization for the exercise of a power of great importance that is *not* properly associated with the work of another branch does not become constitutional simply because it is narrow.

Id.; *see also id.* at 198:

> Other things equal, more open-ended authority over a wider range of decisions ought to count against a finding of constitutionality, but the critical concern remains whether the authority constitutes a commitment of discretion to make general rules for others or to direct activity within the recipient's constitutionally assigned realm.

182. JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 90, 96, 99, 115, 187, 290 (2012) (describing extraordinarily broad grants of discretionary authority to the Executive Branch in early American history).

behavior, not private conduct.[183] That history also has at least a few examples, however, of *limited* delegations to determine rules of private conduct.[184]

There may also be a way to subcategorize the scope of the discretion being conferred. There is probably a difference, for example, between so-called jurisdictional questions and nonjurisdictional questions. The question *whether* something should be regulated appears qualitatively different than a decision over *how* something is to be regulated after Congress has already declared that it should be regulated.[185] Additionally, discretion over *purpose* is surely more legislative than discretion over how to effectuate that purpose—that, indeed, might be the law under *Panama Refining* (the other

183. HAMBURGER, *supra* note 119, at 83–85 & n.a (characterizing Mashaw's examples as granting discretion to provide rules for official conduct); *cf., e.g.*, MASHAW, *supra* note 182, at 193, (describing the grant of authority to a Steamboat Inspection Board to establish "rules and regulations for their own conduct and that of the several boards of inspectors within the districts," i.e., to establish rules governing official conduct (quoting Act of Aug. 30, 1852, ch. 106, § 18, 10 Stat. 61, 70)).

184. For example, one early statute permitted the President almost untrammeled discretion to license trade with Indians. Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137. This was a broad discretion in the sense that the President had wide and almost unbridled discretion, and it also determined private rights and primary rules of conduct. But it was limited in the sense that it was an issue touching on the President's executive power to conduct foreign relations. The early steamboat inspection laws permitted the inspection service to determine maximum passenger limits on steamships. MASHAW, *supra* note 182, at 196. This was a delegation of power to determine private rights—it would determine the number of contracts a steamship owner/captain could enter into with passengers, it limited the rights of prospective passengers, and so on. But the discretion was limited. Congress had decided that steamboats should be regulated for safety and decided that there should be passenger limits, *id.* at 195–96, but left it up to the inspection service to decide what that limit should be. Although we are straying from the early history now, consider also the early power of the Bureau of Animal Industry to quarantine livestock. ALAN L. OLMSTEAD & PAUL W. RHODE, ARRESTING CONTAGION: SCIENCE, POLICY, AND CONFLICTS OVER ANIMAL DISEASE CONTROL 76–82 (2015). That power clearly determined private rights and established rules of conduct. But the discretion was limited in an important sense. Congress decided that contagious livestock diseases were a threat and should be eradicated (a controversial proposition); and Congress decided that quarantines were an appropriate tool to achieve that goal. *Id.* at 76. *Where* to place the quarantine to achieve that goal was left up to the Bureau.

185. This may sound like the distinction between "jurisdictional" and "non-jurisdictional" questions rejected by *City of Arlington v. FCC*, where the Court held that for purposes of *Chevron* deference there is no difference between these two kinds of questions. 569 U.S. 290, 296–301 (2013). That case, however, demonstrates merely that such a distinction does not work under *Chevron*, whose inquiry boils down to whether the agency has acted within its statutory authority—that is, whether it exceeded its jurisdiction or exceeded its authority within its jurisdiction, the question is really the same (whether the agency has exceeded its authority). Thus, Justice Scalia, writing for the majority, explained that even for major and important questions involving jurisdiction—here he cited *Brown & Williamson* and *MCI*—the Court has applied the *Chevron* framework. *Id.* at 303. But this distinction may make a whole lot of sense for as-applied nondelegation because even though the nondelegation inquiry would be the same for jurisdictional and nonjurisdictional delegations—whether Congress impermissibly delegated power—the answer to this question *will* depend on the nature of the implicit delegation. The question of *whether* something can be regulated may be treated just like any other question for the purposes of *Chevron*'s Step One and Step Two analyses, but it may have entirely different implications for a nondelegation analysis.

successful nondelegation challenge).[186] Although these lines can be difficult to draw, that does not mean they do not exist.

This analysis is also consistent with the theory that "important subjects" cannot be delegated. The more a rule affects private conduct or private rights, the more important that subject is for a legislative body; and hence, the less discretion is permitted the executive to make such rules. Critically, however, important subjects might involve the exercise of powers that do not touch upon primary rules of conduct. The post-roads debate in the Second Congress is a prime example. Establishing a post road could mean (as it historically did) the difference between economic prosperity and stagnation for towns; it involved employment and remuneration for local citizens; and it involved controlling the channels of free communication and a free press.[187] It is also a power explicitly given to Congress within the enumeration of Article I, Section 8. The point here is that regulations establishing primary rules of conduct are *more* important a subject than are regulations directing only official behavior; but there are other classes of regulations that for other reasons might be more important, too.

These principles make sense in the context of tobacco regulation. Assume Congress passed a simple, explicit statute granting FDA authority to decide both *whether* tobacco should be regulated, *to what end*—i.e., whether it should consider economic factors or merely health factors—and also *how* it should be regulated. This statute grants broad discretion over whether there should be a regulatory scheme at all and over the purposes for which the regulatory scheme exists, and the objects of the discretion are primary rules of private conduct involving the regulated activity. There would be a very strong case that this is an unlawful delegation of power. Now suppose the statute *instructed* FDA that tobacco should be regulated and that the agency must consider both the economic impact as well as the health impact, and committed only the "how" to the agency's discretion. That is much more likely to pass muster, even if it leaves discretion to determine primary rules of conduct, e.g., that a vendor cannot sell to minors.

As this Article has explained and reiterated, however, it does not matter for present purposes how one defines a delegation of legislative power. The point is that under a given definition, an as-applied framework can have

186. The Court struck down section 9(c) of the National Industrial Recovery Act because it merely *authorized* the President to take action, or not, without specifying whether or why he should or should not do so: "Section 9 (c) does not state whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. . . . The Congress in section 9 (c) thus declares no policy as to the transportation of excess production." Panama Refining Co. v. Ryan, 293 U.S. 388, 415 (1935).

187. *See* LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 77–79 & n.13 (1948) (explaining the importance of post roads to towns).

significant implications for important cases. With these brief musings in mind, let us turn to some examples.

B. Examples

1. Massachusetts v. EPA.—In *Massachusetts v. EPA*, the EPA was presented with a petition requesting that the agency regulate carbon dioxide emissions as air pollutants under section 202(a)(1) of the Clean Air Act, which provides,

> The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.[188]

The Act defines "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air."[189]

In denying the petition, EPA reasoned that the Clean Air Act was intended "to address *local* air pollutants rather than a substance that 'is fairly consistent in its concentration throughout the *world*'s atmosphere'";[190] that carbon dioxide was not an air *pollutant* merely because it is emitted into the atmosphere;[191] and, *a la Brown & Williamson*,[192] that Congress had enacted a separate statutory scheme to address global warming,[193] that regulations under the Clean Air Act would be inconsistent with other motor vehicle regulations already existing,[194] and that regulations may infringe on the President's foreign policy initiatives.[195] EPA thus concluded not only that carbon dioxide was not an air pollutant within the meaning of the Act, but that even if it were, the agency would decline to regulate it.[196]

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188. Massachusetts v. EPA, 549 U.S. 497, 506 (quoting 42 U.S.C. § 7521(a)(1)).

189. *Id.* (quoting § 7602(g)).

190. *Id.* at 512 (citing Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,927 (Sept. 8, 2003)).

191. *Id.* at 557–58 (Scalia, J., dissenting) (citing Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,929 n.3).

192. *See supra* notes 45, 48 and accompanying text.

193. *Massachusetts*, 549 U.S. at 511–12 (citing Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,926).

194. *Id.* at 513 (citing Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,929).

195. *Id.* at 513–14 (citing Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,931).

196. *Id.* at 511.

The majority rejected these arguments under *Chevron* Step One. It held: "The statutory text forecloses EPA's reading" because "air pollutant" includes "*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air."[197] Thus, "[t]he statute is unambiguous."[198] And if carbon dioxide is an air pollutant, EPA must decide whether it "endanger[s] public health or welfare" and cannot consider other requirements such as the President's foreign policy initiatives.[199] If EPA finds that it does, "the Clean Air Act *requires* the Agency to regulate emissions of the deleterious pollutants from new motor vehicles."[200] The Court concluded that "EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change."[201]

In dissent, however, four Justices found two ambiguities. First, they agreed with the Court that *if* the Administrator makes a "judgment" about an air pollutant, then that judgment can only be based on the statutory criteria. But the dissenters argued that the Administrator may consult *other* reasons in deciding *whether to make a judgment at all*:

> [T]he statute says *nothing at all* about the reasons for which the Administrator may *defer* making a judgment—the permissible reasons for deciding not to grapple with the issue at the present time. Thus, the various "policy" rationales that the Court criticizes are not "divorced from the statutory text," except in the sense that the statutory text is silent, as texts are often silent about permissible reasons for the exercise of agency discretion.[202]

The dissent concluded therefore that "EPA's interpretation of the discretion conferred by the statutory reference to 'its judgment'" is, at minimum, entitled to deference under *Chevron*.[203]

Second, the dissent argued that the definition of "air pollutant" was not unambiguous. Merely because carbon dioxide is a "physical" or "chemical" substance that enters into the ambient air does not mean it is a pollutant—indeed, not every physical or chemical substance that does so is a pollutant.[204] When the statute defines air pollutant as "including" "any" such substance, it is similar to the phrase "any American automobile, including any truck or

197. *Id.* at 528–29 (quoting and adding emphasis to 42 U.S.C. § 7602(g)).
198. *Id.* at 529.
199. *Id.* at 532–39 (quoting § 7521(a)(1)).
200. *Id.* at 533 (emphasis added).
201. *Id.*
202. *Id.* at 552 (Scalia, J., dissenting) (citations omitted).
203. *Id.* at 552–53.
204. *Id.* at 557 & n.2.

minivan"—and such a phrase does *not* mean that *any* truck or minivan is American.[205] Thus, again, the dissent would invoke *Chevron* deference.[206]

How would this case be analyzed under as-applied nondelegation? Of course, just as some Justices resolve cases at Step One where others see ambiguities (requiring a resolution under Step Two), the answer depends on how one reads the statute. Under the majority's reading, the statute *requires* EPA to regulate carbon dioxide emissions upon a particular judgment or determination. So long as that is true, any nondelegation problem would be a facial one. Does the statute give sufficient criteria to guide the discretion of the President to make the determination? It's a question of what the statute does on its face. And as it were, there does not appear to be any nondelegation problem under the majority's reading—Congress decided that carbon dioxide *shall* be regulated, if a certain condition is met; Congress declared the purpose for which it should be regulated; and Congress even declared how it should be regulated—by motor vehicle emissions reductions. Of course, the statute might still leave some discretion: At what level to cap emissions? How is that determination to be made? And so on. If any of *those* questions arose through a statutory ambiguity, there would be less of a nondelegation problem.

If, on the other hand, the dissenters' view is correct, then the statute in this application would raise nondelegation concerns. If the Court first found that the Administrator could *defer* the judgment or finding under the statute that triggers jurisdiction, then presumably he could delay it indefinitely. The statutory silence implicitly delegating this discretion would be tantamount to declaring that EPA shall decide *whether* carbon dioxide should be regulated at all. Now, this is not an entirely naked delegation, because if the agency does decide to regulate carbon dioxide, it has to make a particular finding. Nevertheless, the discretion to delay such a finding indefinitely is essentially discretion over whether to regulate something at all. That raises far more serious nondelegation concerns.

As for the definitional ambiguity, it amounts to an implicit delegation of authority to decide *whether* carbon dioxide should be regulated. This appears no different than the ambiguity over deferring judgment. If, however, that creates a nondelegation problem, then it follows that any time there is ambiguity over whether a particular pollutant is covered, that would raise an identical nondelegation problem. This might seem an undesirable result, but perhaps it is not. Under the statutory definition, there are many pollutants over which there is no dispute at all—that is, *Congress has specified clearly* that something shall be regulated. But in those limited cases where it is not so clear that Congress has specified that something should be regulated, it is not unreasonable to insist that Congress go back and specify. By definition,

205. *Id.* at 557.
206. *Id.* at 558.

the ambiguity means we don't know whether Congress would have wanted the particular particle regulated. Congress has not made the law. Congress should be responsible for going back and doing so.

2. Chevron v. NRDC.—One of the key criticisms of the major questions doctrine as it was developed in *Brown & Williamson* and *MCI* is that it is hardly clear that the rulemakings in the *Chevron* case itself were any less "major" in terms of economic and political significance.[207] Although *Chevron v. NRDC* may be a hard case under a major questions doctrine, it comes out more easily under an as-applied nondelegation framework. *Chevron* involved the decision of the EPA under the Reagan Administration to interpret "stationary source" in the Clean Air Act to refer to an entire plant rather than to any individual emitting source within that plant (this was called the "bubble" policy).[208] The importance of the bubble policy was that it permitted plants to fall below certain regulatory standards with respect to *individual* sources of emissions so long as there were offsetting reductions in emissions in other parts of the plant.[209] Put simply, the Act's statutory definition plausibly could refer either to any individual installation within a plant, or to the plant as a whole. The Act defines stationary source as "any building, structure, facility, or installation" which emits air pollution.[210]

In assessing any potential nondelegation problem with Congress's implicit delegation to decide whether to adopt a bubble policy, a court would consider that Congress passed a thoroughly detailed regulatory scheme—detailing statutory purposes, emissions goals, and remedial procedures.[211] In the words of the Court, "The Clean Air Act Amendments of 1977 are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue."[212] The amendments required states failing to achieve emissions targets to create state implementation plans by a certain deadline, and specifically required such plans to "require permits for the construction and operation of new or modified major stationary sources . . . ."[213] The only question was whether an entire plant could be considered a stationary source so that each individual emitting component did not need to achieve certain

207. Moncrieff, *supra* note 35, at 611 & n.74; Sunstein, *supra* note 33, at 243, 245–46.

208. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840 (1984) (citing Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 172(b)(6), 91 Stat. 685, 747 (requiring "permits for the construction and operation of new or modified stationary sources"); Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval, 46 Fed. Reg. 50,766 (Oct. 14, 1981) (changing the definition of "source" from one that included "an individual piece of process equipment within the plant" to "an entire plant only")).

209. *Id.* at 853–55.

210. *Id.* at 860 (quoting 42 U.S.C. § 7411(a)(3)).

211. *Id.* at 848–51.

212. *Id.* at 848.

213. *Id.* at 849–50 (quoting Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 172(b)(6), 91 Stat. 685, 747).

targets. Framed thus, Congress established that something *should* be regulated (particular pollutants), established the purposes and goals of such regulation (attainment of lower emissions levels), and even established generally a method of achieving these targets (by the regulation of stationary sources). The only discretion left to the agency was the *how* of the implementation, taking into account all of these directives. In that case, to be sure, the *how* question could have major economic and political significance—and it could even determine the ultimate level of acceptable emissions, a question that affects private rights and private conduct. It certainly *could* be considered legislative. But it probably was not an exercise of "exclusively legislative"[214] power such that Congress could not delegate it.

3. U.S. Telecom Ass'n v. FCC.—The final example involves a recent and controversial issue—the FCC's 2015 Open Internet Order that imposed so-called "net neutrality" rules on Internet access providers. Promulgated under Section 706 of the Telecommunications Act of 1996 and Title II of the Communications Act of 1934, the order prohibited the "blocking, throttling, [or] paid prioritization" of content on the part of the Internet access providers[215]—i.e., providers of Internet access such as Comcast or Verizon could not treat preferentially (or "edge") some content providers over others. In June 2016, the D.C. Circuit upheld the order under *Chevron* as a permissible interpretation on the part of the FCC of the 1934 and 1996 Acts.[216]

It does not take a detailed analysis of the statutes and the order to see that the order—or more precisely the statutory ambiguities pursuant to which it was issued—are ideal candidates for an as-applied nondelegation challenge. The case revolved around whether the FCC could plausibly classify Internet access providers as "offering" a "telecommunications service," as opposed to merely providing an "information service."[217] For the order to be valid, providers had to be classified as telecommunications services so that they could be subject to the common carrier regulations of Title II.[218] The D.C. Circuit held, relying on the Supreme Court's decision in

214. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825); *see supra* note 110.

215. Protecting and Promoting the Open Internet, 30 FCC Recd. 5601 ¶ 14 (Apr. 3, 2015).

216. U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), *petition for cert. filed*, No. 17-504 (U.S. Sept. 28, 2017).

217. *Id.* at 701.

218. *Id.* at 691. Under the Telecommunications Act of 1996, the FCC's authority to regulate telecommunications carriers as "common carriers" is limited to "the extent that [the carrier] is engaged in providing telecommunications services." 47 U.S.C. § 153(51) (2012). The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public." *Id.* § 153(53). In contrast, "information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," *id.* § 153(24), and is not subject to common carrier regulation. *U.S. Telecom*, 825 F.3d at 691, 701.

National Cable & Telecommunications Ass'n v. Brand X Internet Services,[219] that this classification depended on the meaning of the term "offering," which was ambiguous, and thus the FCC's classification was entitled to *Chevron* deference.[220]

In short, the D.C. Circuit held, "the Supreme Court expressly recognized that Congress, by leaving a statutory ambiguity, had delegated to the Commission the power to regulate broadband service."[221] That is, Congress, through the statutory ambiguity, delegated to the FCC the power to decide *whether* the Internet access providers should be regulated at all—because under the statutory language, such providers could plausibly be subject to regulations or could plausibly be exempt from them. This is the kind of jurisdictional "whether" question suggesting a possible nondelegation problem.

But more still, this implicit delegation of authority was particularly problematic. As explained elsewhere in the opinion, the Communications Act also grants the FCC authority to "forbear 'from applying any regulation or any provision' of the Communications Act if it determines that the provision is unnecessary to ensure just and reasonable service or protect consumers and determines that forbearance is 'consistent with the public interest.'"[222] Not only, then, did this delegation from Congress give the agency discretion *whether* to regulate the Internet access providers, but it also gave the agency enormously broad discretion *how to do so*—by choosing whether any of the statutory provisions should apply or not. The FCC had nearly free rein to decide whether and how the Internet was to be regulated. This discretion was guided only by very broad, general purposes—such as the "consistent with the public interest," the "just and reasonable" charges or practices, or the "not necessary for the protection of consumers" standards of the 1934 Act for purposes of forbearance.[223] It was also, perhaps, guided by the even broader purposes of the 1996 Act "to promote the continued development of the Internet," "to preserve the vibrant and competitive free market that presently exists for the Internet," and "to encourage the development of" certain technologies.[224]

In short, Congress's implicit (and in the case of forbearance, explicit) delegations of authority—effectively to decide whether, how, and to what end the Internet should be regulated—present a likely nondelegation problem. There is little disagreement that the 1934 and 1996 Acts are

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219. 545 U.S. 967, 989 (2005) ("The term 'offe[r]' as used in the definition of telecommunications service is ambiguous . . . ." (alteration in original) (citation omitted)).

220. *U.S. Telecom*, 825 F.3d at 702–04.

221. *Id.* at 704.

222. *Id.* at 695–96 (quoting 47 U.S.C. § 160(a)).

223. 47 U.S.C. § 160(a).

224. *Id.* § 230(b)(1)–(3).

ambiguous with respect to whether the Internet is covered by their statutory definitions; the FCC's interpretation was thus entitled to *Chevron* deference. And it is beyond question that the relevant statutory provisions in the 1934 and 1996 Acts do not violate the nondelegation doctrine in their entirety. But the Open Internet Order was a clear candidate for an as-applied nondelegation challenge.

IV. Conclusion

An as-applied nondelegation doctrine has much to commend it. Because the doctrine is modest, it would reinvigorate the nondelegation doctrine by permitting courts to assess nondelegation challenges in terms of narrower delegations of authority. Courts no longer need to fear striking down entire statutory schemes or provisions—the central provisions of the Communications Act, the Clean Air Act, the Clean Water Act, the Securities and Exchange Act—merely by entertaining a nondelegation challenge. The doctrine is more intellectually honest and rigorous than the so-called major questions exception to *Chevron*, and it is invited by prevailing theories of judicial review. Finally, it may be determinative in important cases, and indeed has the potential to reshape how administrative law is litigated.

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Regulating Motivation: A New Perspective on the Volcker Rule

Ryan Bubb* & Marcel Kahan**

The myriad problems with the Dodd-Frank Act's ban on proprietary trading by banks have led to a rare bipartisan consensus: the Volcker Rule must be pared back or even repealed. At the root of the Rule's problems is the fundamental definitional challenge posed by the current approach. The definition of banned proprietary trading turns on the motivation underlying a trade, which is difficult for regulators to determine. Regulators must adopt either a hardline approach that risks deterring banks from engaging in core financial intermediation functions or a more permissive approach that risks the continuance of speculative gambles that threaten the financial system.

We propose a new paradigm for achieving the Volcker Rule's objectives that resolves this dilemma. Rather than define and ban proprietary trading, regulators should simply ban banks from paying traders on the basis of trading profits. Our proposal takes advantage of the competition between proprietary trading firms in two markets: they compete in the securities market to identify and exploit trading opportunities, and they compete in the labor market to hire and motivate the best traders. Because speculative trading is a zero-sum game, handicapping banks relative to unregulated entities, such as hedge funds, in the labor market for traders would generate powerful incentives for banks to get out of the trading game. Our simple compensation-based approach would likely be more effective at ending speculative trading at banks—and do so at lower cost—than the complex and loophole-ridden current approach.

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> If you want to be trading, you have to have a lawyer and a psychiatrist sitting next to you determining what was your intent every time you did something.
>
> Jamie Dimon, CEO of JPMorgan Chase & Co., Jan. 9, 2012[1]

Introduction

The Volcker Rule is among the most controversial provisions of the Dodd-Frank Act. By banning proprietary trading by banks and their affiliates, the rule attempts to reduce the risk-taking of banks. But "proprietary trading" is an amorphous concept. The rule is intended to ban speculative trading aimed at profiting from short-term price movements. Many core functions of banks, however, entail the bank buying and selling financial instruments and assuming price risk as a principal for its own account. The Volcker Rule does not seek to constrain such trading if it is incidental to core financial intermediation functions, like market making, but rather only proprietary trading of a "speculative" sort. Determining whether a transaction constitutes banned proprietary trading therefore requires an inquiry into the motivation for the trade. Did the bank buy these securities to meet an anticipated client need or for some other permissible motivation, or is the bank just making a bet that their price is headed up?

The challenge in identifying the type of transactions that should be prohibited has led to a complicated scheme of definitions, presumptions, carve-outs, and quantitative tests. Roberta Romano argues that the resulting "Rube Goldberg-like Volcker Rule," at "over 900 pages," will "produce further surprises, in addition to imposing substantial compliance costs."[2] While this is somewhat of an exaggeration on length—the regulatory release in total may run around 900 pages, but the text of the final rule itself is a mere 40[3]—compliance is indeed expensive.

More fundamentally, the definitional challenges inherent in the approach create real risks of both under- and over-deterrence. Speculative trading at some banking entities may continue under the rule, while at others, socially valuable intermediation activities like market making may be

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1. *Jamie Dimon: U.S. Experiencing 'Mild' Recovery*, CNBC (Jan. 9, 2012), https://www.cnbc.com/video/2012/01/09/jamie-dimon-u-s-experiencing-mild-recovery.html [https://perma.cc/79RM-TK5W].

2. Roberta Romano, *Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation*, 43 HOFSTRA L. REV. 25, 72 (2014); *see also* Chloe Brighton, Development Article, *The Finalized Volcker Rule*, 33 REV. BANKING & FIN. L. 514, 517 (2014) (describing the proposed Volcker Rule as "over 963 pages long, with 2,826 footnotes and 1,347 questions" (quoting *The Volcker Rule: More Questions Than Answers*, ECONOMIST (Dec. 14, 2013), https://www.economist.com/news/finance-and-economics/21591587-push-make-americas-banks-safer-creates-new-uncertainties-more-questions [https://perma.cc/B3HW-2ADN]) (internal quotation marks omitted)).

3. 12 U.S.C. § 1851 (2012).

inhibited out of fear that the necessary transactions would be mistaken for illegal proprietary trading. These problems also plague a similar proposal by the European Commission to define and ban proprietary trading at EU banks.[4]

Concerns about the cost and effectiveness of this "define and ban"-type regulation have led prominent academic commentators to conclude that the game is not worth the candle and to call for the repeal of the Volcker Rule,[5] a call taken up in draft legislation recently introduced in Congress.[6] Existing proposals for reform short of repeal entail tinkering with the same basic define-and-ban approach.[7]

But what if there were a better way to achieve the objectives of the Volcker Rule, at far lower cost, based on a fundamentally different regulatory strategy? Instead of the current define-and-ban approach, we propose that banks should simply not be permitted to pay compensation to traders based on trading profits. If banks cannot pay traders based on trading profits, neither the bank nor individual traders would *want* to engage in speculative proprietary trading, and banks would have incentives to devise their own schemes that permit trading that is incidental to core banking functions but eliminate speculative trading.

Our proposal takes advantage of the competition between firms in two key markets that are essential to proprietary trading: the securities market and the labor market for traders.[8] First, firms that engage in the type of speculative trading targeted by the Volcker Rule compete in the securities market to identify and exploit trading opportunities. Doing so requires skill in acquiring and analyzing information that predicts future price movements of securities. Importantly, however, making bets on short-term price movements of

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4. European Commission, Proposal for a Regulation of the European Parliament and of the Council on Structural Measures Improving the Resilience of EU Credit Institutions 7 (Jan. 29, 2014), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014PC0043&from=EN [https://perma.cc/2GEH-KC7K]. For a comparative perspective on the approaches taken in the United States, UK, and EU, see Jan-Pieter Krahnen et al., *Structural Reforms in Banking: The Role of Trading*, 3 J. FIN. REG. 66 (2017).

5. *See* Matthew P. Richardson & Bruce Tuckman, *The Volcker Rule and Regulations of Scope*, *in* REGULATING WALL STREET: CHOICE ACT VS. DODD-FRANK 69 (Matthew P. Richardson et al. eds., 2017); Robin Greenwood et al., *The Financial Regulatory Reform Agenda in 2017* (Project on Behavioral Finance and Financial Stability Working Paper No. 2017-09), http://people.hbs.edu/asunderam/Reg_Reform_20170214.pdf [https://perma.cc/U9W7-2S8H].

6. Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017), https://financialservices.house.gov/uploadedfiles/hr_10_the_financial_choice_act.pdf [https://perma.cc/VE53-PKV2].

7. The Trump Administration, for example, has proposed exempting banks with less than $10 billion in assets, narrowing the definition of "proprietary trading," and expanding the definitions of permitted activities. *See* U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: BANKS AND CREDIT UNIONS 71–78 (2017), https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf [https://perma.cc/G9W6-E9ZE].

8. By traders, we mean all persons involved in making investment decisions and executing trades as well as their direct and indirect supervisors.

securities is inherently a zero-sum game: for every winner, there is a loser. For a trader to systematically earn profits from speculative trading requires not some absolute level of skill but rather a high degree of relative skill. The trader must be better at predicting future price movements than the counterparties with which he or she trades, which include other speculative traders.

Second, given the importance of having skillful traders, firms that engage in proprietary trading must compete for these traders in the labor market. To attract and incentivize trading talent, firms offer high-powered incentive contracts in which the individual trader enjoys a significant share of his or her trading profits. The individual traders who excel at this game are rewarded handsomely for it. Many different types of firms compete for the same trading talent, including hedge funds and other types of entities outside the scope of the Volcker Rule as well as the banking entities subject to the rule.

Our proposal is based on a simple insight that follows from the competition between proprietary trading firms in these two markets. Prohibiting banking entities from paying individuals based on their trading profits would put them at a substantial disadvantage to unregulated entities like hedge funds in the labor market for traders. Because of the zero-sum nature of betting on short-term price movements, firms that can only attract subpar traders—the "B-team"—do not merely stand to make lower profits than firms with traders in the A-team, they stand to make losses. Put simply, if a firm cannot attract and motivate the best trading talent, it is better off staying out of the speculative trading game altogether. Thus, banning banking entities from paying individuals based on their trading profits would create powerful incentives for banks to cease such trading. Our simple compensation-based approach would likely be more effective at ending speculative trading at banks—and do so at lower cost—than the complex and loophole-ridden current approach.[9]

Our Essay proceeds as follows. In Part I we summarize, and discuss the shortcomings of, the current define-and-ban approach to implementing the Volcker Rule. Next, in Part II, we explain our alternative approach of banning

9. In an important contribution, Lucian Bebchuk and Holger Spamann suggest regulating the pay of bank executives to reduce risk-taking. *See* Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 99 GEO. L.J. 247 (2010). Their article is similar to ours in as much as it makes a proposal to use pay regulation to reduce bank risk-taking. However, our proposal is based on a different link between compensation and bank risk. Our proposed scheme is based on the insight that pay regulation would make it harder for banks to compete for quality traders and thus primarily reduces the incentives of the banks themselves, at the firm level, to engage in proprietary trading. The Bebchuk–Spamann proposal, in contrast, is aimed at reducing the incentives of the pay recipients, the executives, to engage in risk-taking.

banks from compensating traders based on their trading profits. In Part III we address potential objections to our approach. Part IV concludes.

I. The Volcker Rule

Section 619 of the Dodd-Frank Act, commonly known as the Volcker Rule, prohibits banking entities from engaging in proprietary trading or from maintaining an interest in or sponsoring a hedge fund or private equity fund.[10] "Banking entities" are defined as insured depository institutions, any company that controls an insured depository institution, any bank holding company, or any affiliate or subsidiary of a bank holding company.[11]

A. The Justification for the Rule

For purposes of this Essay, we take as given the Volcker Rule's objective of eliminating proprietary trading by banks and simply ask how best to achieve that objective. The primary goal of the Volcker Rule is to reduce the systemic risk posed by banking entities and to increase financial stability.[12] Speculative trading by banks aimed at profiting from short-term price movements of securities inefficiently increases the riskiness of bank assets and therefore systemic risk. Such bank risk-taking is expected to be socially excessive because of the spillovers caused by bank failures. Banks play crucial roles in credit intermediation and in the payments system. Moreover, the failure of any one bank can have a domino effect on the health of other banks. As the recent financial crisis painfully demonstrated, bank failures produce outsized social costs. Concern over those costs motivates prudential regulation generally, including restrictions like the Volcker Rule on the activities of banking entities.

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10. Dodd-Frank Wall Street Reform and Consumer Protection Act § 619, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended at 12 U.S.C. § 1851(a)(1) (2016)) [hereinafter Dodd-Frank Act]; Proprietary Trading and Certain Interests in and Relationships with Covered Funds, 12 C.F.R. § 44.3(a) (2017).

11. 12 U.S.C. § 1851(h)(1) (2016); 12 C.F.R. § 44.2(c)(1) (2017). Provided that certain conditions are met, insurance companies, venture capital companies, and foreign banks are exempt from the rule. 12 U.S.C. § 1851(d)(1)(E)–(F), (H).

12. *See* 12 U.S.C. § 1851(b)(1)(A) (listing first among enumerated purposes of the statute to "promote and enhance the safety and soundness of banking entities"). Related purposes that are also enumerated include to "protect taxpayers and consumers and enhance financial stability by minimizing the risk that insured depository institutions and the affiliates of insured depository institutions will engage in unsafe and unsound activities"; and to "limit activities that have caused undue risk or loss in banking entities and nonbank financial companies supervised by the [Federal Reserve], or that might reasonably be expected to create undue risk or loss in such banking entities and nonbank financial companies supervised by the [Federal Reserve]." *Id.* § 1851(b)(1)(B), (E); *see also* H.R. Rep. No. 111-517, at 868 (2010) (Conf. Rep.), *as reprinted in* 2010 U.S.C.C.A.N. 722, 725 ("Title VI improves prudential regulation of banks, saving associations, and their holding companies.").

The problem of excessive bank risk-taking is exacerbated by the moral hazard that results from formal and informal government guarantees. Taxpayers bear much of the cost of the failure of an insured depository institution. In addition, large banking entities affiliated with insured depository institutions, even if they are not themselves insured depository institutions, enjoy an informal guarantee. This informal guarantee results from the expectation that the government is likely to bail out "too big to fail" institutions in times of crisis.[13]

Proprietary trading by banks can also crowd out their core functions of deposit-taking and lending.[14] In short, banks might be tempted to allocate their scarce funds to short-term trading rather than investing in long-term lending, and it is the latter activity that may justify the special government subsidies that banks enjoy.[15]

Another concern motivating the Volcker Rule was that proprietary trading by banks produces conflicts of interest vis-à-vis their customers.[16] For example, a bank might profit from betting against a financial instrument that the bank itself had created and sold to customers, as Goldman Sachs was accused of doing during the run-up to the financial crisis.[17]

In addition to these incentive problems, Paul Volcker himself took the position that proprietary trading at banks had eroded the conservative bank

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13. Sens. Jeff Merkley & Carl Levin, *The Dodd-Frank Act Restrictions on Proprietary Trading and Conflicts of Interest: New Tools to Address Evolving Threats*, 48 HARV. J. LEGIS. 515, 521–22 (2011); *see also* Matthew Richardson et al., *Large Banks and the Volcker Rule*, *in* REGULATING WALL STREET 181, 202 (Viral V. Acharya et al. eds., 2011) (describing how banks acquired large positions in mortgage-backed securities funded by low capital costs that derived from explicit and implicit government guarantees).

14. Arnoud W.A. Boot and Lev Ratnovski, *Banking and Trading*, 20 REV. FIN. 2219, 2235–40 (2016).

15. As Paul Volcker himself put it,

> [T]he continuing explicit and implicit support by the Federal government of commercial banking organizations can be justified only to the extent those institutions provide essential financial services. A stable and efficient payments mechanism, a safe depository for liquid assets, and the provision of credit . . . clearly fall within that range of necessary services. Proprietary trading of financial instruments—essentially speculative in nature—engaged in primarily for the benefit of limited groups of highly paid employees and of stockholders does not justify [] tax payer subsidy . . . .

Paul Volcker, *Commentary on the Restrictions on Proprietary Trading by Insured Depositary Institutions*, WALL STREET J. (Feb. 13, 2012), http://online.wsj.com/public/resources/documents/Volcker_Rule_Essay_2-13-12.pdf [https://perma.cc/6QFU-ZBZX].

16. FIN. STABILITY OVERSIGHT COUNCIL, STUDY & RECOMMENDATIONS ON PROHIBITIONS ON PROPRIETARY TRADING & CERTAIN RELATIONSHIPS WITH HEDGE FUNDS & PRIVATE EQUITY FUNDS 48 (2011) [hereinafter FSOC STUDY & RECOMMENDATIONS], http://www.treasury.gov/initiatives/Documents/Volcker%20sec%20%20619%20study%20final%201%2018%2011%20rg.pdf [https://perma.cc/T6BF-9ZZB].

17. *See* Press Release, Sec. Exch. Comm'n, SEC Charges Goldman Sachs with Fraud in Structuring and Marketing of CDO Tied to Subprime Mortgages (Apr. 16, 2010), https://www.sec.gov/news/press/2010/2010-59.htm [https://perma.cc/FK66-JAZU].

risk-management culture. The idea is that the outsized compensation packages of traders that gave them powerful incentives to take risks had resulted in a shift in organizational culture at the bank more generally toward excessive risk-taking.[18]

Finally, proprietary trading by banking entities was an attractive regulatory target because allowing it conferred little benefit.[19] Banks do not seem to enjoy meaningful economies of scope in proprietary trading.[20] And other asset managers including hedge funds already engage in proprietary trading and could be expected to fill any gap left by the exit of banks from this activity.[21]

B. The Prohibition on Proprietary Trading

Under the Volcker Rule, a banking entity may not engage in "proprietary trading," which is defined as "engaging as principal *for the trading account* of the banking entity in any purchase or sale of one or more financial instruments"[22] unless a specific exception applies. The scope of that definition in turn hinges largely on the meaning of "trading account." The primary test is purpose-based and encompasses accounts used by a banking entity to trade financial instruments principally for the purpose of reselling in the short term; profiting from arbitrage or short-term price movements; or hedging against a position resulting from one of the foregoing.[23] A position

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18. Volcker, *supra* note 15, at 2.

19. Richardson et al., *supra* note 13, at 200–01.

20. *Id.*

21. The extent to which they do so is an empirical question. There is some evidence that the Volcker Rule has reduced liquidity in the bond market. *See* JACK BAO ET AL., THE VOLCKER RULE AND MARKET-MAKING IN TIMES OF STRESS (2016), https://www.federalreserve.gov/econresdata/feds/2016/files/2016102pap.pdf [https://perma.cc/SR5L-X7GX].

22. 12 C.F.R. § 44.3(a) (2017) (emphasis added). "Financial instrument" is defined as including a security, derivative, contract of sale of a commodity for future delivery, or an option on any one of the foregoing. *Id.* § 44.3(c)(1). It excludes loans; foreign exchange and currency; and commodities, except for excluded commodities, derivatives, or contracts of sale of a commodity for future delivery or options thereon. *Id.* § 44.3(c)(2). Bonds and other instruments issued by U.S. agencies are also exempt. 12 U.S.C. § 1851(d)(1)(A).

23. 12 C.F.R. § 44.3(b)(1)(i). This test is the one that most closely aligns with our colloquial understanding of proprietary trading as trading to profit from price movements. It is also the one that most closely tracks the definition of proprietary trading in the statute. The statute defines a "trading account" as

> any account used for acquiring or taking positions in the securities and instruments described in [the definition of proprietary trading] principally for the purpose of selling in the near term (or otherwise with the intent to resell in order to profit from short-term price movements), and any such other accounts as the appropriate [f]ederal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission may . . . determine.

12 U.S.C. § 1851(h)(6). There are two additional tests by which transactions can qualify as "for the trading account." The first pertains to banking entities that are, or have affiliates that are, insured depository institutions, bank holding companies, or thrifts, and that calculate their required ratios of

held by a banking entity for fewer than sixty days or a position with respect to which a banking entity transfers the risk within sixty days is presumed to meet this test.[24]

C. *Exceptions to the Prohibition on Proprietary Trading*

The statutory rule carves out from its prohibitions certain permitted activities that represent or are integral to core banking functions performed in the service of banks' customers.[25] The three most important permitted activities for our purposes are market making, underwriting, and hedging.

1. Permitted Market Making-Related Activities.—Market making entails a banking entity acting as an intermediary to match buyers and sellers, including by purchasing and holding in its inventory a financial instrument for which there is not a ready market buyer, or conversely, selling from its inventory a financial instrument for which there is not a ready market seller. Such market making-related activities are permissible if they comply with specific regulatory requirements. Among others, the trading desk purporting to engage in market making must exhibit the traits generally characteristic of a market making operation;[26] the banking entity must establish a reasonable

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risk-based capital under the market risk capital rule. 12 C.F.R. § 44.3(b)(1)(ii). For institutions subject to the rule, trades of financial instruments that qualify as both covered positions and trading positions constitute trading for the banking entity's account. *Id.*; *see also id.* §§ 44.3(e)(10)–(11) (defining "[m]arket risk capital rule" and "[m]arket risk capital rule covered position and trading position" for purposes of the subpart). The second applies to banking entities licensed or registered as dealers, swaps dealers, or security-based swaps dealers. 12 C.F.R. § 44.3(b)(1)(iii)(A). For such entities, any trade connected to activities that would require the entity to be licensed as such (i.e., as a dealer, swaps dealer, or security-based swaps dealer) meets the test and qualifies as for the entity's trading account, regardless of the purpose for which the trade is made. *Id.*

24. *Id.* § 44.3(b)(2). The presumption can be rebutted by demonstrating that the trade was not made principally for a prohibited purpose. *Id.*

25. 12 U.S.C. § 1851(d)(1)(B) (permitting the "purchase, sale, acquisition, or disposition of securities and other [enumerated] instruments . . . in connection with underwriting or market-making-related activities" in quantities "designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties").

26. The desk must be one that routinely stands ready to purchase and sell financial instruments related to its inventory and be willing to trade such instruments on its own account in commercially reasonable amounts and throughout market cycles. 12 C.F.R. § 44.4(b)(2)(i). The amount, type, and risk of products maintained in inventory, though, must be designed not to exceed the reasonably expected near-term demands of the market maker's customers, clients, and counterparties, in keeping with market making's core character as a service provided to other traders. *See id.* § 44.4(b)(2)(ii).

internal compliance program;[27] and compensation arrangements may not be designed to reward or incentivize banned proprietary trading.[28]

2. Permitted Underwriting Activities.—Also permissible under the final rule are underwriting activities.[29] As an underwriter, the banking entity facilitates debt and equity offerings by acting as an intermediary between the issuer and the market purchasers of the security.[30] In that role, the banking entity often guarantees the sale of a set number of shares by committing to purchase them in the event that they cannot be sold on the market at the offering price.[31] During the period before and immediately after the sale, it also acts as a market maker in order to provide liquidity and stabilize the secondary market.[32] The rule allows banking entities to continue to trade in order to perform these underwriting functions as long as they conform to requirements regarding the type, size, and time period of positions held.[33]

3. Permitted Hedging Activities.—Integral to banks' ability to engage in market making and underwriting is the ability to hedge their positions in order to reduce risk. Thus, "[r]isk-mitigating hedging activities . . . designed

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27. That program must impose limits respecting the amount and composition of each trading desk's inventory and include a plan to mitigate risks consistent with those limits. *Id.* § 44.4(b)(2)(iii). In the event those limits are exceeded, the trading desk must act to bring its inventory in conformance with them. *Id.* § 44.4(b)(2)(iv).

28. *Id.* § 44.4(b)(2)(v).

29. *Id.* § 44.4(a). Underwriting activities are functionally very similar to market making activities. In both, the banking entity acts as an intermediary between buyers and sellers in order to facilitate transactions in an illiquid market.

30. *See id.* § 44.4(a)(4) (defining "underwriter"); FSOC STUDY & RECOMMENDATIONS, *supra* note 16, at 21–22.

31. FSOC STUDY & RECOMMENDATIONS, *supra* note 16, at 21–22.

32. *See* Katrina Ellis et al., *When the Underwriter Is the Market Maker: An Examination of Trading in the IPO Aftermarket*, 55 J. FIN. 1039, 1040 (2000) ("An implicit, and at times even explicit, part of the contract between underwriters and issuers in an IPO is that the underwriter will provide liquidity in the post-issuance trading of the newly traded security.").

33. The first of these requires, intuitively, that the banking entity be acting as a licensed underwriter for the distribution of securities and that the position taken by the trading desk be related to that distribution. 12 C.F.R. § 44.4(a)(2)(i), (v). The size of the position taken by the trading desk must be proportionate to reasonably expected near-term demand, and the desk must make reasonable efforts to reduce the size of its position within a reasonable time period. *Id.* § 44.4(a)(2)(ii). The banking entity must implement and enforce a compliance program that is reasonably designed to ensure compliance with these requirements. *Id.* § 44.4(a)(2)(iii). The requirements also specify that compensation arrangements of those performing the underwriting activity must be designed not to reward or incentivize proprietary trading. *Id.* § 44.4(a)(2)(iv).

to reduce the specific risks to the banking entity in connection with" other permitted activities likewise qualify as permitted activities.[34]

D. Volcker's Fundamental Definitional Challenge

An ideally constructed Volcker Rule would clearly define banned proprietary trading in a way that made it easily distinguishable from the desirable banking functions the rule seeks to preserve, such as market making and hedging.[35] Common characteristics of desirable and undesirable banking activities, however, make that practically infeasible. The fundamental difference between prohibited proprietary trading and other types of transactions regards the reason for which inventory is held, and under any formulation it is likely to remain difficult to distinguish between inventory purportedly held to meet anticipated client needs, for example, and inventory held in the hope of profiting from price movements.[36] Banking entities trying to circumvent the Volcker Rule may thus shut down their explicitly denominated proprietary trading desk but continue to engage in proprietary trading under the guise of permitted activities.[37]

Defining the scope of banned proprietary trading thus requires a classic tradeoff between false positives and false negatives. Given the bleed between proprietary trading and permitted activities, broad rules that capture and deter all forms of proprietary trading impinge on desirable bank activities, whereas narrow rules giving wide berth to permitted activities leave room for speculative proprietary trading in the interstices.[38] That a junk-bond trader at Goldman Sachs reportedly made profits of $250 million—a magnitude that suggests that substantial capital was put at risk—while, according to an

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34. 12 U.S.C. § 1851(d)(1)(C) (2016).

35. Letter from Paul Volcker, Chairman, President's Econ. Recovery Bd., to the Members of the Fin. Stability Oversight Council (Oct. 28, 2010), http://www.merkley.senate.gov/news/press-releases/senators-call-on-regulators-to-implement-strong-merkley-levin-provisions [https://perma.cc/2J2E-BP6X] ("The extent of permitted activities, particularly 'market making' and 'risk mitigating hedging,' should be strictly and clearly delineated to ensure that high-risk proprietary trading stops, while economically beneficial and risk-reducing activities continue.").

36. *See* Richardson et al., *supra* note 13, at 201. Recognizing the difficultly of the task, the U.K. adopted a ring-fencing approach to avoid having to distinguish between market making and proprietary trading, instead requiring that retail operations reside in a separate entity from wholesale and investment banking operations. Romano, *supra* note 2, at 71.

37. *See* FSOC STUDY & RECOMMENDATIONS, *supra* note 16, at 4. Indeed, several large banking entities closed their proprietary trading units following the enactment of the Volcker Rule, but admitted to the FSOC that individuals previously employed within these units had been transferred to units specializing in permitted activity. *Id.* at 17–18; *see also* Richardson et al., *supra* note 13, at 202 ("It seems doubtful that highly compensated practitioners, backed by phalanxes of lawyers and lobbyists well versed in putting pressure on regulators, will take very long to find ways to erode the practical force of the Volcker Rule's proprietary trading restrictions.").

38. FSOC STUDY & RECOMMENDATIONS, *supra* note 16, at 18.

internal review, complying with the Volcker Rule[39] may be an indication that not all trades that Paul Volcker would have wished to ban are within the scope of the rule.

1. Market Making v. Proprietary Trading.—The delineation between market making and proprietary trading is one of the hardest to make. Not only do the two manifest similar outward characteristics, but a degree of proprietary trading and assumption of risk is inherent in market making.[40] Banking entities serve an important function as market makers by matching buyers and sellers, including by purchasing from a seller a position for which there is not a ready buyer and holding the position as inventory until such a buyer becomes available.[41] In doing so, the banking entity assumes the risk that the value of the position will change. The degree of risk may be particularly large in illiquid markets such as those for over-the-counter derivatives, which are frequently unique instruments that were specially created for the seller.[42] This dynamic—purchasing and holding a security in inventory, so that the banking entity bears the risk of price changes—precisely mirrors that of proprietary trading. The two manifest similar outward characteristics, with the critical distinction being the purpose with which the banking entity acts—in the case of market making, to provide its client with a buyer or seller; in the case of proprietary trading, to profit from holding the position.[43]

The notice of proposed rulemaking for the Volcker Rule acknowledges that these underlying similarities may beget practical difficulties in distinguishing between market making-related activities and impermissible proprietary trading:

> It may be difficult to distinguish principal positions that appropriately support market making-related activities from positions taken for short-term, speculative purposes. In particular, it may be difficult to determine whether principal risk has been retained because (i) the retention of such risk is necessary to provide intermediation and liquidity services for a relevant financial instrument or (ii) the position

39. *See* Dakin Campbell & Sridhar Natarajan, *Goldman Said to Prepare Volcker Defense for $250 Million Trader*, BLOOMBERG (Nov. 29, 2016), https://www.bloomberg.com/news/articles/2016-11-29/goldman-said-to-prepare-volcker-defense-for-250-million-trader [https://perma.cc/4JRE-QYNG].

40. *See id.* (noting that a degree of proprietary trading is inherent in market making); Charles K. Whitehead, *The Volcker Rule and Evolving Financial Markets*, 1 HARV. BUS. L. REV. 39, 50 (2011) (noting the difficultly of differentiating between market making and proprietary trading).

41. FSOC STUDY & RECOMMENDATIONS, *supra* note 16, at 18–19.

42. *Id.*

43. *Id.*

> is part of a speculative trading strategy designed to realize profits from price movements in retained principal risk.[44]

Commentators have expressed pessimism about the feasibility of making the distinction. Richardson *et al.* argue that the carve-out for market making "reads like a green light for continuing carry trades."[45] Gary argues that broad carve-outs embodied in the statute reflected the hatchet work of financial industry lobbyists who succeeded in substantively gutting the rule while preserving its skeleton, which Congress could tout to the public.[46]

2. Hedging v. Proprietary Trading.—Distinguishing permitted hedging from proprietary trading presents a similar difficulty. Both exhibit outwardly similar characteristics in that both entail the bank holding a financial instrument in its inventory and assuming the risk of price changes. The distinction is in what the banking entity seeks to obtain from that change in value: a straight profit, in the case of proprietary trading, or a counterbalance to another position, in the case of a hedge.[47]

By hedging, banking entities are able to mitigate the risks that arise from their market making transactions as well as from their other core banking functions.[48] Fulfilling its role as market maker often leaves a banking entity holding an inventory with a one-sided risk profile. Hedging serves as a critical corollary to market making by allowing the banking entity to mitigate this one-sided risk, which is a prerequisite to its willingness to act as market

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44. Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 76 Fed. Reg. 68, 846, 68, 869 (proposed Nov. 7, 2011).

45. Richardson et al., *supra* note 13, at 203.

46. *See* Alison K. Gary, Comment, *Creating a Future Economic Crisis: Political Failure and the Loopholes of the Volcker Rule*, 90 OR. L. REV. 1339, 1357 (2012). Gary applies interest group theories to argue that the concentrated interests and expertise of the financial industry, compared to the diffuse interests and inexpertness of the public, gave the former relatively greater influence in lobbying Congress to shape the statute. *Id.*; *see also* Louis Uchitelle, *Volcker, Loud and Clear*, N.Y. TIMES (July 11, 2010), https://query.nytimes.com/gst/fullpage.html?res=9400E5DC1138F932A25754C0A9669D8B63&pagewanted=all [https://perma.cc/56WN-A2C8] (quoting Barney Frank as saying that although he would have preferred a stronger version of the Volcker Rule, a stronger version would not have been able to pass the Senate). Senators Merkley and Levin offer a more optimistic assessment. While they acknowledge the problem that proprietary trading may sneak in under the guise of market making, they contend that quantitative metrics will provide regulators with a sufficient basis to delineate the two. *See* Sens. Jeff Merkley & Carl Levin, *The Dodd-Frank Act Restrictions on Proprietary Trading and Conflicts of Interest: New Tools to Address Evolving Threats*, 48 HARV. J. LEGIS. 515, 544 (2011) (quoting a banker as saying that "I can find a way to say that virtually any trade we make is somehow related to serving our clients").

47. Given the necessary persistence of basis and factor-based risks, the FSOC recommended that "a banking entity's hedging strategy should be clearly defined and directly related to an underlying set of fundamental risk factors to which the entity is exposed." FSOC STUDY & RECOMMENDATIONS, *supra* note 16, at 20.

48. FSOC STUDY & RECOMMENDATIONS, *supra* note 16, at 20.

maker in the first place. Hedging also plays a role outside the context of market making in mitigating risks that stem from banking entities' core business functions—namely, credit and interest rate risk.

That a hedge has a counter-position to which it should correspond makes identifying hedging more practically feasible than distinguishing market making, where there is no equivalent outward verification of the principal's intent. The complexity of the risks against which banks seek to hedge, however, makes it difficult to discern the extent to which a given position is intended as a hedge as opposed to a trade intended to profit the bank.[49] Most positions against which banks seek to hedge do not have counterparts that are both liquid and perfectly offset the risk of the position. What purports to be an imperfect hedge, however, may be risk that was purposefully assumed by the bank in order to profit on its own account as a form of concealed proprietary trading.[50]

Senators Merkley and Levin, who drafted the statutory provision, recognize the difficulty of surreptitious proprietary trading accomplished through intentionally imperfect hedging but express confidence that this difficulty will be mitigated by the Rule's requirements that banking entities identify the specific positions against which the hedge is designed to operate, combined with quantitative metrics.[51] The manner in which banking entities manage their hedging, however, will make the process of assessing hedges against their corresponding hedged positions, at the very least, trying and costly. Banks routinely hedge not on an instrument-by-instrument basis but en masse, on a portfolio level.[52] Doing so is frequently the most efficient way to hedge, but it creates a further distance between the primary position and purported hedge that makes it more difficult to test the nature of the relationship between the two.[53]

In sum, the core characteristic of the activity that the Volcker Rule seeks to prevent is inherent in the activities that the Volcker Rule seeks to preserve as well. Assumption of risk by the principal, even knowingly assumed risk to the principal, is therefore not itself dispositive of proprietary trading.[54]

E. Implications of the Definitional Problem

The difficulty with distinguishing prohibited proprietary trading from permitted activities results in various practical problems. One result is a

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49. *Id.*

50. *Id.*

51. *See* Merkley & Levin, *supra* note 46, at 545.

52. FSOC STUDY & RECOMMENDATIONS, *supra* note 16, at 21.

53. *See id.* (noting that "portfolio hedging activities" may be difficult to link to trading operations "in a clear and fully transparent manner").

54. *See* Whitehead, *supra* note 40, at 51 (recognizing the potential for hedging activities to conceal prohibited proprietary trading).

complicated rule, which raises compliance and enforcement costs. Reliance on quantitative measures to identify proprietary trading and differentiate between it and permitted activities such as market making requires banks to expend considerable resources developing and implementing programs to monitor such measures.[55] This logistical task is formidable, given that banks may themselves have trouble quantifying the level of risk posed by their assets.[56] The Office of the Comptroller of the Currency estimates that the total compliance costs to banking entities will be at least $4 billion,[57] although an SEC commissioner has challenged that figure as too low.[58]

Second, these definitional problems result in a significant risk of over-deterrence. Would-be market makers, for example, may be deterred from fulfilling that role by the lack of clarity between conduct that regulators will regard as permitted market making versus that which they will regard as banned proprietary trading.[59]

Third, attempts to prevent such over-deterrence by explicitly carving out broad classes of permitted activities might conversely result in under-deterrence. For example, the statute carves out any transaction in MBS issued by the GSEs (e.g., Fannie Mae and Freddie Mac) from the prohibition on proprietary trading.[60] This may allow banking entities to continue to speculate on the housing market, despite the fact that bets on housing by such entities played a critical role in the recent financial crisis.[61]

Indeed, the define-and-ban approach might even *exacerbate* bank risk-taking. Consider the presumption under the rulemaking implementing the Volcker Rule that any position held by a banking entity for fewer than sixty days constitutes proprietary trading.[62] This presumption was included to clarify what counts as proprietary trading. A downside of this presumption, however, is that banks that are engaged in bona fide market making or hedging, but are unsure about the applicability of the exceptions, might hold positions for longer than they would otherwise in order to reach the sixty-day mark, just to be on the safe side. Moreover, banks that try to engage in proprietary trading that violates the letter or spirit of the Volcker Rule might

55. *Id.* at 51–52.

56. Gary, *supra* note 46, at 1377.

57. Romano, *supra* note 2, at 73.

58. *Id.*

59. FSOC STUDY & RECOMMENDATIONS, *supra* note 16, at 10 (summarizing comments in response to the FSOC's request for information that unclear definition of proprietary trading could reduce liquidity).

60. 12 U.S.C. § 1851(d)(1)(A) (2016).

61. *See* Ryan Bubb & Prasad Krishnamurthy, *Regulating Against Bubbles: How Mortgage Regulation Can Keep Main Street and Wall Street Safe—From Themselves*, 163 U. PA. L. REV. 1539, 1557 (2015).

62. 12 C.F.R. § 44.3(b)(2) (2017).

similarly hold on to positions for longer than sixty days to escape or reduce scrutiny.

To be sure, the sixty-day cutoff in the current rules and the strength of the presumption for positions held for more or less than sixty days, respectively, could easily be modified. However, any scheme that relies on a define-and-ban approach to end short-term proprietary trading and that seeks to provide effective guidance to banks would have to use some cutoffs and presumptions which, in turn, can lead to undesirable distortions in banks' trading activities.

II. A Better Approach: Prohibiting Compensation Based on Trading Profits

Given the definitional challenges of the Volcker Rule, we outline here a better approach to achieving its objectives: banning banking entities from compensating individuals based on their trading profits. Rather than seek to identify the motivation behind a trade, our approach seeks to *demotivate* proprietary trading by handicapping banking entities relative to their unregulated competitors.

A. The Markets in Which Proprietary Trading Firms Compete

Firms that engage in proprietary trading compete in two key markets: the securities market and the labor market for traders. In the securities market, firms compete to identify and exploit mispricing of securities. Speculative trading in securities is inherently a zero-sum game. This is most obvious in the form of bilateral securities, like a credit default swap. If two parties make opposing bets using a credit default swap, then if the reference security defaults, the buyer will make money on the contract and the seller will lose money—and vice versa if the reference security does not default. Speculating on short-term price movements of securities is fundamentally similar. The securities market as a whole will generate some total return. Short-term buying and selling of securities only affects who gets what share of that total return.

One implication of the zero-sum nature of speculative trading is that the returns to the activity depend on the relative skill of competing traders.[63] The relevant skills include the ability to ferret out information, to assess it, and to predict accurately the reaction by market participants to future events. Skilled professional traders compete with each other to seek out profitable trading opportunities generated by investors who trade for nonspeculative reasons and by other speculative traders. In order to profit systematically from trading, a trader must be better than his or her trading counterparties at

63. By "trader," we mean the person at the firm who has authority to make the investment decision, not necessarily the person who actually executes the trades.

identifying mispricing. The firms that hire and effectively motivate the best traders will generally build profitable trading businesses. Firms that are unable to do so, however, engage in proprietary trading at their own peril.

Reflecting this, the second key market in which firms that engage in proprietary trading compete is the labor market for traders. Both banking entities covered by the Volcker Rule and financial institutions outside of its scope, such as hedge funds, compete to hire the best traders. A common incentive compensation contract used to attract and motivate traders—employed by both hedge funds and by proprietary trading desks at banks—pays the individual trader a fraction of his or her trading profits.[64] Incentive compensation may also incorporate, in addition to individualized performance measures, collective measures based on the performance of the trading unit or overall firm. Individualized measures, however, have increasingly come to predominate as banks compete to retain top trading talent, which as a rule prefers individualized compensation arrangements in which their gains are not diluted within a firm-wide pool.[65]

Such incentive compensation serves both a screening and effort-inducing function. More talented traders are more willing to take such incentive contracts because they are more confident that they will produce the trading profits needed for a big payday. Moreover, such pay structures provide traders with strong incentives to exert effort to identify and exploit profitable trading opportunities on behalf of the firm.

B. Handicapping Banking Entities in a Competitive Zero-Sum Game

The competition between proprietary trading firms in these two key markets suggests a simple way to get banking entities out of the game: ban them from paying individuals on the basis of their trading profits. Consider first the effects of such a ban on the competition for trading talent in the labor market. With an effective ban in place, banking entities that wanted to engage in speculative trading would be at a distinct disadvantage relative to hedge funds in attracting and motivating trading talent. Start with the motivation

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64. DOUGLAS J. ELLIOTT, BROOKINGS INSTITUTION, WALL STREET PAY: A PRIMER 2 (2010), https://www.brookings.edu/research/wall-street-pay-a-primer/ [https://perma.cc/76CF-8KBL]; Peter Muller, *Proprietary Trading: Truth and Fiction*, 1 QUANTITATIVE FIN. 6, 7 (2001) (stating that proprietary traders are compensated with "a percentage of their trading profits"); Brian DeChesare, *Prop Trading 101: How You Break In, What You Do, and How Long It Takes to Make $10 Million and Retire to Your Own Private Beach in Thailand*, MERGERS & INQUISITIONS, http://www.mergersandinquisitions.com/proprietary-trading-careers/ [https://perma.cc/R247-42AJ] (interviewing proprietary trader who conveyed that partners negotiate their compensation in the range of 25–40% of their trading profits and that junior traders receive bonuses at the discretion of partners).

65. ELLIOTT, *supra* note 64, at 2; *see also* Paul Willman et al., *Traders, Managers and Loss Aversion in Investment Banking: A Field Study*, 27 ACCOUNTING, ORGS. & SOC. 85, 93 (2002) (reporting that while the success of the overall trade desk played some role in determining incentive compensation, individual performance constituted the primary determinant).

point. Traders at banking entities would have relatively weak incentives to identify and exploit trading opportunities since doing so would have little effect on their compensation. Moreover, the most talented traders would be able to earn higher expected compensation at hedge funds and other entities that could pay them a share of their trading profits. The resulting labor-market advantage of these unregulated entities relative to banking entities would lead to the best trading talent congregating at hedge funds.

The disadvantage of banking entities in the labor market for traders would in turn put them at a profound disadvantage in the competition to identify and exploit trading opportunities in the securities markets. Traders employed by banking entities would be on average less adept at making money and avoiding losses than those employed by their unregulated competitors. This would dramatically reduce banking entities' incentives to engage in proprietary trading.

Importantly, banks stuck with lower quality traders—the "B-team"—would not merely expect to make lower trading profits than unregulated institutions that can employ the A-team. Banks would expect that their B-team traders regularly engage in trades with A-team traders or pursue trades that the A-team has declined to pursue. Because of the zero-sum nature of trading, banks would expect, on average, to make *losses* in these trades.

Thus, an effective ban on trading-profit-based compensation produces fundamentally different incentives for banks than the define-and-ban approach. Under the define-and-ban approach, banks would still want to engage in speculative proprietary trading, but are constrained by the fear of liability if they engage in such trading that violates the rules and their activities are detected. Banks will thus have incentives to exploit gaps and ambiguities in the define-and-ban regime to engage in speculative trading that is, at least arguably, not prohibited as well as to conceal the true nature of any speculative trading from their regulators. These incentives, in turn, necessitate the complex regulation and costly enforcement that characterize the current regime.

Under a ban on trading-profit-based compensation, by contrast, banks will no longer want to engage in speculative trading. Banks will thus come up with their own schemes to control the trading activities in their market making, hedging, and underwriting operations. Moreover, if traders will not receive compensation based on their trading profits, they will likewise lack incentives to engage in underhanded speculative trading. Engaging in such trading, against bank guidelines, would not earn, say, a market maker higher pay, but may result in her losing her job. A bank's incentives and ability to inhibit speculative trading under a ban on profit-based compensation are thus much stronger than under the define-and-ban approach. Our compensation-based approach is hence likely to be both simpler and more effective than the current define-and-ban approach.

C. *Implementing the Ban*

The ban of compensation based on trading-based profits that we propose would have three components: a ban on contracts that explicitly base compensation on the individual's trading profits (or on the trading profits earned by a unit or subunit); a ban on legally nonbinding representations that the individual's pay will be tied to their trading profits; and a ban on the practice of basing compensation (such as discretionary bonuses) on the individual's trading profits.[66] Likewise, bank decisions to retain or terminate an employee may also not be based on the amount of trading profits generated by the employee (although, as discussed below, employees could be fired if they generate trading losses). Violations of this rule would result in a fine to the entity, claw-back of the individual's impermissible incentive pay, and potential criminal liability for intentional violations.

Although we would ban compensation based on trading profits, banks would be free to provide other forms of incentive compensation. In particular, under our proposal, banking entities would be allowed to pay their employees (or independent contractors) on the basis of profits in two specific ways: (1) if the profits are calculated excluding trading profits; or (2) if the employee's share of profits is "sufficiently diluted." Furthermore, banking entities would be allowed to incentivize their employees not to make trading losses (i.e., to pay traders whose trades generate losses less than traders whose trades break at least even).

1. Excluding Trading Profits from Compensation.—Under our proposed approach, banking entities could compensate employees on the basis of profits so long as "trading profits" were excluded from the measure of profits used in determining their compensation. For these purposes, "trading profits" would constitute any change in the value of the securities portfolio of the firm over the period. In particular, trading profits would include profits from speculative proprietary trading banned under the Volcker Rule as well as profits from proprietary trading, such as market making and hedging, permitted under the Volcker Rule. Thus, unlike the Volcker Rule, our proposal does not require any rules distinguishing between various types of trading.

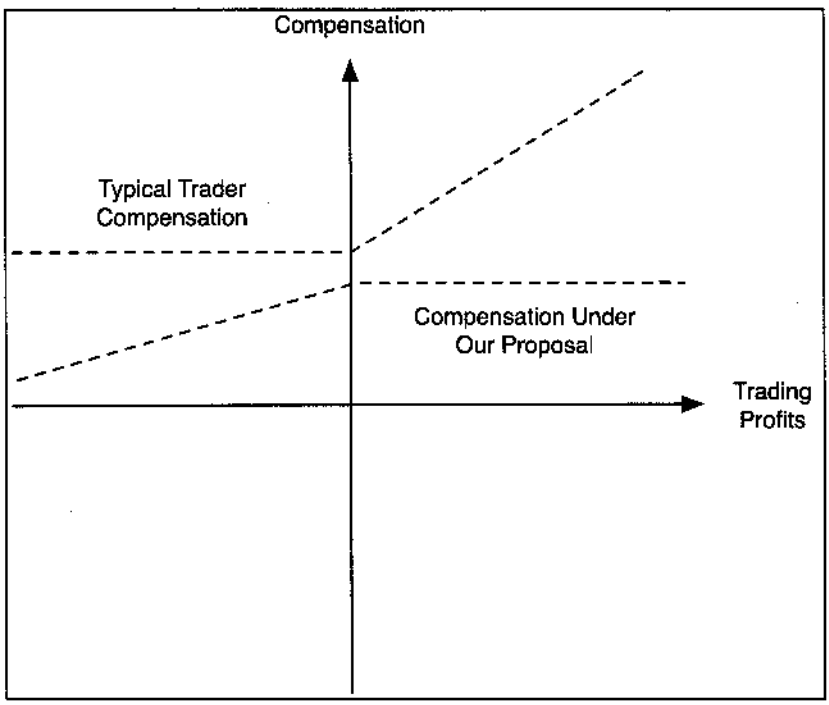
Firms would remain able to pay employees on the basis of avoidance of trading *losses* in a securities portfolio. The reason why avoidance of losses

66. The relevant trading profits are the profits that a trader earns for the bank. Banks would generally be permitted to base compensation for traders on profits that a trader earns for bank customers since such profits do not constitute bank trading profits. However, such compensation would not be permitted unless the trader involved makes no trading decisions for the bank's own account and the trades for customers are sufficiently walled off from trades for the bank's own account so that the bank would not be able to match the trades that the trader makes on behalf of bank customers.

should be a proper basis for compensating employees is to enable them to incentivize hedging. Hedging activities are designed to reduce the risk of losses (and the possibility of gains). But as discussed, hedges are not perfect. Traders who are better in hedging may find better hedges—hedges that involve a smaller risk of losses (and a smaller possibility of gains)—and it would be entirely appropriate for banks to reward traders based on the *ex post* accomplishment of the goal of loss avoidance.

Figure 1 below provides graphical representations of the structure of the typical trader compensation contract and the trader compensation contract allowed under our rule. The horizontal axis represents trading profits and the vertical axis represents trader compensation. The typical trader contract is flat for the region of negative trading profits—traders are generally paid a salary and are not charged for any trading losses they cause. In contrast, it is sloped upward over the positive region of trading profits, reflecting the share of profits enjoyed by the trader. The trader compensation scheme allowed under our rule is the mirror image of the typical trader compensation contract. It is flat in the region of positive profits and sloped only in the negative region of trading profits, since banks could deduct from trader profits for any trading losses they cause in order to motivate hedging.

Figure 1: Notional Trader Compensation Contracts



While enabling banks to reward good hedgers is the principal reason for permitting compensation based on loss avoidance, we note that a compensation scheme that rewards traders for loss avoidance, but not for profit making, would generally enhance—rather than create a loophole to—the prohibition of basing compensation on trading profits. A scheme that reduces compensation for trading losses but did not increase compensation for trading gains would induce traders to hold a conservative portfolio: a portfolio that is expected to generate no losses (and no gains), i.e., one that is hedged. Most traders would only reduce their expected compensation by adding speculative risk to their portfolio.

To be sure, there may be instances where reducing compensation for losses could induce risk-taking. Consider, for example, a trader whose hedges so far have not worked out and who has accumulated significant losses. Such a trader may have incentives to speculate to reduce these losses, even at the risk of incurring further ones. But such situations should be rare. We stress, moreover, that the important issue is not whether a compensation scheme that penalizes traders for losses could create incentives for traders to engage in speculative trading—it sometimes could—but rather whether banks would want to use such a scheme to hire and motivate top speculative traders. Traders who have accumulated large losses—and may now want to engage in speculative trading to avoid being penalized—are presumably exactly the traders whom banks would *not* want to engage in speculation. So banks would have proper incentives to monitor the trading by such traders, limit their risk exposure, or even to fire them, to reduce any speculation. Or, if such measures are not sufficiently reliable, a bank could simply not reduce pay based on trading losses.

2. Employee's Share of Profits Is "Sufficiently Diluted."—Banking entities could also pay employees a share of profits even without excluding trading profits so long as their share is "sufficiently diluted." To see the intuition, consider the most common form of incentive pay: stock options. Equity options effectively provide a share in the overall profits of the firm, including changes in the value of the firm's securities portfolio. But for the banking entities subject to the Volcker Rule, any individual employee's share in the profits of the firm through option grants is so small, and the portion of the firm's profits attributable to that individual's trading activity is so small, that the use of such options could not be an effective way to attract and motivate talented traders. Stock grants similarly could be allowed with little risk of incentivizing proprietary trading.

D. The Ability to Detect Compensation Based on Trading Profits

One key advantage of our proposal is that it does not entail the complex line-drawing required under the existing Volcker Rule to distinguish banned speculative proprietary trading from permitted market making, underwriting,

and hedging. Because our approach, however, also requires line-drawing—between banned compensation based on trading compensation and permitted compensation that is fixed or based on other metrics—it is important to highlight the reasons why this form of line-drawing does not generate costs equivalent to those of the existing Volcker Rule.

As a preliminary matter, note that for a ban on profit-based compensation to have the desired effect, it needs to affect traders' *expectations* rather than the actual compensation they receive per se. As long as a trader does not anticipate receiving a share of her trading profits, even a compensation scheme in which traders turn out to receive a share of profits will not have the screening and effort-incentive functions the bank desires. Paying profit-based compensation after the fact, without traders knowing *ex ante* that they will receive such compensation, will thus neither enable the bank to compete for A-team traders with hedge funds and other unregulated entities nor motivate the traders it hires to excel.

Importantly, moreover, a ban on trading-profit-based compensation need not fully eliminate any expectation of compensation based on trading profits to be effective. The reason is that, as we have discussed, banks' success at proprietary trading hinges on their *relative* ability to compete with hedge funds and other unregulated entities in two markets: the labor market for traders and the securities market. As long as the ban substantially reduces the *percentage share* of profits that a trader expects to receive, relative to the compensation available at other entities, a bank will be at a significant competitive disadvantage in the labor market for traders. In turn, that labor market disadvantage will produce a trading disadvantage. Thus, the possibility that a bank could, under the guise of some neutral principles, pay a somewhat higher compensation to traders who make larger profits would do a bank little good.

The three elements of our prohibition—explicit promised tie-in, implicit promised tie-in, and actual tie-in—are designed to reduce the ability of firms to generate expectations on the part of their traders that they will receive a share of trading profits. Banning explicit and implicit promised tie-ins would go a long way to reduce such expectations. Enforcing the ban on explicit trading-profit-based compensation should be relatively easy. Determining whether actual compensation contracts create an explicit tie-in is straightforward. Since several traders will be aware of any implicit promises of a tie-in, those that fail to generate profits may have an incentive to inform regulators. And the threat of criminal liability for intentional violations would further deter bank managers from making express, though legally unenforceable, promises to their traders. Without banks making a legally binding promise, or at least communicating, to their traders that their compensation will be based on their trading profits, traders will harbor significant uncertainty and doubts about this relationship.

The last element of our ban—de facto tie-in—further inhibits the ability of banks to create a reputation for basing compensation on profits. To generate a reputation for basing compensation on profits, the relationship between compensation and profits would have to be sufficiently persistent (across traders and over time) and strong (in terms of compensation for an individual trader). Such a persistent and strong relationship could be easily detected through statistical means. If the bank lacks any other plausible explanation for why it just happens that traders who make more profits keep receiving more compensation, one could infer that the bank uses a de facto trading profit-based compensation scheme. Evidence of a substantial relation could also lead regulators to investigate more closely whether the bank uses an implicit promised tie-in. In the context of such an investigation, there would be a high chance that any implicit tie would be detected. That any impermissible pay may be clawed back further reduces the trader's expectation that they will in fact receive—and retain—compensation based on their trading profits.

E. An Illustration: The London Whale

Perhaps the most infamous example from recent years of the risk of proprietary trading gone awry is the "London Whale" incident that generated $6.2 billion in losses for JPMorgan Chase & Co. (JPM).[67] The episode is instructive as to both the challenges of the define-and-ban approach and the critical role of compensation in incentivizing speculative trading.

The trading that led to the large losses occurred in the synthetic credit portfolio (SCP) managed by the bank's Chief Investment Office (CIO), which was responsible for investing excess deposits on behalf of JPM.[68] The SCP was originally established to hedge JPM's exposure to credit risk. To do so, the SCP took various positions in credit default swaps.[69] (A credit default swap is like an insurance contract covering default on a bond.) Even though the SCP originated as a hedging operation, over time it became a major revenue generator in its own right. In 2011, for example, swaps held in the SCP generated a $400–$550 million "windfall" gain (in the words of an internal report) to JPM when American Airlines declared bankruptcy.[70]

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67. STAFF OF THE SENATE PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, JPMORGAN CHASE WHALE TRADES: A CASE HISTORY OF DERIVATIVES RISKS AND ABUSES 1 (Comm. Print 2013) [hereinafter SENATE REPORT].

68. *Id.* at 35.

69. REPORT OF JPMORGAN CHASE & CO. MGMT. TASK FORCE REGARDING 2012 CIO LOSSES 2 (2013) [hereinafter TASK FORCE REPORT].

70. SENATE REPORT, *supra* note 67, at 54; *see also id.* at 50 (describing how SCP generated over $1 billion in revenue due in part to the bankruptcy of General Motors).

Shortly after the American Airlines bankruptcy, the CIO received instructions to reduce its risk-weighted assets (RWA), and the management of CIO decided to do so by cutting the RWA of the SCP in particular.[71] But simply unwinding the SCP book would have been costly: the traders involved estimated that unwinding the SCP quickly, given the resulting "fire sale" prices the bank would receive, would result in losses of $516 million.[72] In addition, traders were concerned about the potential loss of profits that the current SCP positions would generate if further corporations declared bankruptcy. Echoing this concern, the head of the CIO, Ina Drew, instructed traders to ensure that the SCP remained well-positioned to profit from future "American Airlines-type" defaults.[73]

SCP traders responded to this mix of objectives—reduce RWA, minimize execution costs, remain positioned to profit from corporate defaults—by *adding* long positions in credit default swaps on investment-grade bonds (i.e., selling insurance that these bonds will default) rather than simply unwinding their short positions on high-yield bonds.[74] These long positions, the traders believed, would help offset the risks of the short positions and hence reduce the RWA.[75] Moreover, the premiums earned from the long positions helped fund the purchases of additional short positions.

The long positions in credit default swaps on investment-grade bonds served as a hedge against any changes in default risk that affected investment-grade bonds and high-yield bonds similarly. At the same time, however, these positions transformed the positions held by JPM into a more targeted bet on the *differential* in default risk between investment-grade bonds and high-yield bonds.

After the trades began to be executed in January 2012, the spreads between high-yield bonds and investment-grade bonds declined.[76] As a result, the bank lost more money on its short position on high-yield bonds than it gained on its long position on investment-grade bonds.[77] As the SCP's mark-to-market losses accumulated, SCP traders responded by growing their positions, in the hope that future defaults on junk bonds would result in profits that would offset the accumulated losses.[78] Ultimately, the SCP added more long positions so that the portfolio was net long on credit risk, dispensing with even the façade that the portfolio was a hedge against JPM's

71. *Id.* at 62.
72. *Id.*
73. *Id.* at 63; TASK FORCE REPORT, *supra* note 69, at 3.
74. SENATE REPORT, *supra* note 67, at 76–77.
75. TASK FORCE REPORT, *supra* note 69, at 30–31.
76. SENATE REPORT, *supra* note 67, at 87.
77. SENATE REPORT, *supra* note 67, at 89.
78. TASK FORCE REPORT, *supra* note 69, at 42.

exposure to credit risk rather than, as a Senate subcommittee investigation concluded, "a high risk proprietary trading operation."[79]

Two key aspects of this episode are instructive for our purposes. First, the London Whale trades occurred in a portfolio that the bank insisted served as a hedging operation allowed by the Volcker Rule. Bank executives characterized the trading as "consistent with what we believe the ultimate outcome will be related to Volcker" in its April 13, 2012, earnings call.[80] JPMorgan CEO Jamie Dimon himself insisted again in May 2012 that the trading involved hedging that was allowed by the Volcker Rule.[81] Likewise, JPM's regulator, the Office of the Comptroller of the Currency, informed the Senate Banking Committee that "the whale trades would have been allowed under the draft Volcker Rule."[82] These characterizations by bank management and its regulator illustrate that the define-and-ban approach will allow proprietary trading to continue under the rule's permitted activities exceptions.

Second, there is good evidence that the expectation of key CIO executives and traders that they would share in profits generated by their trading led them to adopt their risky trading strategy. CIO traders and management received discretionary incentive compensation,[83] where the factors that influenced this discretion included individual and business-unit financial performance.[84] The yearly correlation between SCP profits and the bonuses for key employees with responsibility for SCP trading suggests that the unit's trading gains were an influential determinant of incentive compensation.[85]

Despite these facts, an internal JPM study concluded that the bank's "compensation system did not unduly incentivize the trading activity that led to the losses."[86] It instead attributed traders' attempt to make a profit in unwinding the SCP to a *communication failure* about compensation:

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79. SENATE REPORT, *supra* note 67, at 81, 94.

80. *Id.* at 253.

81. Jamie Dimon, Chairman & CEO, JPMorgan Chase, Business Update Call 12 (May 10, 2012) http://i.mktw.net/_newsimages/pdf/jpm-conference-call.pdf [https://perma.cc/UN57-TH7F] (JPMorgan Chase transcript) ("We always said, this violates our principles whether or not it violates Volcker principles and you know we want to run and build a great company. We do believe we need to have the ability to hedge in a CIO type position and that Volcker allows that.").

82. SENATE REPORT, *supra* note 67, at 216. While the OCC later backtracked, the OCC's Chief Counsel continued to characterize CIO's trades as a "risk reducing hedge that would be allowable under the Volcker Rule." *Id.* at 247.

83. *See id.* at 57–60 (citing TASK FORCE REPORT, *supra* note 69).

84. TASK FORCE REPORT, *supra* note 69, at 92 ("These factors include financial performance—for the Firm, for the business unit and for the individual in question—but they also consider 'how' profits are generated . . . .").

85. *See* SENATE REPORT, *supra* note 67, at 57–59.

86. TASK FORCE REPORT, *supra* note 69, at 11.

"management . . . should have emphasized . . . that, consistent with the Firm's compensation framework, [traders] would be properly compensated for achieving the [reduction in risk-weighted assets] . . .—even if, as expected, the Firm were to lose money doing so."[87] This claim, however, is belied by Ina Drew's role in pushing SCP traders to make a profit similar to the one they had through the American Airlines bankruptcy.[88] But even if we were to accept the JPM internal study's conclusion that the problem was one of communication, that itself implies that in the normal course these traders were compensated based on trading profits: exactly because traders expected to be compensated based on trading profits, it was imperative to communicate to them that *in this instance* reducing RWA took priority and that they would not be penalized for the losses this reduction would generate.

In sum, the London Whale incident illustrates the challenges for the define-and-ban approach and the promise of the compensation-based approach. The attempt to avoid over-deterrence by creating exceptions to the ban on proprietary trading for hedging and other permitted activities, combined with the pay practices predominant in big banks in which annual bonuses turn on a business unit's, or even an individual's, profits and losses, risks the continuance of proprietary trading at banks. If the compensation earned by Ina Drew and the SCP traders did not depend on trading profits, it is hard to see why they would have undertaken such speculative trading after being instructed to reduce risk-weighted assets. And if JPM did not believe that it could attract first-rate trading talent, it is hard to see why it would have permitted SCP traders to incur that much risk.

III. Responses to Potential Objections

In this Part, we address various objections that might be raised to our proposed ban of trading-profit-based compensation. We first consider the objection that existing regulation of compensation within banks already achieves an effective ban on compensation based on trading profits. Next, we examine the concern that the ban would inhibit the market making and underwriting businesses of banks. Third, we address the concern that banks would engage in speculative proprietary trading even if they are not permitted to compensate traders based on their trading profits. Finally, we consider whether taxing away banks' trading profits would be preferable to our proposed compensation-based approach.

87. *Id.* at 92–93.

88. *Compare id.* (stating that Drew should have communicated to traders that success in unwinding the SCP would not be assessed based on profit generation), *with* SENATE REPORT, *supra* note 67, at 63 ("Ms. Drew instructed [the SCP trader] to 'recreate' the American Airlines situation, because those were the kinds of trades they wanted at the CIO: the CIO 'likes cheap options.'").

Objection 1: Existing regulations already effectively prevent banks from paying traders on the basis of trading profits.

One objection to our proposal is that the existing Volcker Rule and other Dodd-Frank rules already ban compensation on the basis of trading profits and hence meet our proposal. In terms of the Volcker Rule itself, there are at least three aspects of the current approach that mimic, to some degree, our proposed ban. First, for trading to qualify under the rule's permitted activities exceptions, the compensation arrangements of those engaged in the activity may not be designed to reward or incentivize proprietary trading.[89] Second, banking regulators, in enforcing the rule, will no doubt consider compensation arrangements in which individuals are paid on the basis of trading profits as indicia of banned proprietary trading.[90] Third, the ban on proprietary trading itself affects the labor market for traders in a way similar to our proposed ban. In particular, an A-team trader would find the inevitable constraints imposed by the current regulatory approach to be unattractive relative to the freedom to trade at, say, a hedge fund. Consistent with the view that the current approach functions similarly to our proposal, in 2012 Bloomberg reported that a large number of top traders were decamping from investment banks, where their incentive compensation had been curtailed, to hedge funds, which offered to pay them up to 12% of their trading profits.[91]

However, while it is true that the existing approach has affected compensation arrangements for traders, the objection misses the mark for two reasons. First, our proposal entails regulating compensation *instead of* defining and banning proprietary trading subject to numerous exceptions. The result will be lower cost in terms of direct compliance costs entailed by the complexity of the current approach, over-deterrence costs, as well as under-deterrence costs.

Second, on the under-deterrence point, the current rule does much less to inhibit compensation on the basis of trading profits than our proposal would. Consider, for example, the provision in the current rule requiring that the compensation arrangements of persons involved in underwriting "are designed not to reward or incentivize prohibited proprietary trading."[92] In response to comments on the proposed rule, the promulgating agencies defended the use of the term "designed," stating:

> The banking entity should provide compensation incentives that *primarily* reward client revenues and effective client services, not

89. 12 C.F.R. §§ 44.4(a)(2)(iv), (b)(2)(v) (2016).

90. *See* FSOC STUDY & RECOMMENDATIONS, *supra* note 16, at 27–28 (listing among the indicia of "bright line" proprietary trading as "[c]ompensation structures similar to hedge fund[s]").

91. Lisa Abramowicz et al., *Billion-Dollar Traders Quit Wall Street for Hedge Funds*, BLOOMBERG (May 7, 2012), http://www.bloomberg.com/news/articles/2012-05-07/billion-dollar-traders-quit-wall-street-for-hedge-funds [https://perma.cc/D7FB-6MUJ].

92. 12 C.F.R. § 44.4(a)(2)(iv).

> prohibited proprietary trading. For example, a compensation plan based purely on net profit and loss with no consideration for inventory control or risk undertaken to achieve those profits would not be consistent with the underwriting exemption . . . . The Agencies continue to believe it is appropriate to focus on the design of a banking entity's compensation structure, so the Agencies are not removing the term "designed" from this provision. This retains an objective focus on actions that the banking entity can control—the design of its incentive compensation program—and avoids a subjective focus on whether an employee feels incentivized by compensation, which may be more difficult to assess.[93]

This interpretation seems to allow ample room for a banking entity to adopt a discretionary bonus structure like the one used for the JPM traders involved in the London Whale episode that, while not *designed* to *primarily* encourage proprietary trading, in practice produces "subjective" expectations on the part of the relevant personnel that do just that. In contrast, we would go much further, explicitly prohibiting such practices.

Finally, Section 956 of the Dodd-Frank Act (a provision distinct from the Volcker Rule) requires the relevant agencies to issue rules prohibiting "any types of incentive-based payment arrangement . . . that the regulators determine encourages inappropriate risks" at banking institutions.[94] In 2016, a proposed rule implementing this requirement[95] provided that an incentive-based compensation arrangement is considered to encourage inappropriate risks, and therefore banned, unless it "(1) [a]ppropriately balances risk and reward; (2) is compatible with effective risk management and controls; and (3) is supported by effective governance."[96] Nothing in the rule, however, would prevent banks from paying traders on the basis of their trading profits, including through the type of arrangement used by JPM for employees responsible for the trading in the London Whale incident.

It is noteworthy, however, that regulators could use Section 956 as the statutory basis for a rule implementing our proposal to ban compensation on the basis of trading profits. By adopting such an approach, combined with a simpler "bright line" approach to implementing the define-and-ban approach required by the statute, regulators could effectively implement our proposal with no statutory changes.

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93. Prohibitions and Restrictions on Proprietary Trading and Certain Interest in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5536, 5574 (Jan. 31, 2014) (emphasis added).

94. Dodd-Frank Wall Street Reform and Consumer Protection Act§ 956(b) , Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended at 12 U.S.C. § 5641(b) (2016)).

95. Proposed Rule, Incentive-Based Compensation Arrangements, 81 Fed. Reg. 37,670 (June 10, 2016).

96. *Id.* at 37,710.

Objection 2: Banning banking entities from paying trading-profit-based compensation would reduce their ability to perform market making and underwriting.

As we have explained, banks engaged in market making and underwriting will inherently take proprietary positions in the securities involved. Banks engaged in market making will hold, in their proprietary accounts, certain securities for sale to customers or buy, for their own accounts, certain securities from customers seeking to sell. Banks engaged in underwriting buy the securities they underwrite from a customer and then try to resell them immediately—but take on the risk that they are unable to resell them quickly. Finding perfect and liquid hedges for these securities is often impossible or impracticable. Indeed, the lack of such hedges is the very reason why market making and underwriting businesses exist.

Market making and underwriting, however, differ in one crucial respect from proprietary trading. Banks engaged in market making and underwriting provide valuable services to their customers. These activities, unlike speculative trading, are not zero-sum games. As a consequence, a bank may well be able to build a profitable market making business without employing A-team traders.

From a bank's perspective, the ideal employee working on market making or underwriting would excel in all aspects of the respective business. The ideal market maker would excel at anticipating the future demand by customers who would wish to buy or sell, at finding liquid hedges to reduce the risk of proprietary positions, and at predicting future price movements. The ideal underwriter would excel at predicting demand for underwritten securities and, if the securities cannot be sold at the underwritten price, at assessing whether the bank should sell them quickly at a lower price or whether it should retain a proprietary position and try to sell them later. That is, the ideal market maker and underwriter would have the same skills as the ideal proprietary trader, as well as additional skills specific to market making and underwriting.

If not permitted to base compensation on trading profits, banks will not be able to compete for market makers and underwriters who have top proprietary trading skills. Banks, however, should be able to hire as market makers or underwriters employees who have top skills specific to market making and underwriting. Banks would not face direct competition for these employees from unregulated entities engaged in "pure" speculative trading. Banks could still base the compensation of these employees on nonprofit metrics, such as customer satisfaction, speed of execution, or commission revenues generated and reduce compensation if a market maker or underwriter incurs losses from proprietary positions. And, as discussed, banks can incentivize their employees to avoid trading losses. These incentive mechanisms should enable banking entities to attract as market makers and underwriters employees who, in addition to having top skills

specific to market making and underwriting, also make the B-team (rather than, say, the F-team) in terms of their proprietary trading skills.

Conceivably, proprietary trading is such an important aspect of market making or underwriting that banks that can attract only employees with B-team proprietary trading skills (albeit top skills in other aspects of market making or underwriting) will no longer be able to compete in the market making and underwriting business. Also, conceivably, talent is distributed such that employees with top skills in other aspects of market making or underwriting will also have top proprietary trading skills—and will accordingly prefer to work as traders for an unregulated entity. In these cases, a ban on compensation based on trading profits could have the incidental effect of causing banks to quit the market making or the underwriting business.[97]

We doubt that this will be the case. However, if it turns out that we are wrong, then banks being in the market making and underwriting business is probably incompatible with the spirit of the Volcker Rule. Put differently, if market making or underwriting is not sufficiently profitable for banks so that it pays them to stay in the business without earning additional profits from speculative trading, then the objectives of the Volcker Rule would be furthered if banks quit these businesses.

Objection 3: Even with an effective ban on paying trading-profit-based compensation, banks would engage in speculative proprietary trading.

Our principal argument has been that, if banks cannot compensate traders based on their trading profits, they will not be able to hire A-team

97. Specifically, because market making and speculative proprietary trading are tied to each other (in that a single trade often includes both components) and because banks presumably derived profits from the speculative component prior to the Volcker Rule, eliminating these profits would make market making as a whole less profitable. If market making becomes unprofitable as a result, then the Volcker Rule—which is meant to eliminate speculative proprietary trading—would imply that banks should cease market making. (For an analogous point regarding the effect of the Volcker Rule on liquidity, see Richardson & Tuckman, *supra* note 5, at 83 (noting that, to the extent that banks took on too much risk prior to the financial crisis, they may have provided too much liquidity, then any reduced liquidity resulting from the Volcker Rule and other regulations would be appropriate).) Our proposed ban, however, may have another, lesser, effect on market making profits. If the optimal compensation structure for market makers who do not engage in any speculative proprietary trading activities involves compensation based on trading profits from market making (profits akin to the bid-ask spread on a security at the time the bank takes a proprietary position, as opposed to profits based from a parallel change in the bid and ask prices of the security after the bank takes a proprietary position), then our proposed ban would reduce banks' profits from pure market making. Note, however, that the fact that market makers received compensation based on trading profits prior to the enactment of the Volcker Rule, when they also engaged in some speculative proprietary trading, does not indicate that such a regime is optimal for market makers who do not engage in speculative proprietary trading. Moreover, our proposal could be easily adapted to permit a very slight degree of compensation based on trading profits sufficient for banks to structure an effective compensation regime for market makers but insufficient to attract quality speculative traders.

traders; and if banks cannot hire A-team traders, then, due to its zero-sum nature, they will not want to engage in speculative proprietary trading. However, plausibly, certain types of speculative proprietary trading—such as high-speed trading based on computer algorithms or trading based on nonpublic information learned from customers—may be profitable to banks even if they do not have highly talented traders. In addition, plausibly, banks may be able to attract A-team traders even without offering them compensation based on their trading profits, such as by offering very high fixed compensation to traders with a proven track record.

For various reasons, we do not believe that these possible scenarios undermine our proposal. First, the existing Volcker Rule leaves significant scope for speculative proprietary trading, among others by targeting only short-term speculative trading and by exempting trading in several types of financial instruments from its scope. Thus, even if our proposal were to leave scope for certain forms of speculative trading, this would not necessarily render it inferior to the existing rule.

Second, to the extent that certain forms of proprietary trading are profitable to banks even if banks do not have highly talented traders, such trading could be restricted through a supplementary ban *as long as such trading can be easily distinguished from regular market making, underwriting, or related hedging.* The complexity of the current Volcker Rule stems not from the fact that it takes a define-and-ban approach, but from the fact that certain banned trading closely resembles permitted trading, especially in the form of market making and hedging of positions taken on in the context of market making. But forms of trading that are sufficiently distinct, such as algorithmic trading, lend themselves to be banned through a define-and-ban regime. Similarly, to the extent that a goal of the Volcker Rule is to prevent banks from using information supplied by bank clients to take proprietary positions adverse to their clients' interest, more targeted regulations can address that concern.[98]

A more serious objection is that banks may be able to hire A-team traders by offering them a compensation package that does not include profit-based compensation. As we have explained, such a package would be suboptimal and more costly for banks (in terms of expected compensation paid, of the trading talent attracted, and of the effort induced) than a package that includes profit-based compensation. Whether banks would want to pursue proprietary trading with this handicap is ultimately an empirical question.

But even if it turns out that our proposed ban on profit-based compensation is, on its own, not sufficient to induce banks to cease all

98. *See, e.g.*, Andrew Tuch, *Financial Conglomerates and Information Barriers*, 39 J. CORP. L. 563 (2014) (proposing the use of statistical inference to both detect and prove trading by banks using nonpublic information).

speculative proprietary trading, it could easily be extended in two directions to further deter speculative proprietary trading. First, one could impose additional regulations on compensation. For example, one could limit the amount of total compensation paid to employees who engage in proprietary trading on behalf of banks. Since speculative trading talent does not come cheap, and since the ban on profit-based compensation would require banks to offer a high amount of noncontingent compensation, such limitations may make it impossible for banks to attract A-team traders.

Second, one could supplement the regulation of compensation with restrictions on proprietary trading that is clearly unrelated to any activity permitted under the current Volcker Rule. These restrictions should be in the form of rules that are much simpler and more easily applied than those under the current define-and-ban approach.

More generally, the thrust of our proposal is that regulation of compensation is a superior way to tackle speculative trading than regulation designed to distinguish banned speculative trading and permitted market making, underwriting, and hedging. The exact form that such regulation should take, and whether a ban on profit-based compensation is sufficient, is secondary. Moreover, our view that compensation restrictions are a superior regulatory tool than define-and-ban implies that the principal regulatory effort should be devoted to devising and enforcing proper compensation restrictions; it does not mean that define-and-ban regulations that are not overbroad and that do not entail significant compliance costs should not also be part of the regulatory regime.

Objection 4: Would it not be simpler and preferable to impose a confiscatory tax on trading profits?

An alternative to both the define-and-ban approach and to our compensation-based approach to the Volcker Rule would be to impose a confiscatory tax on the profits derived from proprietary trading. In its simplest form, banks would have to pay to the government all trading profits earned over a particular accounting period. One might argue that this would be a simpler, and perhaps more effective, approach than our compensation-based approach. Such a tax, however, would suffer from the same flaws as define-and-ban: it would over-deter proprietary trading and result in large compliance and enforcement costs.

To see this, note that a confiscatory tax on trading profits would tend to induce banks to cease all forms of trading—both the proprietary trading of the speculative sort that is the target of the Volcker Rule and trading that is incidental to market making, hedging, and underwriting. Such a tax would thus be highly overbroad.

One approach to mitigating this problem would be to impose the tax only on profits above a certain threshold, set at the level of profits a market making and underwriting business would be expected to generate. Setting

such a threshold would be a complex undertaking, however, and not just because expected profits will vary with the specific activity (e.g., the type of instruments for which a market is made), but because it requires an accurate measure of the scale of the activity (e.g., how much "market making" a bank is engaged in). If the threshold is set too low, then this tax would likewise induce banks to exit the market making and underwriting businesses.

But even a tax set "correctly" at the expected profit level would hamper banks' market making and underwriting business. Consider market making. While banks engage in market making in order to earn a bid-ask spread, market makers will also earn incidental trading profits (or suffer losses) from price movements in the securities they hold in their trading account. Such profits or losses would arise whenever a position is not fully hedged—and the difficulty of finding a perfect hedge is of course a reason why market makers exist to start with. Having to pay a confiscatory tax on such incidental profits from advantageous price movements, while bearing the losses from disadvantageous price movements, will result in market makers, after accounting for the tax, earning *less* than the expected profits. To cushion market makers against this downward bias, the threshold exemption would have to be set above the profit level that market making would be expected to generate. But at such a level, it may pay a bank to engage not just in market making, but also in proprietary trading of the speculative sort.

Furthermore, a confiscatory tax would generate significant enforcement, compliance, and evasion costs. Such a tax, much like our compensation-based approach, would be based on a definition of trading profits. But, unlike in our approach, the precise dollar amount of trading profits (as opposed to nontrading profits or a lesser amount of trading profits) would matter, and matter a lot, in every single instance. Companies would be required to segregate trading accounts in their books, and tax authorities would have to determine whether these books are properly kept. Even banks that have no interest in engaging in speculative proprietary trading would have strong financial incentives to minimize their trading profits or shift them from one year to another—by characterizing profits as nontrading profits, offsetting them through expenses or trading losses, manipulating recognition events, undervaluing noncash consideration received, or selling securities below their fair value to favored customers (who may reciprocate by giving the bank other business). A confiscatory tax on trading profits, like any other tax at a high rate, would be a boon to accountants and tax advisors, but not attractive from a policy perspective.

Conclusion

In the wake of the financial crisis of 2008, former Federal Reserve Board Chairman Paul Volcker called for prohibiting banking entities from engaging in risky activities such as proprietary trading. In the Dodd-Frank Act, Congress decided to implement Volcker's objective through Section 619—

dubbed the Volcker Rule—which seeks to define and ban proprietary trading. But because illicit proprietary trading is hard to distinguish from proprietary positions that banks take incidental to desirable banking activities, the define-and-ban approach both entails high compliance costs and creates the risk of under- and over-deterrence.

In this Essay, we propose a different approach to achieve Paul Volcker's objective: ban banking entities from compensating traders based on trading profits. Our proposal does not hinge on the ephemeral distinction between proprietary trading intended to make profits from short-term price movements and proprietary trading incidental to other profit-making activities, such as market making or underwriting. Instead, our proposal exploits the fact that speculative trading is a zero-sum game in which only players who can attract top trading talent can expect to succeed. Banks, if not permitted to compensate traders based on trading profits, will not attract sufficiently talented traders to make speculative trading worth their while. Rather than threatening banks with sanctions for engaging in proprietary trading that (but for the sanctions) would be profitable—an approach that creates incentives for banks to find loopholes in the regulatory regime and conceal their proprietary trading and hence requires a complex enforcement apparatus—our approach targets banks' abilities to engage in profitable proprietary trading directly. It is therefore likely to be both less costly and more effective at ridding banking entities of proprietary trading than the define-and-ban approach taken by the Dodd-Frank Act.

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Becoming Penelopes: Rethinking the Federal No-Impeachment Rule After *Peña-Rodriguez*[*]

Introduction

The United States has a long, complicated relationship with juries.[1] While particular jury verdicts encounter disbelief or even hostility, the system itself is generally praised as a protector of justice and other key democratic values. Yet even the staunchest defenders of the jury system admit it is imperfect, and very few expect the system to be without fault. Often, it falls to the courts to recognize the limitations of the jury system, and in particular to protect verdicts from demands of perfection. Expecting faultless verdicts would threaten the integrity of the system itself: as Learned Hand once wrote, requiring perfection would turn judges into "Penelopes," constantly reconsidering verdicts until they were delivered by an ideal jury.[2]

In an effort to preserve the system's integrity, the law has frequently sought to protect juries and the verdicts they deliver. Nowhere is this goal more apparent than in the long-standing "no-impeachment rule," codified in Federal Rule of Evidence 606(b), which generally precludes the introduction of evidence related to the validity of a verdict.[3] Considered essential to ensuring the jury's independence and guaranteeing the right to a fair trial,[4] the no-impeachment rule has nevertheless come under significant attack, culminating in the Supreme Court's recent decision in *Peña-Rodriguez v. Colorado*.[5] By ruling that Rule 606(b) is incompatible with the Sixth Amendment under certain circumstances, the Court continued the long line of conflicting opinions on the Rule and the common law tradition that supports it.

The problem confronting *Peña-Rodriguez*—as well as other opinions regarding Rule 606(b)—is that there is not one common law tradition supporting the adopted no-impeachment rule. Rather, it is the result of an

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1. Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 205 (2005).

2. Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir. 1947).

3. FED. R. EVID. 606(b).

4. Lee Goldman, *Post-Verdict Challenges to Racial Comments Made During Juror Deliberations*, 61 SYRACUSE L. REV. 1, 3, 12–13 (2010); Martin J. Greenberg, Note, *Impeachment of Jury Verdicts*, 53 MARQ. L. REV. 258, 261–62 (1970); Note, *Public Disclosure of Jury Deliberations*, 96 HARV. L. REV. 886, 892 (1983); Courselle, *supra* note 1, at 211.

5. 137 S. Ct. 855 (2017).

uneasy synthesis of two common law paths, directed toward similar goals yet destined to conflict. *Peña-Rodriguez*, then, does not represent a final decision on an issue that has been plaguing federal courts and commentators for years, but rather another attempt to draw principled distinctions from a Rule confronted by internal tension.

The no-impeachment rule's history shows the difficulty in striking a balance between protecting crucial interests—such as finality and deliberative secrecy—and ensuring that deliberations are free from misconduct. Federal Rule of Evidence 606(b), far from uniting two competing interpretations, has instead led to muddied distinctions and inconsistent judgments. More troubling, Rule 606(b) has failed to protect important interests more consistently than other, more permissive interpretations of the no-impeachment rule.

This Note seeks to explain these shortcomings by evaluating the common law history of the Rule and decisions from federal courts—including the Supreme Court—that have sought to clarify it. It begins in the years before the drafting of the Federal Rules, when different jurisdictions sought different ways to reconcile the values of jury deliberation and the threat of juror misconduct. It then describes the process that created Federal Rule 606(b) and the first major decision to analyze the Rule, *Tanner v. United States*.[6] Next, it notes the analytical difficulties the *Tanner* decision created, and traces the issues courts struggled with until the announcement of two additional noteworthy Supreme Court decisions, *Warger v. Shauers*[7] and *Peña-Rodriguez v. Colorado*. It concludes by offering solutions to the difficulties raised by Rule 606(b) and advocating for an approach that would better guard against juror misconduct while still protecting the policies the Rule purports to serve.

I. The History of Impeachment Before the Federal Rules

A. Early English History and the Mansfield Rule

Although now considered one of the bedrocks of contemporary criminal procedure, the secrecy of jury deliberations may have arisen as a historical accident.[8] In fact, many British courts thwarted deliberative secrecy by admitting juror testimony to impeach verdicts until the late eighteenth century.[9] Before the American Revolution, the common law of both England

6. 483 U.S. 107 (1987).

7. 135 S. Ct. 521 (2014).

8. Ashok Chandran, Note, *Color in the "Black Box": Addressing Racism in Juror Deliberations*, 5 COLUM. J. RACE & L. 28, 31 (2014).

9. Benjamin T. Huebner, Note, *Beyond* Tanner*: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. REV. 1469, 1472 (2006).

and the American colonies liberally allowed jurors' testimony and affidavits,[10] frequently without any questions[11] or hesitation.[12]

However, this relatively liberal admissibility convention ended in 1785 with Lord Mansfield's opinion in *Vaise v. Delaval*,[13] where the court excluded a juror's testimony that the verdict had been reached by a game of chance.[14] The resulting rule, later known as Mansfield's Rule, prohibited jurors from testifying about either their subjective mental processes or events that occurred during deliberations.[15] Rooted in the doctrine that a witness should not be heard to allege his own moral turpitude,[16] the Mansfield Rule sharply distinguished between testimony about deliberations by a juror (which is inadmissible) and testimony about deliberations by a non-juror (which is admissible).[17] For the first time, English courts adopted a rule protecting the secrecy of the jury's deliberations to avoid the corruption that would result from inquiring into verdicts.[18] Mansfield's Rule thus fundamentally transformed evidence laws by routinely excluding evidence that would have been admissible a scarce half-century before.[19]

B. American Applications of the Mansfield Rule: The Federal Approach and the Iowa Rule

The Mansfield Rule, however, was not free from criticism or condemnation.[20] Wigmore, for one, commented that the Rule was "neither strictly correct as a statement of the acknowledged law nor at all defensible upon any principle in this unqualified form. It is a mere shibboleth and has no intrinsic signification whatever."[21] Perhaps because of these criticisms, adherence to the Mansfield Rule has never been universal in American courts.[22] Furthermore, even courts that used the Rule rarely interpreted it strictly.[23] Indeed, many jurisdictions in the United States substantially

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10. Greenberg, *supra* note 4, at 260.

11. *Id.*

12. Ronald L. Carlson & Steven M. Sumberg, *Attacking Jury Verdicts: Paradigms for Rule Revision*, 1977 ARIZ. ST. L.J. 247, 249 (1978).

13. (1785) 99 Eng. Rep. 944 (K.B.).

14. *Id.* For commentary on the importance of this decision, see Huebner, *supra* note 9, at 1472–73; John L. Rosshirt, Note, *Evidence—Assembly of Jurors' Affidavits to Impeach Jury Verdict*, 31 NOTRE DAME L. REV. 484, 484 (1956).

15. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 863 (2017).

16. Greenberg, *supra* note 4, at 260; Rosshirt, *supra* note 14, at 484.

17. Carlson & Sumberg, *supra* note 12, at 249.

18. Greenberg, *supra* note 4, at 261.

19. Rosshirt, *supra* note 14, at 484–85.

20. Greenberg, *supra* note 4, at 274.

21. *Id.* at 268 (quoting 8 WIGMORE ON EVIDENCE § 2345, at 677 (McNaughton Rev. 1961)).

22. Huebner, *supra* note 9, at 1473.

23. Christopher B. Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 NEB. L. REV. 920, 925 (1978).

reduced and refined the Rule by allowing particular kinds of testimony to identify and correct flawed verdicts.[24] Eventually, two general departures from the Mansfield Rule solidified in American courts: the federal approach and the Iowa Rule.

The so-called federal approach to the no-impeachment rule, like the original Mansfield Rule, accepted that the finality interests protected by a robust no-impeachment rule outweighed the risks of juror misconduct.[25] Unlike the Mansfield Rule's complete ban, however, the federal approach permitted juror testimony offered to show that an "extraneous matter" *had* influenced the jury,[26] while it continued to prohibit evidence regarding *how* such extraneous matters had influenced the jury.[27] The federal approach thus refused to admit evidence of quotient verdicts, decisions to abide a majority vote, misinterpretation of instructions, or misuse of evidence; however, courts could hear evidence of improper juror contacts with bailiffs or parties, the introduction of unauthorized evidence into the jury room,[28] or personal investigations of the facts.[29]

A more substantial challenge to the Mansfield Rule—indeed, a "direct repost to Mansfield's Rule"[30]—was issued by the Iowa Supreme Court in *Wright v. Illinois Central and Mississippi Telegraph Co.*[31] By focusing on whether the "alleged [juror] misconduct was sufficiently litigable to justify threatening the finality of verdicts,"[32] the court declared a rule that greatly expanded the scope of the no-impeachment rule. Under the resulting Iowa Rule, affidavits by jurors would be admitted "to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself . . . ."[33] Thus, instead of allowing only evidence of *extraneous* misconduct, the Iowa Rule allowed evidence of *any* misconduct—including, crucially, misconduct that occurred inside the deliberation room—while still maintaining an exclusion on how the evidence impacted the jurors' decisions.[34]

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24. *Id.*

25. Chandran, *supra* note 8, at 34.

26. Warger v. Shauers, 135 S. Ct. 521, 526 (2014).

27. Mueller, *supra* note 23, at 926.

28. *Id.*

29. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 863 (2017).

30. Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 BAYLOR L. REV. 872, 882 (2009).

31. 20 Iowa 195 (1866).

32. Huebner, *supra* note 9, at 1474.

33. *Wright*, 20 Iowa at 210.

34. *See id.* (clarifying (1) the rule's allowance of evidence that a juror was improperly approached by a party, that witnesses discussed the case with the jurors out of court, or that the verdict was determined in an improper manner, and (2) the rule's prohibition of evidence that a juror

The *Wright* court articulated three reasons in support of its position.[35] First, the court argued that, in contrast to events or discussions that occurred during deliberation, matters personal to a juror were incapable of verification by objective proof;[36] thus, evidence of the former should be admitted and evidence of the latter excluded.[37] Second, the court noted that receiving affidavits of juror misconduct would positively affect the deliberations by creating the possibility of exposing such improprieties.[38] Finally, the court argued that while jurors who acted legitimately deserved the protection of the court, those who engaged in misconduct deserved no such protection and could properly be called to be witnesses to their own impropriety.[39]

By emphasizing the importance of the quality of the jury's decision-making process and making that process open to scrutiny by the courts,[40] the Iowa court rejected the principles supporting the federal approach: finality ceased to be the paramount concern. The Iowa Rule instead reflected a desire to balance finality with fairness by providing relief in cases of clear and objectively verifiable juror misconduct.[41] This shift, however, would lead to vacillating treatment by the Supreme Court of the United States on the issue of whether to admit juror affidavits impeaching a verdict.[42]

C. Conflicting Supreme Court Decisions

This fluctuation between interpretations of the no-impeachment rule also figured prominently in Supreme Court decisions. The first Supreme Court case to consider the admissibility of juror affidavits to impeach a verdict was *United States v. Reid*.[43] There, the Court considered the impact of a juror's affidavit that he had read a newspaper account of the case during deliberations; the juror insisted, however, that the newspaper did not influence his decision because he had already made up his mind.[44] The Court ruled that the affidavit would not be admitted in a motion for a new trial.[45] However, it was hesitant to rigidly adopt the Mansfield Rule,[46] stating that

misunderstood the jury instructions or was "mistaken in his calculations or judgment," and evidence of "other matter[s] resting alone in the juror's breast").

35. Carlson & Sumberg, *supra* note 12, at 256.

36. *Id.*

37. *See Wright*, 20 Iowa at 210–11 (weighing the costs of allowing evidence of juror influences—which are impossible to disprove—against the benefits of allowing evidence of juror misconduct—"which, if not true, can be readily and certainly disproved by . . . fellow jurors").

38. Carlson & Sumberg, *supra* note 12, at 256.

39. *Wright*, 20 Iowa at 212; Carlson & Sumberg, *supra* note 12, at 256.

40. Carlson & Sumberg, *supra* note 12, at 256–57.

41. Huebner, *supra* note 9, at 1475.

42. Carlson & Sumberg, *supra* note 12, at 259.

43. 53 U.S. 361 (1851).

44. *Id.* at 362.

45. *Id.* at 366.

46. Carlson & Sumberg, *supra* note 12, at 259.

"[i]t would perhaps hardly be safe to lay down any general rule" on verdict impeachment, since "cases might arise in which it would be impossible to refuse [juror testimony] without violating the plainest principles of justice."[47]

Some forty years later, the Supreme Court again considered modifications to the no-impeachment rule in *Mattox v. United States*.[48] Mattox not only complained that jurors had read a newspaper account during deliberations, but also sought to introduce juror affidavits showing that the bailiff had engaged in misconduct.[49] While acknowledging the reasoning behind a policy supporting a blanket ban on juror testimony, the Court maintained that such a policy might "create an exception to its own rule" when the interest of justice commanded.[50] The Court found such an exception existed in *Mattox* because the juror misconduct was the effect of external causes, i.e., extraneous prejudicial information and improper outside influences.[51] Clearly, the Court's decision in *Mattox* indicated its adoption of the federal approach to the no-impeachment rule.

However, the *Mattox* Court also argued for changes to the no-impeachment rule in language similar to, and possibly informed by, the Iowa Rule. Not only did the Court determine that the affidavits were admissible because "[t]hey tended to prove something which did not essentially inhere in the verdict," it also argued that evidence of overt acts should be admitted because such acts are accessible "to the knowledge of all the jury . . . ."[52] The Iowa Rule's influence on the Supreme Court's interpretation of the no-impeachment rule reached its height twenty years later in *Hyde v. United States*,[53] where the Court prohibited juror testimony about "matters which essentially inhere[d] in the verdict itself . . . ."[54] At the turn of the twentieth century, then, it was clear that even the Supreme Court was struggling with the principles and contours of the no-impeachment rule.

The last significant word the Supreme Court would have on jury impeachment before the drafting of the Federal Rules came in *McDonald v. Pless*,[55] where the Court refused to admit a juror's affidavit alleging that the jury had delivered a quotient verdict.[56] Seemingly retreating from the liberal

47. *Reid*, 53 U.S. at 366.
48. 146 U.S. 140 (1892).
49. *Id.* at 142–43.
50. *Id.* at 148.
51. Miller, *supra* note 30, at 884.
52. *Mattox*, 146 U.S. at 148–49.
53. 225 U.S. 347 (1912).
54. *Id.* at 384.
55. 238 U.S. 264 (1915).
56. *Id.* at 266. A "quotient verdict" is one in which, instead of achieving true unanimity in determining the precise amount of damages to award the plaintiff, the jury adds the damages awards *each juror* believes is proper, then divides by the number of jurors. *See id.* at 265 (explaining the process by which the jurors in *Pless* arrived at their quotient verdict).

approach in *Mattox*,[57] the Court determined that the public injury resulting from a more permissive no-impeachment rule generally outweighed private injuries caused by juror misconduct.[58] In addition, the Court detailed the policies justifying this more restrictive rule: limiting juror testimony was necessary to preserve the finality of verdicts, promote the frankness of private deliberations, and prevent juror harassment by the litigants.[59] Significantly, however, the Court limited the extent of the rule to apply only in civil cases, stating that "[t]he suggestion that . . . jurors could not be witnesses in criminal cases . . . is without foundation."[60]

D. Codified Rules

While the Supreme Court struggled to develop a consistent jurisprudence around the no-impeachment rule, drafters of the Model Code of Evidence and the Uniform Rules of Evidence were coalescing around provisions that strongly resembled the Iowa Rule.[61] Rule 301 of the Model Code of Evidence allowed witnesses—"including every member of the jury"—to testify about "any material matter," including statements about jurors' conduct or condition, even if they occurred during deliberations.[62] The only limitation placed on admissibility was that no evidence was to be admitted "concerning the effect which anything had upon the mind of a juror as tending to cause him to assent to or dissent from the verdict . . . or concerning the mental processes by which it was reached."[63] Seeking to distinguish the Rule from the English common law and the majority of American cases, the drafters declared that "[t]he Rule permits the juror to testify to *every relevant matter* except his mental processes and the effect which any act or event had upon" the determination of the verdict.[64] An accompanying case illustration explained that, under the rule, evidence that jurors reached a verdict by a coin toss would be admissible, while evidence that a juror misunderstood the jury instructions or agreed to a verdict because she wanted to go home would be inadmissible.[65]

A similar development occurred in the Uniform Rules of Evidence, where two separate rules addressed the no-impeachment rule. Rule 41 disallowed the introduction of any evidence that would "show the *effect* of

57. Carlson & Sumberg, *supra* note 12, at 260.

58. *Pless*, 238 U.S. at 267.

59. *Id.* at 267–68; Huebner, *supra* note 9, at 1479.

60. *Pless*, 238 U.S. at 269.

61. *See* Greenberg, *supra* note 4, at 266–67 (noting that the Model Code of Evidence contained a similar provision to the Iowa Rule and that the Uniform Rules of Evidence were in accord with the Iowa Rule).

62. MODEL CODE OF EVIDENCE R. 301 (AM. LAW INST. 1942).

63. *Id.*

64. *Id.* R. 301 cmt. a (emphasis added).

65. *Id.* R. 301 cmt. a, illus. 3.

any statement, conduct, event or condition upon the mind of a juror as influencing him to assent or dissent from the verdict."[66] Rule 44 provided that Rule 41 "shall not be construed to exempt a juror from testifying as a witness . . . to conditions or occurrences either within or outside the jury room having a material bearing on the validity of the verdict."[67] The comments explained that the Rules imposed no limitations "on testimony about conditions or events bearing on the verdict"[68] and allowed for juror testimony on any "proper subject for judicial inquiry."[69] The comments further emphasized that Rule 44 was included out of an "abundance of caution" to make it clear that the rules imposed no additional limitations.[70]

II. From Writing the Rules to *Tanner v. United States*

It was against this backdrop of inconsistency and conflict that the Federal Rules of Evidence were drafted in 1975. The Supreme Court had struggled with the limits of the no-impeachment rule, and its opinions reflected the tensions between Mansfield's Rule, the Iowa Rule, and the federal approach. Those who sought to codify rules of evidence tended toward the more permissive Iowa Rule, while still acknowledging that most American cases advocated a stricter rule more in line with the federal approach.[71] These conflicts would plague Rule 606(b)'s drafting process and the judicial opinions that sought to explain and clarify the Rule. Thus, while courts have successfully articulated the policies supporting the Rule, they have struggled to apply it in a principled and consistent way.

A. The Drafting and Adoption of Rule 606(b)

When the Judicial Conference formulated its approach to the no-impeachment rule, it drew from "an extensive and still-vibrant common law debate."[72] Seeking to protect the policies supporting the no-impeachment rule while also avoiding "irregularity and injustice,"[73] the Rule's initial proposal "would have permitted much greater leeway for jurors to impeach their verdict" than under the federal approach.[74] In strikingly similar language to the Uniform Rules of Evidence, the Advisory Committee's proposed Rule excluded juror testimony only where it concerned the effect of anything upon

66. UNIF. R. EVID. 41 (emphasis added) (amended 1999).

67. *Id.* 44.

68. *Id.* 41 cmt.

69. *Id.* 44 cmt.

70. *Id.*

71. *See* MODEL CODE OF EVIDENCE R. 301 cmt. a (AM. LAW INST. 1942) (observing that "[t]he majority of American cases do not permit a juror to testify even to objective misconduct in the jury room").

72. Huebner, *supra* note 9, at 1478–79.

73. FED. R. EVID. 606(b) advisory committee's note to proposed rules.

74. Goldman, *supra* note 4, at 5.

a juror's mind or emotions or the juror's mental processes.[75] Through its explicit reference to *Wright*, the Committee indicated its proposed Rule was based on a long-standing precedent precluding evidence concerning jurors' mental processes, while permitting evidence concerning conditions or occurrences both inside and outside the jury room.[76]

Reluctant to adopt such a far-reaching rule, the Supreme Court recommended changes to the Advisory Committee's draft to bring the Rule closer to the federal approach it advocated in *Pless*.[77] When the Committee presented the new draft to the House, however, it was rejected because "it limited jury testimony to an unnecessary degree."[78] Referring to the Advisory Committee's original draft, the House emphasized that jurors were the only people "who know what really happened" during deliberations.[79] The House believed that allowing jurors to testify about objective instances of misconduct involved "no particular hazard" to values such as finality and free discussion, further noting that twelve states allowed such testimony.[80] The House therefore recommended adopting the Advisory Committee's original draft[81] and sent the Rule forward to the Senate.

When the House rule reached the Senate, however, it was heavily criticized "as promoting juror harassment, interfering with jury deliberations, and undermining finality."[82] Deeming the House's extension of the no-impeachment rule to be "unwarranted and ill-advised," the Senate Judiciary Committee recommended the Supreme Court's version, which "embodied long-accepted Federal law."[83] The Senate particularly objected to the draft's

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75. *Compare* Rules of Evidence for U.S. Dist. Courts and Magistrates, 46 F.R.D. 161, 289–90 (Preliminary Draft, 1969) ("[A] juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.") *with* UNIF. R. EVID. 606(b) ("[A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.").

76. Miller, *supra* note 30, at 887.

77. The federal approach had been reaffirmed by the Court in decisions between *Pless* and the drafting of the Federal Rules. *See, e.g.*, Marshall v. United States, 360 U.S. 310, 312–13 (1959) (holding that jurors' exposure to unfavorable news articles during trial was so prejudicial that the accused was entitled to a new trial, especially because the trial court had barred the articles' introduction into evidence); Remmer v. United States, 347 U.S. 227, 229–30 (1954) ("A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions.").

78. Goldman, *supra* note 4, at 6.

79. H.R. REP. NO. 93-650, at 9–10 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7083.

80. *Id.* The twelve states named by the House Judiciary Committee were California, Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, and Washington. *Id.*

81. Goldman, *supra* note 4, at 6.

82. *Id.*; S. REP. NO. 93-1277, at 13–14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060.

83. S. REP. NO. 93-1277, at 13–14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060.

refusal to prohibit testimony about conduct and statements made inside the jury room.[84] Allowing such testimony, the Senate argued, would open verdicts up to challenge on what happened during deliberations.[85] It would also encourage the harassment of former jurors by losing parties as well as possible exploitation of the system by "disgruntled or otherwise badly-motivated ex-jurors."[86]

Criticism of the House rule also came from the Justice Department and Senator John McClellan.[87] Senator McClellan suggested that overturning verdicts based on bias would lead to a flood of litigation that would damage the justice system,[88] and he expressed disbelief that it would be possible to conduct trials—particularly criminal prosecutions—"if every verdict were followed by a post-trial hearing into the conduct of the juror's deliberations."[89] The Senate Judiciary Committee echoed this concern, fearing that jurors would be unable to function effectively if their deliberations were scrutinized.[90] Accordingly, "[i]n the interest of protecting the jury system and the citizens who make it work,"[91] the Senate rejected the House proposal and recommended adoption of the Supreme Court's version.[92]

The version adopted by the Conference—and, with minimal changes, the version still followed today[93]—embraced the Senate's restrictions. Instead of allowing juror testimony except where it described a juror's mental process, the adopted Rule opted for broadly prohibitive language with two exceptions:

> (b) Inquiry into the validity of a verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question[:]

84. *Id.*

85. *Id.*

86. *Id.*

87. Goldman, *supra* note 4, at 5.

88. *Id.*

89. 117 CONG. REC. 33641, 33645 (1971) (letter from Sen. McClellan).

90. S. REP. NO. 93-1277, at 14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060.

91. *Id.*

92. Goldman, *supra* note 4, at 6.

93. The Rule was restyled in 2011, and an exception was added by amendment in 2006 to allow testimony that there was a mistake made in entering the verdict on the verdict form. *See* FED. R. EVID. 606(b) (1987) (amended 2006) (providing that juror testimony may be used to prove that the verdict was the result of a mistake in entering the verdict on the verdict form); FED. R. EVID. 606(b) (2006) (amended 2011) (emphasizing that the amended language was part of the restyling effort and such changes were intended to be stylistic rather than substantive).

> [(1)] whether extraneous prejudicial information was improperly brought to the jury's attention or
>
> [(2)] whether any outside influence was improperly brought to bear upon any juror.
>
> Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.[94]

While Congress believed that it was merely codifying common law principles about deliberative secrecy,[95] the changes from the Advisory Committee's first draft to the final version expanded the Rule's exclusionary impact significantly.[96] Though seemingly based on the federal approach,[97] the Rule also seemed broader than *any* previous common law doctrine because it also excluded juror testimony that would be prohibited for some other reason, such as hearsay.[98] It is true that Rule 606(b)'s exceptions are consistent with a long-held desire to shield the jury from outside influences in order to protect the legitimacy of the system itself.[99] It is equally true, however, that there was also a vibrant common law tradition that sought to balance the importance of deliberative secrecy with the costs of juror misconduct.[100] Nor were these competing common law traditions a relic of the distant past. As seen above, the Iowa Rule informed both the Advisory Committee and the House Judiciary Committee in writing Rule 606(b). Rule 606(b) may indeed amount to a conservative, modern-day restatement of an old principle,[101] but the challenges of the federal approach created difficulties for the Supreme Court as it sought—and continues to seek—the proper contours of Rule 606(b).

B. The Tanner *Decision*

Much of the current jurisprudence surrounding Rule 606(b) comes from the Supreme Court's decision in *Tanner v. United States*.[102] In *Tanner*, the Court was asked to determine the admissibility under Rule 606(b) of an affidavit from a juror alleging alcohol and drug use by jurors during the trial. The scope of the alleged juror misconduct was extraordinary: four jurors consumed one to three pitchers of beer between themselves during various

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94. FED. R. EVID. 606(b) (1977) (amended 2011).

95. Chandran, *supra* note 8, at 34.

96. Mueller, *supra* note 23, at 929.

97. Chandran, *supra* note 8, at 35. Recall that this distinction formed the basis of the federal approach, but was of little consequence for the Iowa Rule, which must be considered at least a competing "common law tradition." *See supra* Part I(B).

98. Mueller, *supra* note 23, at 932.

99. Courselle, *supra* note 1, at 220.

100. *Id.*

101. Mueller, *supra* note 23, at 972.

102. 483 U.S. 107 (1987).

recesses, two jurors had one or two mixed drinks during the lunch recess, and the foreperson had a liter of wine on three occasions.[103] Moreover, four jurors "smoked marijuana quite regularly during the trial"; two jurors ingested cocaine; one juror took marijuana, cocaine, and drug paraphernalia into the courthouse; and one juror even managed to sell to another juror a quarter pound of marijuana.[104] Unsurprisingly, this behavior affected the jurors' ability to focus during the trial: some of the jurors fell asleep during afternoon sessions, and one juror described himself as "flying."[105]

The Court approached Rule 606(b) in terms of the familiar "external/internal distinction" evident in the common law federal approach. Under the Court's interpretation, evidence that reflected misconduct that was "external" to the deliberations—extraneous influences and external information—could be admitted to impeach the verdict, but misconduct that reflected internal misconduct was barred.[106] The Court determined that the evidence of substance abuse was inadmissible because interpreting such evidence as an improper outside influence stretched the Rule beyond its appropriate application.[107] "However severe their effect and improper their use," the Court said, "drugs or alcohol voluntarily ingested by a juror seems no more an 'outside influence' than a virus, poorly prepared food, or a lack of sleep."[108]

More importantly, the *Tanner* opinion detailed the "substantial policy considerations" supporting its highly exclusionary interpretation of Rule 606(b).[109] The Court reasoned that "allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict [would] seriously disrupt the finality of the judicial process."[110] Furthermore, postverdict scrutiny of jurors' conduct would undermine full and frank deliberations, a willingness to return an unpopular verdict, and the community's trust in the jury system.[111] Most importantly, *Tanner* emphasized that, while "very substantial concerns" supported limiting the admissibility of evidence impeaching a verdict, defendants' Sixth Amendment interests in an unimpaired jury were protected by several aspects of the trial process:

> The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*. Moreover, during the trial the jury is observable by the court, by counsel, and by court personnel.

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103. *Id.* at 115.
104. *Id.* at 115–16.
105. *Id.* at 116.
106. *Id.* at 117.
107. *Id.* at 122.
108. *Id.*
109. *Id.* at 119.
110. *Id.* at 120 (citing Gov't of V.I. v. Nicholas, F.2d 1073, 1081 (3d Cir. 1985)).
111. *Id.* at 120–21.

> Moreover, jurors are observable to each other, and may report inappropriate juror behavior to the court *before* they render a verdict. Finally, after the trial a party may seek to impeach the verdict by non-juror evidence of misconduct.[112]

Justice Marshall's concurrence in part and dissent in part illustrated the divergent common law traditions that continued to animate the debate about the proper scope of Rule 606(b). Despite readily acknowledging the important policy considerations that supported the no-impeachment rule, Justice Marshall used language from the Advisory Committee notes to show that courts and commentators had also recognized that such a stringent interpretation could "only promote irregularity and injustice."[113] Furthermore, the majority's interpretation of Rule 606(b) as applying an absolute bar on testimony was not supported by the text. According to the text, the Rule *only* excluded juror testimony related to the jury's deliberations, and even this exclusion is limited to excluding testimony about certain juror conduct that has no verifiable manifestations.[114] Since the juror misconduct alleged in *Tanner* occurred before deliberations had begun and involved conduct that was unquestionably verifiable,[115] neither of these prohibitions should apply.

Marshall continued by stating that even if he agreed with the Court's "expansive construction of Rule 606(b)," both common sense and suggestions from commentators indicated that evidence of juror intoxication should be admissible under the outside-influence exception.[116] Marshall then contested the majority's comparison of intoxication and a viral illness, arguing that distinguishing between the two was simply "a matter of line-drawing," which courts were frequently called to do.[117] Finally, he declared the majority's reliance on other procedural safeguards "misguided":[118] voir dire was incapable of discovering if a juror would abuse drugs during a trial, such conduct could not be readily verifiable through nonjuror testimony, the jurors were unsupervised and unobservable by courtroom personnel when the misconduct occurred, and reliance on observations of the court was "particularly inappropriate on the facts of [the] case."[119]

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112. *Id.* at 127.

113. *Id.* at 137 (Marshall, J., concurring in part and dissenting in part) (quoting FED. R. EVID. 606(b) advisory committee's note on proposed rules).

114. *Id.* at 138.

115. *Id.*

116. *Id.* at 140–41. Indeed, as Justice Marshall points out, many commentators suggested that testimony as to drug and alcohol abuse fell under the outside influence exception *even when it occurred during deliberations*. *Id.* at 141.

117. *Id.*

118. *Id.* at 141–42.

119. *Id.*

C. *The Shortcomings of* Tanner

As Justice Marshall's opinion indicates, people questioned the adequacy of the *Tanner* protections as soon as the case was decided.[120] Criticism is particularly pointed regarding the adequacy of the voir dire "protection,"[121] for three reasons. First, the power of voir dire depends greatly on how the process itself is conducted and to what extent certain issues are probed, a decision that largely lies within the discretion of the trial judge.[122] Second, even where counsel conducts the questioning, strategic considerations may advise against asking the precise sorts of questions that are required to delve into jurors' potential biases and prejudices.[123] What's more, only a highly skilled lawyer can craft questions that are specific enough to elicit meaningful answers but generalized enough to avoid focusing the voir dire on something like racial prejudice. Third, even when highly skilled counsel conduct voir dire, jurors may choose to conceal information regarding their biases, especially where something like racial bias is involved.[124] Not only are jurors unlikely to willingly reveal their known biases and prejudices, many jurors are completely unaware of such biases, and honestly believe they can be fair and impartial.[125]

There is also a significant analytical problem plaguing the rule adopted by *Tanner*. While the Court correctly identified the policies that underlie the general bar on juror testimony—fullness and frankness of deliberations, protecting jurors from harassment, ensuring the legitimacy of the jury system, and promoting finality of verdicts—the internal/external framework it developed does not always serve those policies.[126] Consider, for instance, protecting and promoting deliberative secrecy. Even under the Iowa Rule—the most permissive form of the no-impeachment rule in use—courts' inquiries into "internal events" allow jurors to testify only about an objective *act* of misconduct while excluding testimony about the misconduct's *effect*.[127] It is hard to understand why applying this more permissive interpretation to other forms of "internal" misconduct would significantly

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120. Leah S.P. Rabin, Comment, *The Public Injury of an Imperfect Trial: Fulfilling the Promises of* Tanner *and the Sixth Amendment Through Post-Verdict Inquiry into Truthfulness at Voir Dire*, 14 U. PA. J. CONST. L. 537, 542 (2012).

121. *E.g.*, *id.* at 552–55 (discussing voir dire's weakness as a Sixth Amendment safeguard).

122. *Id.* at 552.

123. Chandran, *supra* note 8, at 43; *see also* Rabin, *supra* note 120, at 553 ("[M]any attorneys may strategically refrain from requesting voir dire questions regarding racial bias as such questioning can lead to problematic and antithetical results.").

124. Rabin, *supra* note 120, at 552.

125. Amanda R. Wolin, Comment, *What Happens in the Jury Room Stays in the Jury Room . . . but Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. REV. 262, 285 (2012).

126. Huebner, *supra* note 9, at 1471, 1483.

127. *Id.* at 1485.

threaten the secrecy of deliberations *Tanner* seeks to protect.[128] Additionally, consider the goal of shielding jurors from postverdict harassment. Once again, the internal/external framework does little to promote this goal: because jurors may testify about external influences or extraneous information, litigants still have incentives to contact and interview jurors.[129] Not only does the *Tanner* framework fail to achieve these policies better than other interpretations of the no-impeachment rule, it also tends to over-exclude evidence, resulting in more misconduct going unheard and unrepaired.

III. The Current Jurisprudence

For years following *Tanner*, federal circuit courts struggled with applying the opinion's main findings to the cases that came before them. Significant circuit splits on the adequacy of voir dire and applying the internal/external framework to questions of racial prejudice resulted in two important Supreme Court decisions regarding Rule 606(b). However, these two cases—*Warger v. Shauers* and *Peña-Rodriguez v. Colorado*—suffer from the same interpretive difficulties that have long confronted the Supreme Court, and they further illustrate the fundamental tensions that make Rule 606(b) largely unworkable going forward.

A. Circuit Conflicts over the Power of Voir Dire

Because *Tanner* justified an expansive no-impeachment rule based on the idea that voir dire could protect defendants, it would stand to reason that when jurors lie during voir dire, courts should be more permissive toward admitting evidence of juror misconduct. Yet circuit courts confronted with this situation have ruled evidence of juror misconduct inadmissible, despite the apparent infirmity of the voir dire "protection."[130] In *Williams v. Price*,[131] the defendant sought to introduce evidence that the jurors lied during voir dire when they denied their racial prejudice.[132] During the voir dire proceedings, the trial court asked two questions regarding racial bias, and all the selected jurors' answers indicated that they had no racial biases.[133] In his

128. *See id.* (explaining how juror testimony of misconduct via drug consumption, without revealing how it affected their thoughts, satisfies the *Tanner* rationale).

129. *Id.* at 1486.

130. The Supreme Court further ruled in *McDonough Power Equip., Inc. v. Greenwood*, that a mistaken response by a juror made during voir dire was not a sufficient basis to overturn a judgment based on juror misconduct. McDonough Power Equip. v. Greenwood, 464 U.S. 548, 555–56 (1984).

131. 343 F.3d 223 (3d Cir. 2003).

132. *Id.* at 225.

133. *Id.* at 226. The two questions asked were: "Do you personally believe that blacks as a group are more likely to commit crimes of a violent nature involving firearms?" and "Can you listen to and judge the testimony of a black person in the same fashion as the testimony of a white person, giving each its deserved credibility?" *Id.* All the selected jurors answered "no" to the first question and "yes" to the second. *Id.*

appeal, however, Williams relied on an affidavit submitted by a juror who alleged that other jurors "made remarks that suggested acute racial bias."[134] Williams argued that the courts were obligated to consider the juror's affidavit testimony, because the no-impeachment rule could not be applied to evidence that would support a claim of juror misconduct committed during voir dire.[135]

In a decision authored by then-Judge Alito, the court rejected this claim. If the argument were correct, the court reasoned, "a party could call jury members to testify about statements made during actual jury deliberations so long as the purpose for introducing the evidence was to show that a juror had lied during voir dire."[136] Such a claim clearly fell within Rule 606(b)'s prohibition on juror testimony "as to any matter or statement occurring during the course of the jury's deliberations."[137] While emphasizing the limited scope of the court's holding,[138] the opinion nevertheless suggested that at least one federal circuit viewed the scope of Rule 606(b) as unaffected by a failure of the voir dire protection.

Indeed, in some cases involving deceptive answers during voir dire, courts have held that evidence of misconduct was inadmissible despite a *Tanner* safeguard's clear failure. In *United States v. Benally*,[139] the judge asked two questions during voir dire about whether the jurors would be prejudiced against the defendant because he was Native American.[140] Though no juror answer indicated bias, the day after the jury announced its verdict one juror claimed that the deliberation had been improperly influenced by two jurors' racist claims about Native Americans.[141] The defendant argued that Rule 606(b) did not prohibit this evidence, because it was being offered to show that a juror had been dishonest during voir dire, not to inquire into the validity of the verdict.[142]

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134. *Id.* at 234–35.

135. *Id.* at 235.

136. *Id.*

137. *Id.* (quoting FED. R. EVID. 606(b)). In dicta, the court addressed whether the statements would be barred under Rule 606(b) if they were not made during deliberations since they would not concern any matter or statement made during deliberations or their effect upon the decision process. *Id.* at 236. While noting that it "appreciate[d] [the] argument," the court indicated that such an interpretation might "create the potential for the very sort of problems that the 'no impeachment' rule is designed to prevent." *Id.* at 236–37. Thus, it seems likely that the *Williams* court would have denied the admission of *any* evidence of juror misconduct on the basis of a lie told in voir dire, much as the Supreme Court later held in *Warger v. Shauers*. *See infra* notes 162–75 and accompanying text.

138. *Id.* at 237.

139. 546 F.3d 1230 (10th Cir. 2008).

140. *Id.* at 1231.

141. *Id.* at 1231–36.

142. *Id.* at 1235.

Relying on the policy rationales of protecting the integrity of the jury system and ensuring a finality to litigation[143] as well as the legislative history that accompanied Rule 606(b),[144] the court rejected this argument. "Although the immediate purpose of introducing the testimony may have been to show that the two jurors failed to answer honestly during voir dire, the sole point of this showing" was to challenge the validity of the verdict.[145] Allowing juror testimony "through the backdoor of a voir dire challenge" would risk swallowing the rule, which the court declined to do given the importance of protecting jury deliberations from judicial review.[146] Crucially, the court noted that each *Tanner* protection "might not be equally efficacious in every instance of juror misconduct."[147] However, since voir dire *could* protect defendants, and since some of the other protections were unaffected, the court reasoned that the defendant's interest in an impartial jury was nevertheless unthreatened.[148]

Still other courts, however, took the opposite tack, arguing that at least in some cases the *Tanner* protections did not provide adequate safeguards. In *United States v. Villar*,[149] hours after the defendant was convicted, defense counsel received an email from one the jurors claiming that another juror engaged in racial profiling during deliberations.[150] In contrast to both *Williams* and *Benally*, neither party requested the court to ask jurors voir dire questions about racial or ethnic bias, and so no such questions were asked.[151]

While the court ultimately ruled that Rule 606(b) was inapplicable in this case because the alleged misconduct violated the defendant's Sixth Amendment right to a fair trial,[152] its analysis shows the skepticism some courts have expressed about the efficacy of the *Tanner* protections. Stressing that "the policies embodied in Rule 606(b) and underscored in *Tanner* are extremely important," the court nevertheless believed that the *Tanner* protections were inadequate in guarding against particular instances of misconduct.[153] The court noted that observation of the jury during proceedings was unlikely to identify jurors that might engage in misconduct, and also observed that relying on non-jurors to report misconduct was more likely to result in the reporting of alcohol or drug use than prejudice during

143. *Id.* at 1233–34.
144. *Id.* at 1238–39.
145. *Id.* at 1235.
146. *Id.* at 1236.
147. *Id.* at 1240.
148. *Id.*
149. 586 F.3d 76, 87 (1st Cir. 2009).
150. *Id.* at 78.
151. *Id.* at 79.
152. *Id.*
153. *Id.* at 87–88.

deliberations.[154] The court also remarked on the multiple ways voir dire failed at protecting defendants, from the recognition that jurors may be reluctant to admit racial bias[155] to the acknowledgement that tactical concerns would often lead to questions about bias or prejudice going unasked.[156]

Moreover, in *United States v. Henley*,[157] the Ninth Circuit determined that when the voir dire protection proved inadequate because of juror dishonesty, Rule 606(b)'s prohibitions should be relaxed.[158] There, a juror indicated on his voir dire questionnaire that he had no racial biases but later made racist statements to other jurors while they carpooled to and from the courthouse.[159] The court determined that an affidavit from another juror testifying to these statements was "indisputably admissible" to determine whether the juror had been honest during voir dire.[160] It then added that the Rule's primary purpose of insulating the jurors' private deliberations from post-verdict scrutiny would not be implicated by permitting juror testimony about what was said while the jurors carpooled to the trial.[161]

B. The Supreme Court Weighs In

It was not until 2014, in *Warger v. Shauers*,[162] that the Supreme Court would rule on whether evidence from deliberations indicating juror dishonesty during voir dire would be admissible under Rule 606(b). In this negligence case about a car accident, counsel for both parties conducted lengthy voir dire of the prospective jurors.[163] During these proceedings, Warger's counsel asked "whether any jurors would be unable to award damages for pain and suffering or for future medical expenses," as well as if any juror thought she could not be fair or impartial.[164] A prospective juror who later became the foreperson answered no to each of these questions.[165] After the jury returned a verdict for the defendant, a juror contacted Warger's counsel to express concern over the foreperson's conduct during deliberations.[166] She then signed an affidavit challenging the foreperson's ability to consider the case fairly and impartially.[167] Warger moved for a new

154. *Id.* at 87.
155. *Id.*
156. *Id.* at 87 n.5 (citing McDonough Power Equip. v. Greenwood, 464 U.S. 548, 558 (1984)).
157. 238 F.3d 1111 (9th Cir. 2001).
158. *Id.* at 1120–21.
159. *Id.* at 1121.
160. *Id.* (citing Hard v. Burlington N. R.R., 812 F.2d 482, 485 (9th Cir. 1987)).
161. *Id.* at 1120.
162. 135 S. Ct. 521 (2014).
163. *Id.* at 524.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* The affidavit claimed that the foreperson could not be impartial because her daughter had previously been involved in a car accident in which a person had died. This experience made

trial, contending that the foreperson had lied during voir dire about her impartiality.[168] He also claimed the affidavit was admissible under Rule 606(b) because it did not inquire into the validity of the verdict; rather, it inquired into the validity of the voir dire proceedings.[169]

Writing for a unanimous Court, Justice Sotomayor began by acknowledging the tortuous history and varied interpretations of the no-impeachment rule.[170] She then argued that Warger's interpretation would limit the scope of Rule 606(b) to prohibit *only* evidence of misconduct that occurred during deliberations.[171] The Rule's proper scope, she contended, was more expansive than this: it prohibited evidence about misconduct in *any proceeding* inquiring into the validity of the verdict, regardless of when the alleged misconduct the evidence referred to occurred.[172] If Warger's motion for new trial were granted, proceedings inquiring into the validity of the verdict would inevitably follow. Even though the alleged misconduct Warger complained of took place during voir dire, he would still be asking the court to consider evidence about deliberations in an effort to challenge the validity of the verdict.[173] Such admission would run directly contrary to the Rule's directives and, therefore, the motion for new trial must be denied.

The Court then reinforced the collective effectiveness of the *Tanner* protections, explaining that even if jurors concealed bias during voir dire, other protections assured impartiality.[174] The Court, however, ended with an important caveat: in a footnote, it advised that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process."[175]

C. *Muddying Through the Internal/External Distinction*

Determining the strength of the *Tanner* "protections," as well as how Rule 606(b) should be applied when such protections were clearly ineffective, was not the only aspect of *Tanner* that confounded lower courts. Many of them also found the internal/external distinction difficult to interpret and apply. Lower courts' interactions with the issue of whether or not racial bias fell within the "extraneous influence" exception articulated in Rule

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the foreperson unlikely to vote for the plaintiff because of her belief that "if her daughter had been sued, it would have ruined her life." *Id.*

168. *Id.*
169. *Id.* at 524, 528.
170. *Id.* at 526–27.
171. *Id.* at 528.
172. *Id.*
173. *Id.*
174. *Id.* at 529.
175. *Id.* at 529 n.3.

606(b)(2)(A) illustrates this difficulty. For example, the Ninth Circuit in *Henley* presented the "powerful case . . . that Rule 606(b) is wholly inapplicable to racial bias" based on Supreme Court precedent which stated that a juror "may testify concerning any mental bias in matters *unrelated to the specific issues that the juror was called upon to decide*."[176] The court also suggested that it would support an interpretation of Rule 606(b) that considered racial bias "extraneous prejudicial information" while adding that, even without such a characterization, it would be consistent with the Rule's text to hold that racial bias does not generally fall within the scope of the Rule.[177]

However, other courts have determined that racial bias constitutes impermissible evidence of an internal process. The Sixth Circuit, for instance, declared flatly and with little analysis that racial slurs were internal influences and that testimony on such subjects should therefore be barred by Rule 606(b).[178] And the D.C. Court of Appeals, "in accordance with the overwhelming majority of decisions from other jurisdictions," held that evidence alleging racial bias could not be admitted because such bias did not constitute extraneous influence.[179] The expression of racial bias, according to the court, did not clearly fall within any definable category of "extraneous influence," nor was it evidence that the jurors could obtain outside of the trial process.[180] The application of *Tanner*'s internal/external divide, while perhaps helpful in determining some of the boundaries of Rule 606(b)'s application, has not offered guidance to lower courts on more difficult questions. This has often forced them to determine questions of admissibility based not on the text of the Rule, but rather on the protections afforded to criminal defendants by the Sixth Amendment.[181]

D. Peña-Rodriguez v. Colorado

Thus, when the Supreme Court met to hear oral arguments in *Peña-Rodriguez v. Colorado*, there was no consensus on either the admissibility of racial bias or how exactly *Tanner*'s internal/external distinction operated in the face of a constitutional challenge. Asked to determine whether a state rule modeled on Rule 606(b) applied to juror testimony that the deliberations had

176. United States v. Henley, 238 F.3d 1111, 1119–20 (9th Cir. 2001) (quoting Rushen v. Spain, 464 U.S. 114, 121 n.5 (1983) (per curiam)).

177. *Id.*; *see also* Wolin, *supra* note 125, at 289 (arguing that racial bias constitutes an impermissible extraneous influence that falls outside of Rule 606(b)'s prohibition).

178. Mason v. Mitchell, 320 F.3d 604, 636 (6th Cir. 2003).

179. Kittle v. United States, 65 A.3d 1144, 1151 (D.C. 2013).

180. *Id.* at 1150.

181. *See* Wolin, *supra* note 125, at 281 ("Every court except for the Tenth Circuit in *Benally* . . . has either held that such testimony is admissible under an exception to the Rule, or, if not, that the Sixth Amendment might require its admittance in certain situations. Until the Supreme Court decides this issue, courts will continue to struggle with the intersection of the Sixth Amendment and Rule 606(b).").

been tainted with racial bias, the Court was forced to address not only the contours of Rule 606(b), but also its interaction with the Sixth Amendment. In holding that Rule 606(b) could result in evidentiary rulings that would violate the Sixth Amendment, *Peña-Rodriguez* illustrated the deficiencies of Rule 606(b) in determining admissibility of juror testimony on its own terms.

Peña-Rodriguez was convicted in state district court of unlawful sexual contact and harassment.[182] After the jury had been discharged, two jurors contacted his attorney and told him that another juror had expressed anti-Hispanic bias during deliberations.[183] The attorney reported this to the court and obtained sworn affidavits from the two jurors, which described the biased statements.[184] After reviewing the affidavits and considering Colorado Rule of Evidence 606(b)—which is generally equivalent to its federal counterpart—the trial court acknowledged the bias but denied the motion for a new trial because the evidence was inadmissible since it occurred during deliberations.[185]

Justice Kennedy's opinion noted first that the Court's "early decisions did not establish a clear preference for a particular version of the no-impeachment rule"[186] and detailed the development of the law surrounding Rule 606(b), including the recognition in *Warger* that there may be extreme cases where the Sixth Amendment required an exception to the no-impeachment rule.[187] It then distinguished the racial bias in *Peña-Rodriguez* from the misconducts alleged in *Pless*, *Tanner*, and *Warger*. While the latter three decisions "involved anomalous behavior from a single jury—or juror—gone off course," *Peña-Rodriguez* involved "racial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice."[188] The Court noted a "pragmatic" distinction as well: the *Tanner* protections, while adequate to address other forms of prejudice, were largely ineffective in rooting out racial bias.[189] Voir dire was unlikely to uncover racial bias because of the inherent difficulty in posing such questions, and "the stigma that attends racial bias" made it unlikely that

182. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017).

183. *Id.*

184. *Id.* at 861–62.

185. *Id.* at 862.

186. *Id.* at 863.

187. *Id.* at 864–66.

188. *Id.* at 868. The Court received little pushback from the dissenters in distinguishing *Peña-Rodriguez* from earlier cases considering juror misconduct. Rather, as Justice Alito's dissent indicates, *see infra* notes 179–83 and accompanying text, the three dissenting Justices argued that there was no principled way to distinguish between racial bias and bias based on religion, gender, and sexual orientation. Transcript of Oral Argument at 3–4, 6–7, 56, Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) (No. 15-606). The majority sought to distinguish race from other forms of bias by pointing out that the Sixth Amendment applied to the state through incorporation by the Fourteenth Amendment, which was primarily intended to deter racial discrimination. *Id.* at 5–6.

189. *Peña-Rodriguez*, 137 S. Ct. at 866, 868.

other jurors would report such misconduct to the court.[190] "It is one thing," the Court argued, "to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case . . . . It is quite another to call her a bigot."[191]

Relying in part on "the experiences of the 17 jurisdictions that have recognized a racial-bias exception,"[192] the Court therefore determined that Rule 606(b)'s prohibition of evidence of racial bias infringed upon a defendant's Sixth Amendment rights. "[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant," the Court concluded, "the Sixth Amendment requires that the no-impeachment rule give way . . . ."[193] The majority added—perhaps in an effort to limit the scope of the holding—that "[n]ot every offhand comment indicating racial bias or hostility" would be admissible, but only those statements that "tend[ed] to show that racial animus was a significant motivating factor in the juror's vote to convict."[194]

While Justice Thomas contributed a brief dissent, the main opposition was provided by the author of one of the most influential circuit opinions in determining the scope of Rule 606(b): Justice Alito. After emphasizing the importance of keeping deliberations confidential, Alito argued that "*Tanner* and *Warger* rested on two basic propositions."[195] The first, which the majority did not dispute, was that the no-impeachment rule advances crucial interests such as verdict finality and deliberative secrecy; the second, reaffirming *Tanner*, was that the right to an impartial jury is adequately protected by procedures other than the use of jury testimony regarding deliberations.[196] Through individual questioning of prospective jurors and the use of "subtle and nuanced" questions, a carefully conducted voir dire was capable of adequately protecting defendants' interests in a fair trial even where jurors may hold racial biases.[197]

Alito ended his dissent by arguing that while it was "undoubtedly true" that racial bias implicated unique concerns, he could not see what these concerns "ha[d] to do with the scope of an individual criminal defendant's Sixth Amendment right[s] . . . ."[198] The Justice argued that the majority's decision was incapable of producing principled distinctions between different types of juror partiality, which threatened to completely subsume

190. *Id.* at 869.
191. *Id.*
192. *Id.* at 870.
193. *Id.* at 869.
194. *Id.*
195. *Id.* at 879 (Alito, J., dissenting).
196. *Id.* at 879, 884–85.
197. *Id.* at 880.
198. *Id.* at 883 (emphasis omitted).

the no-impeachment rule.[199] If the Sixth Amendment required the admission of evidence showing one type of juror partiality, Justice Alito reasoned, it equally required evidence showing any type of juror partiality.[200] Since such a concept ran against Rule 606(b)'s general ban on evidence to impeach a verdict, Justice Alito argued that the Court should not allow this type of evidence to be admitted.

IV. Toward a Better No-Impeachment Rule

Justice Alito was not the first person to doubt that there is a principled distinction between racial bias and any other form of internal bias.[201] One commentator had previously noted that no language existed in the Sixth Amendment that would justify treating racial comments differently from other comments indicating partiality or unfairness,[202] while another deemed it "unlikely" that courts would use the type of reasoning deployed in *Peña-Rodriguez* for fear that it "would effectively undercut the entire purpose of Rule 606(b)."[203] If for no other reason, then, the holding in *Peña-Rodriguez* that the Sixth Amendment might sometimes render Rule 606(b) unconstitutional suggests a rethinking of the Rule itself.

To be sure, proposals for amending Rule 606(b) have been made in the past. People concerned with the impact of racial bias have argued that the Rule should include instructions indicating that racial bias should fall within one or both of the Rule's exceptions.[204] Others think the Rule should add a fourth exception allowing for allegations of racism that occurred during deliberations.[205] Still others have advocated for adding an exception that would allow the introduction of evidence that violence or a threat of violence was made upon one juror by another.[206] Because these suggestions predate both *Warger* and *Peña-Rodriguez*, however, they do not consider these decisions or the difficulties in interpreting and applying Rule 606(b) that led to them. Such suggestions, therefore, either do not go far enough or are no longer applicable given the Supreme Court's understanding of the scope of the Rule.[207] At least one more recommendation, then, is in order.

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199. *Id.* at 884.

200. *Id.* at 883.

201. Chandran, *supra* note 8, at 44.

202. Goldman, *supra* note 4, at 19.

203. Chandran, *supra* note 8, at 44.

204. *See, e.g.*, Wolin, *supra* note 125, at 293 (asserting that because "such bias or prejudice is not part of the record, . . . it should be considered either extraneous prejudicial information or an outside influence").

205. *See, e.g.*, Chandran, *supra* note 8, at 50 (concluding that the exception would help signal the legal system's "legitimacy," particularly in communities of color, which have historically experienced a distrust of law enforcement).

206. Carlson & Sumberg, *supra* note 12, at 271.

207. *See* Cynthia Lee, *Peña-Rodriguez v. Colorado: The Court's New Racial Bias Exception to the No-Impeachment Rule*, GEO. WASH. L. REV. (Mar. 19, 2017), http://www.gwlr.org/pena-

The first and most drastic change that should be made is to create two separate no-impeachment rules: one governing the admissibility of evidence in criminal trials and one governing the admissibility of evidence in civil trials. A number of factors support this separation. First, older Supreme Court precedent indicates that the Court understood that a strict no-impeachment rule was only applicable in civil cases.[208] Second, it is the simplest and most effective way to account for the Supreme Court's recognition in *Peña-Rodriguez* of the inherent conflict between Rule 606(b) and the Sixth Amendment[209] while preserving the existing Rule in cases where it is not in conflict. Third, it accords with the practice of other Federal Rules of Evidence that make constitutionally based distinctions for criminal defendants. Rule 803(8)—the public-records exception to the hearsay rule—is illustrative of this distinction: the exception does not allow for factual findings of a legally authorized investigation to be introduced against criminal defendants because of concerns rooted in the Confrontation Clause of the Sixth Amendment.[210] Finally, the separation accords with other postverdict relief available solely for criminal defendants, such as habeas corpus petitions, claims of ineffective assistance of counsel, and *Batson* challenges.

Furthermore, while Rule 606(b)'s current construction can be retained for civil trials, the rule governing criminal trials should be altered. In accordance with the Iowa Rule, it should only disallow evidence of jurors' mental and decision-making processes. While such a change would certainly lead to more evidence being admitted, it would also ensure courts balance the interests of deliberative secrecy with avoiding juror misconduct. Moreover, allowing the court to consider more instances of juror misconduct—particularly statements indicating biases against minorities—would have benefits beyond individual defendants. In fact, rather than *threatening* the jury system's legitimacy,[211] a more permissive rule might actually *strengthen* the jury system's legitimacy, particularly among communities of color.[212]

The fears of Justice Alito and others that the no-impeachment rule will perish if it adopts such a policy of greater admissibility are arguably suspect. After all, if the sanctity of jury deliberations and the finality of verdicts were

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rodriguez-v-colorado-the-courts-new-racial-bias-exception-to-the-no-impeachment-rule/ [https://perma.cc/N45M-E7W7] (noting that *Peña-Rodriguez* may prompt reconsideration of previously established notions regarding confidence in jury verdicts).

208. *See* Miller, *supra* note 30, at 886 (noting that the Court ended its opinion in *Pless* by clarifying that the more robust no-impeachment rule it adopted therein was only applicable in civil cases); McDonald v. Pless, 238 U.S. 264, 269 (1915) (explaining that, though it is true that a losing party cannot use the testimony of a juror to impeach their verdict, this rule is limited to private parties and does not reach criminal cases or contempt proceedings).

209. Wolin, *supra* note 125, at 265, 267–68.

210. FED. R. EVID. 803(8)(A)(iii).

211. George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 705 (1997).

212. *See* Chandran, *supra* note 8, at 44–45 (noting courts' indifference towards juror racism has delegitimized the court system before communities of color).

the only considerations, the Advisory Committee should have simply adopted Mansfield's Rule. But the drafters of the Rule understood that such a blanket rule of exclusion would create problems of its own, and important policy objectives could be achieved while still allowing for some needed exceptions. Few, if any, courts suggest that the "extraneous information" or "outside influence" exceptions threaten deliberative secrecy or the integrity of the jury system.[213] It seems overreactive, then, to suggest that any additional exceptions are liable to bring the whole system crashing down.

Amendments to Rule 606(b) would also not threaten the finality of verdicts, which is "[p]erhaps the most important policy supporting Rule 606(b)."[214] First, by expanding the Rule in only criminal cases, this change would impact those cases where only one party, the criminal defendant, could take advantage of greater admissibility, because the Fifth Amendment would bar prosecutors from retrying the case. Second, the fears that a more permissive no-impeachment rule would incentivize parties to challenge the finality of verdicts by seeking out impeachment testimony are unsupported by the empirical evidence. In fact, in almost every case that has addressed the issue so far, petitioners have not actively sought out juror testimony to impeach the verdict; rather, a member of the jury independently reached out and alerted the petitioners of misconduct.[215] Furthermore, the Rule could simply provide that defendants may only challenge the validity of the verdict using evidence obtained through a juror's independent disclosure[216] or evidence obtained from juror interviews conducted immediately after rendition of the verdict. This would alleviate concerns about the finality of verdicts and would also protect against—or at least not encourage—harassment of the jury.

It is undeniable that Rule 606(b) protects important interests of the justice system. Maintaining the secrecy of deliberations through a robust ban on evidence from deliberations serves several crucial functions, such as preserving the jury's independence and encouraging more well-considered verdicts.[217] But "[t]he right to a trial by an impartial jury lies at the very heart

213. *See* United States v. Thomas, 116 F.3d 606, 622–23 (holding FED. R. EVID. 606 and its limited exceptions embody traditional policy generally favoring deliberative secrecy); *see also* Rules of Evidence for U.S. Dist. Courts and Magistrates, 46 F.R.D. 161, 291 n.b (Preliminary Draft, 1969) (allowing jurors "to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected").

214. Goldman, *supra* note 4, at 10.

215. Chandran, *supra* note 8, at 50. The only case referred to in this Note where the jurors provided information about potential misconduct after questioning by attorneys was in *Peña-Rodriguez*. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017). Even in *Peña-Rodriguez*, however, the jurors were approached by the defense immediately following the discharge of the jury and stayed behind of their own accord to speak with the attorney privately. *Id.*

216. Chandran, *supra* note 8, at 50.

217. Courselle, *supra* note 1, at 211–12.

of due process"[218]—indeed, "stands guardian over all other rights."[219] Acts of juror misconduct fundamentally threaten this right. The protection of the right to a fair trial by an impartial jury requires a reckoning with a rule of evidence that often serves to confound and frustrate this right. Seventy years before the Supreme Court decided that Rule 606(b) conflicted with the Sixth Amendment, Judge Learned Hand warned of allowing evidence of juror misconduct to impeach a verdict.[220] Forced to ensure that verdicts were rendered only when every juror was entirely without bias, Hand prophesied that judges "would become Penelopes, forever engaged in unravelling the webs they wove."[221] Faced with the challenges created by our current understanding of the no-impeachment rule, perhaps the time has come for all of us to become Penelopes in the service of fairness and justice.

Fraser Holmes

218. Smith v. Phillips, 455 U.S. 209, 224 (1982) (Marshall, J., dissenting) (citing Irvin v. Dowd, 336 U.S. 717, 721–22 (1961)).

219. Dennis v. United States, 339 U.S. 162, 173 (1950) (Jackson, J., concurring).

220. Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir. 1947).

221. *Id.*

Trinity Lutheran Church of Columbia, Inc. v. Comer and the "Play in the Joints" Between Establishment and Free Exercise of Religion

> No man can serve two masters:
> for either he will hate the one, and love the other;
> or else he will hold to the one, and despise the other.
> Ye cannot serve God and mammon.[1]

I. Introduction

What happens when an irresistible force meets an immovable object? The philosopher will tell us that there is no answer, that it is a paradox. He has the luxury of throwing up his hands. But the irresistible force of Free Exercise has been meeting the immovable object of antiestablishment for 200 years in American courtrooms. And American jurists have had to rough fit an answer. It is no mean feat to weigh two such lofty ideals. We might be more than charitable in accepting and forgiving error made in good faith, were it not thought the importance of the ideals demanded a more rigorous standard.

This past June, the United States Supreme Court handed down its latest landmark decision operating in these interstices of the First Amendment's Religion Clauses. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[2] the Court held that Free Exercise requires the state to provide financial benefits to religious entities on equal terms, notwithstanding the state's interest in antiestablishment.[3] More than being merely wrongly decided, *Trinity Lutheran* has the potential to work an unacknowledged revolution in the Court's Religion Clauses jurisprudence. On the one hand, the holding takes the Free Exercise Clause into broad and uncharted new waters that are well beyond the facts and reasoning of seminal precedent. And on the other, the holding threatens long-standing Establishment Clause practice and precedent with a new legal standard under the Free Exercise Clause with which to challenge prevailing government antiestablishment conduct.

In reaching this destabilizing conclusion, the Court commits two primary errors. First, in arriving at its ultimate holding, the Court miscategorizes the case and misapplies Free Exercise precedent. And the judicial whole cloth it invents to distinguish the case is jurisprudentially

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1. *Matthew* 6:24 (King James).
2. 137 S. Ct. 2012 (2017).
3. *Id.* at 2024–25.

wanting.[4] Second, to get to the Free Exercise Clause issue in the first place, the Court entirely elides an important threshold Establishment Clause analysis.[5] Thus *Trinity Lutheran* is wrongly decided and conceptually infirm, and should be limited and reversed in the future.

II. Facts and Procedural Background

In an effort to reduce the number of used rubber tires that end up in landfills and dump sites, the State of Missouri, through the State's Department of Natural Resources (Department), introduced the Scrap Tire Program.[6] The Program offers reimbursement grants to nonprofit organizations that purchase playground surfaces made from recycled tires.[7] The Department awards grants on a competitive basis to those applicants that score highest on a selection of criteria including population poverty level and the applicant's plan to promote recycling.[8] In 2012, the Trinity Lutheran Church Child Learning Center[9] applied to participate in the Scrap Tire Program to attain funds to replace a large portion of the surface beneath a playground that is part of the Center's facilities.[10] Despite ranking fifth among forty-four applicants, the Department rejected the Learning Center's application.[11] Because the Learning Center was operated by the Trinity Lutheran Church, it was deemed categorically ineligible to receive such a grant pursuant to Article I, Section 7 of the Missouri Constitution, which purported to deny such financial assistance directly to a church.[12]

In response to this categorical denial, Trinity Lutheran filed suit against the Department, alleging the failure to approve its application based on its religious affiliation violated the First Amendment's Free Exercise Clause.[13]

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4. *See infra* Parts IV–V.

5. *See infra* Part VI.

6. *Trinity Lutheran*, 137 S. Ct. at 2017.

7. *Id.*

8. *Id.*

9. The Learning Center was originally established as an independent, nonprofit organization in 1980 before merging with the Trinity Lutheran Church in 1985. *Id.* The Learning Center currently operates under the "auspices" of the Church and on Church property. *Id.*

10. *Id.*

11. *Id.* at 2018. Fourteen grants were ultimately awarded in 2012 as part of the Scrap Tire Program. *Id.*

12. *Id.* Article 1, Section 7 of the Missouri constitution provides in full:

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

MO. CONST. art. I, § 7.

13. Trinity Lutheran Church of Columbia, Inc. v. Pauley, 976 F. Supp. 2d 1137, 1140 (W.D. Mo. 2013); *see also* U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

Trinity Lutheran asked for a declaratory judgment and injunctive relief that would prevent the Department from discriminating against the Church in future grant applications on the basis of its religious affiliation.[14] Finding the present case "nearly indistinguishable"[15] from *Locke v. Davey*,[16] the District Court held that Free Exercise "does not prohibit withholding an affirmative benefit on account of religion[,]" and thus did not require the State to make funds like those provided by the Scrap Tire Program available to a religious institution like the Trinity Lutheran Church.[17] Echoing *Locke*'s principle that there is "play in the joints" between the First Amendment's Religion Clauses,[18] the Eighth Circuit affirmed.[19] It recognized that while Missouri *could* award a grant to Trinity Lutheran without infringing on the Establishment Clause, Free Exercise did not *compel* Missouri to ignore the antiestablishment principle reflected in its constitution.[20]

III. Holding

In a 7–2 opinion authored by Chief Justice Roberts, the Supreme Court reversed, applying what it considered to be the basic principle that "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment,'"[21] to conclude that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'"[22] In reaching this conclusion, the Court relied primarily on *McDaniel v. Paty*,[23] which "struck down under the Free Exercise Clause a Tennessee statute disqualifying ministers from serving as delegates to the State's constitutional

14. *Trinity Lutheran*, 137 S. Ct. at 2018.

15. *Trinity Lutheran*, 976 F. Supp. 2d at 1151.

16. 540 U.S. 712 (2004).

17. *Trinity Lutheran*, 137 S. Ct. at 2018; *see also Trinity Lutheran*, 976 F. Supp. 2d at 1151 (holding that "even assuming that providing a tire scrap grant to Trinity would not violate the Establishment Clause, this Court cannot conclude that the exclusion of a religious preschool from this aid program is constitutionally suspect under the Free Exercise Clause" due to "the longstanding and substantial concerns about direct payment of public funds to sectarian schools").

18. *See Locke*, 540 U.S. at 718 (quoting Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669 (1970)) (remarking that although "the Establishment Clause and the Free Exercise Clause[] are frequently in tension[,] . . . we have long said that 'there is room for play in the joints' between them"); *see also* U.S. CONST. amend. 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

19. Trinity Lutheran Church of Columbia v. Pauley, 788 F.3d 779, 784–85 (8th Cir. 2015).

20. *Id.* It is worth noting that despite its Establishment Clause conclusion, in reaching its Free Exercise conclusion, the Eighth Circuit somewhat paradoxically also acknowledged such a monetary grant to a religious institution to be a "hallmark[] of an 'established' religion." *Id.* at 785 (quoting *Locke*, 540 U.S. at 722).

21. *Trinity Lutheran*, 137 S. Ct. at 2019 (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533, 542 (1993)).

22. *Id.* (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978) (plurality opinion)).

23. 435 U.S. 618 (1978) (plurality opinion).

convention."[24] Because the statute at issue in *McDaniel* meant that "McDaniel could not seek to participate in the convention while also maintaining his role as a minister,"[25] the law impermissibly infringed on McDaniel's constitutional liberties.[26] In the view of Chief Justice Roberts, the Department's policy disqualifying Trinity Lutheran from a public benefit only on account of Trinity's "religious status," was "[l]ike the disqualification statute in *McDaniel*" in that it "put[] Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution."[27] But the "imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights."[28] And "the Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion.'"[29]

In reaching his conclusion, Chief Justice Roberts had one further job in front of him: distinguishing the *Locke* decision that had formed the basis of the lower courts' decisions[30] and that the Department had argued controlled the outcome of the case.[31] *Locke* had upheld, against a Free Exercise challenge, a provision of the Washington Constitution similar to the Missouri provision at issue in the instant case that had been applied to prohibit a state scholarship recipient from applying the scholarship funds to pursue a devotional theology degree.[32] In so doing, *Locke* had established a "play in the joints" principle.[33] There were some state actions that were not prohibited by the Establishment Clause, but neither were they required by the Free Exercise Clause. Applying *Locke*, the Department argued,[34] and the District

24. *Trinity Lutheran*, 137 S. Ct. at 2020; *see also McDaniel*, 435 U.S. at 618.

25. *Trinity Lutheran*, 137 S. Ct. at 2020.

26. *See McDaniel*, 435 U.S. at 634 (concluding that "because the challenged provision requires [McDaniel] to purchase his right to engage in the ministry by sacrificing his candidacy it impairs the free exercise of his religion").

27. *Trinity Lutheran*, 137 S. Ct. at 2021–22.

28. *Id.* at 2022 (quoting Sherbert v. Verner, 374 U.S. 398, 405 (1963)).

29. *Id.* (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988)).

30. *See* Trinity Lutheran Church of Columbia v. Pauley, 976 F. Supp. 2d 1137, 1151 (W.D. Mo. 2013) ("Nonetheless, the existence of a longstanding and legitimate antiestablishment interest makes this case nearly indistinguishable from *Locke*."); *see also* Trinity Lutheran Church of Columbia v. Pauley, 788 F.3d 779, 785 (8th Cir. 2015) ("Therefore, . . . we conclude that *Locke* reinforces our decision.").

31. *See Trinity Lutheran*, 137 S. Ct. at 2022–23 ("The Department attempts to get out from under the weight of our precedents by arguing that the free exercise question in this case is instead controlled by our decision in *Locke v. Davey*.").

32. Locke v. Davey, 540 U.S. 712, 716, 725 (2004) (upholding "as currently operated by the State of Washington," a post-secondary scholarship program whose funds could not be used to "pursue a degree in theology" because of Article 1, § 11 of the Washington Constitution).

33. *See id.* at 719 ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.").

34. *Trinity Lutheran*, 137 S. Ct. at 2021–22.

Court and Eighth Circuit held,[35] that Missouri could allow churches to participate in the Scrap Tire Program, but was not required to. To distinguish *Locke*, Roberts derived a status–use distinction between *Locke* and the case before him.[36] According to the Chief Justice, "[the respondent in *Locke*] was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry."[37] In contrast, "[h]ere there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church."[38] But *Locke* is not so readily distinguishable as the Chief Justice asserts.[39]

IV. *Trinity Lutheran*'s Conflation of the Jurisprudential Background

The fundamental problem with Chief Justice Roberts's analysis is that in reaching his result, he conflates two fundamentally different types of Free Exercise challenges: those actively inhibiting self-determined religious devotion and those merely denying an affirmative benefit. Given the historical purposes of the Clause, it is no surprise that most Free Exercise cases arise in the context of the government imposing an active burden on the individual's actual practice of his faith. Perhaps the most paradigmatic example of such a case is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[40] In a transparent attempt to discourage, if not outright prohibit, the practices of the Santeria Church, the city of Hialeah, Florida enacted certain laws, under the guise of public welfare ordinances, that severely restricted animal slaughter.[41] But a component aspect of the practice of Santeria is the ritual sacrifice of animals as part of religious rights and observances.[42] Importantly, and revelatory of the inherently discriminatory purpose of such laws, exemptions were given to the ritualistic slaughter of animals in other

35. *See Trinity Lutheran*, 976 F. Supp. 2d at 1155 ("[T]here is no basis for concluding that the decision to exclude religious institutions from this program did violate the Free Exercise Clause. Accordingly, Trinity's Free Exercise claim is dismissed."); *Trinity Lutheran*, 788 F.3d at 785 ("[W]e conclude that the district court correctly dismissed Trinity Church's federal constitutional claims.").

36. *Trinity Lutheran*, 137 S. Ct. at 2023; *see also id.* at 2025 (Gorsuch, J., concurring) (discussing the majority's "distinction . . . between laws that discriminate on the basis of religious *status* and religious *use*").

37. *Id.* at 2023.

38. *Id.*

39. *See infra* Part V.

40. 508 U.S. 520 (1993).

41. *See id.* at 526, 527 (remarking that because "[t]he prospect of a Santeria church in their midst was distressing to many members of the Hialeah community . . . the city council adopted three substantive ordinances addressing the issue of religious animal sacrifice").

42. *See id.* at 525 ("[In the Santeria faith, animal s]acrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration.").

religious practices, such as the Kosher butchery of observant Jews.[43] Although such laws were purported to be facially neutral,[44] the Court saw through this pretext[45] and struck down the laws as an attempt to disfavor one particular religious practice that was distasteful to the local residents.[46] Such intentionally gerrymandered laws, designed to burden one discrete and disfavored minority religious practice, go precisely to the core of what the Free Exercise Clause is intended to prohibit.[47]

Although lacking the clear animus present in *Lukumi*, in a similar case the Supreme Court applied the "ministerial exception"[48] doctrine to employment decisions regarding teachers at parochial schools.[49] Recognizing that teachers serve a similar function to ordained and denominated ministers in the course of parochial instruction,[50] the court exempted such teachers from the requirements of equal opportunity in employment laws of general application.[51] To impose such secular constraints on such decisions would be to deny religious practitioners the prerogative to decide for and amongst themselves who would serve as the spiritual leaders and educators in their faith, a core component of self-deterministic religious adherence.[52] Cases like these represent the essential core of the principal of religious liberty; the freedom to direct the substantive practice of your faith as you see fit, without interference from the governing majority.

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43. *See id.* at 536 ("The definition [of slaughter used by the city] excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter.").

44. *See id.* at 532 (beginning the opinion's Free Exercise analysis by discussing the neutrality of the ordinances).

45. *See id.* at 540 (concluding that "the ordinances were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice") (quoting Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

46. *See id.* at 547 ("Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.").

47. *See id.* at 545–46 (quoting Florida Starr v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and concurring in judgment)) ("The ordinances 'ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself.' This precise evil is what the requirement[s of Free Exercise principles are] designed to prevent." (third alteration added)).

48. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 188 (2012) (finding "the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation [as Title VII of the Civil Rights Act of 1964] to claims concerning the employment relationship between a religious institution and its ministers").

49. *See id.* at 192 (finding the teacher at issue was covered by the ministerial exception).

50. *See id.* ("[The teacher's] job duties reflected a role in conveying the Church's message and carrying out its mission.").

51. *Id.*

52. *See id.* at 196 ("[Society's interest in enforcing] employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. . . . The church must be free to choose those who will guide it on its way.").

A second strand of subtly different but principally identical cases concerns the denial of what we might call universal societal benefits based on religious practices. Decided under the Establishment Clause, *Everson v. Board of Education*[53] announced the principle that "cutting off" religious groups "from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks" is antithetical to the protections guaranteed by the First Amendment.[54] Nominally, such services could be deemed affirmative state benefits as opposed to active inhibitions on practice. But their universality and essentiality to functioning in civil society should more than suffice in demonstrating that their denial, based on an individual's religious practice, speaks, once again, to the essential substance of Free Exercise protections. The individual in such cases is being asked to forsake the precepts of his faith to participate fully and equally in society in ways he is otherwise entitled. Thus, although nominally benefits, such denials are better conceived of legally and conceptually as burdens on religious practice.

More than a few cases have been decided under essentially this rubric.[55] Most importantly, the case relied on primarily by the majority in *Trinity Lutheran*, *McDaniel*, is one such case. Recall that *McDaniel* "struck down under the Free Exercise Clause a Tennessee statute disqualifying ministers from serving as delegates to the State's constitutional convention."[56] At first blush it might be possible to conceive, as with the provision of police and firefighters or the availability of unemployment benefits, that the ability to hold public office is an affirmative benefit provided by the state. But a moment's reflection ought to make apparent that in a democratic republic, in

53. 330 U.S. 1 (1947).

54. *Id.* at 17–18.

55. *See, e.g.*, Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 897 (1990) (describing the denial of unemployment benefits on the basis of using peyote for religious sacramental purposes as a "burden imposed by government on religious practices or beliefs"); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (asking whether disqualification from unemployment benefits by refusing to work on one's observed Sabbath "imposes any burden on the free exercise of . . . religion"); Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (describing a state's Sunday Closing Law that prevented a business owner from being open on the days of his choosing, including the weekend day that was not his personal Sabbath, as a "burden on the observance of religion"). But in distinction from cases like *Lukumi*, where the Court is satisfied the Free Exercise infringements are pursuant to the application of neutral laws of generalized application, the Court has often upheld such laws against free exercise challenges. *See, e.g.*, *Emp't Div.*, 494 U.S. at 879 (finding the Free Exercise Clause does not mandate an exemption from valid and neutral laws of general applicability); *Braunfeld*, 366 U.S. at 607 ("[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance . . . ."). But where the burden is too direct and too great, the Court has struck down such laws. *See, e.g.*, *Sherbert*, 374 U.S. at 404 (striking down a law that forced the appellant "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand").

56. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2020 (2017).

which the people are sovereign, and governed of, by, and for themselves, such a proposition cannot withstand the most basic scrutiny. To hold that civic participation in the mechanisms of government should be considered under the law to be but a privilege accorded by the state and not the inalienable right of a free citizen in civil society turns the entire premise of the American Experiment on its head.[57] It is too great a refutation of ordered liberty to be maintained. Therefore, Chief Justice Roberts is incorrect to conceive of *McDaniel* as a case dealing with the denial of an affirmative benefit from the government based on religious practice and observance. In truth, *McDaniel* is thus best conceived of as one imposing an active burden on the functional practice of one's religious faith.

The second category of Free Exercise cases that Chief Justice Roberts fails to distinguish is, as previously identified, those that instead merely deny some form of benefit that the government has chosen of its own prerogative and on its own accord to selectively provide. The Scrap Tire Program grants at issue in *Trinity Lutheran* are beyond a doubt of this second variety of cases. Accepting the premise that denying civic participation to ministers is not merely withholding a benefit but burdening religious faith by imposing a penalty on its pursuit, *McDaniel* is easily distinguishable from *Trinity Lutheran*.[58] In contrast, *Locke v. Davey*, the case that Chief Justice Roberts was forced to distinguish in reaching his holding, arises in the almost identical context of the denial of a monetary grant based on the State's antiestablishment interest.[59]

V. *Locke* and the Status–Use Distinction

Similar to the facts in *Trinity Lutheran*, *Locke* involved the provision of a selective public benefit to a limited number of recipients. High-achieving students could be awarded funds to pursue post-secondary education as part

57. However, that is of course not to say that certain legitimate requirements and qualifications on holding office cannot be imposed. All civil rights are subject to certain contours defining their rational extents and boundaries. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (acknowledging that Free Speech does not protect speech "directed to inciting or producing imminent lawless action and [that] is likely to incite or produce such action"). And of course, the Constitution itself, no less, recognizes this fact. *See* U.S. CONST. art. I, §§ 2–3 (identifying qualifications for service as Representatives and Senators).

58. Such a distinction also seems facially apparent. *McDaniel* dealt with the ability to participate in democratic self-governance, the essence of liberty in our civic system, whereas *Trinity Lutheran* dealt with the infinitely more mundane issue of a few thousand dollars to build one playground space. Even Chief Justice Roberts recognized this distinction in his opinion. *See Trinity Lutheran*, 137 S. Ct. at 2024–25 ("And the result of the State's policy is nothing so dramatic as the denial of political office. The consequence is, in all likelihood, a few extra scraped knees.").

59. *Compare* Locke v. Davey, 540 U.S. 712, 716–17 (2004) (noting Washington's policy of denying funding for the pursuit of a devotional degree), *with Trinity Lutheran*, 137 S. Ct. at 2017 (noting Missouri's policy of denying funding to a religious entity based on an antiestablishment policy compelled by its constitution).

of the Promise Scholarship Program.[60] Among other eligibility requirements, however, a student could "not pursue a degree in theology . . . while receiving the scholarship," though was free to study at accredited religiously affiliated universities.[61] The statute did not expressly define what a degree in theology meant. But it was acknowledged by the parties and by the Court that the statute simply purported to codify the State's constitutional prohibition on providing public money to support or further religious instruction.[62]

Respondent Davey was initially awarded such a scholarship and was interested in pursuing a course of study that included a degree in "pastoral ministries," a concededly theological degree.[63] Upon learning that to receive the scholarship funds he had to certify that he was not pursuing any such degree, he refused, so forfeited any scholarship funds, and filed suit alleging several constitutional violations, including of his right to free exercise of religion.[64] The District Court initially rejected Davey's claims and granted the State's motion for summary judgment.[65] But the Court of Appeals for the Ninth Circuit reversed, concluding that "the State had singled out religion for unfavorable treatment," relying heavily on the approach taken by the Court in *Lukumi*.[66] In this way, the Ninth Circuit in *Locke* reached much the same conclusion as the Supreme Court did in *Trinity Lutheran*. Yet, in *Locke*, seven members of the Supreme Court found this reasoning unpersuasive.[67]

Moreover, Davey had asked the Court to conclude much as the Court in *Trinity Lutheran* ultimately did, that a law "is presumptively unconstitutional because it is not facially neutral with respect to religion."[68] Yet as goes entirely unmentioned by the *Trinity Lutheran* majority, the *Locke* majority expressly refused to do so.[69] Instead, the Court in *Locke* "reject[ed] [t]his claim of presumptive unconstitutionality, . . . to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning."[70] The laws at issue in *Lukumi* sought to suppress the Santeria faith itself.[71] Regarding the law at issue in *Locke*, which merely denied

60. *Locke*, 540 U.S. at 715–16.

61. *Id.* at 716; *see also* WASH. REV. CODE ANN. § 28B.92.100 (West 2014) ("No aid shall be awarded to any student who is pursuing a degree in theology.").

62. *Locke*, 540 U.S. at 716; *see also* WASH CONST. art. I, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment[.]").

63. *Locke*, 540 U.S. at 717.

64. *Id.* at 717–18.

65. *Id.* at 718.

66. *Id.*

67. *Id.* at 725.

68. *Id.* at 720.

69. *Id.*

70. *Id.*

71. *See supra* notes 40–46 and accompanying text.

monetary funds just as were denied in *Trinity Lutheran*,[72] "the State's disfavor of religion (if it can be called that) [was] of a far milder kind."[73] It imposed "neither criminal nor civil sanctions on any type of religious service or rite."[74] And in its very next breath the Court drew a clear distinction between the denial of financial benefits nearly identical to those in *Trinity Lutheran* and "deny[ing] to ministers the right to participate in the political affairs of the community,"[75] precisely the case relied on so heavily by the majority for its outcome, *McDaniel*.[76] As went entirely unrecognized or unremarked upon by the *Trinity Lutheran* Court, the holding in *Locke* is as much of an express disavowal of precisely the argument put forward by Chief Justice Roberts in *Trinity Lutheran* as could be imagined.

Worse yet for the *Trinity Lutheran* majority, it makes extreme light of a state's compelling antiestablishment interest[77] that is treated as next to sacred in a very similar context in *Locke*. Discussing the "procuring [of] taxpayer funds to support church leaders" the *Locke* majority could "think of few areas in which a State's antiestablishment interests come more into play."[78] The funds in *Trinity Lutheran* were not merely to go to "support church leaders," they were to go to support the very church itself, in the form of improved church facilities.[79] In light of "the historic and substantial state interest at issue"[80] concerning antiestablishment in the American system of government,[81] the Court found nothing "that suggests animus toward religion" and refused to "conclude that the denial of funding . . . alone is

72. *See supra* note 60–61 and accompanying text.

73. *Locke*, 540 U.S. at 720.

74. *Id.*

75. *Id.*

76. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2020–22 (2017).

77. *See id.* at 2024 ("[T]he Department offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns.").

78. *Locke*, 540 U.S. at 722.

79. While the money was to be used for a playground, is there any meaningful difference between building a playground as part of a church complex and building the physical structure itself? Certainly, the approach taken by the *Trinity Lutheran* majority admits of no such fine distinctions.

80. *Locke*, 540 U.S. at 725.

81. *See, e.g.*, FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 188 (2003) ("In defending their religious liberty against overreaching clergy, Americans in all regions found that . . . state-supported clergy undermined liberty of conscience and should be opposed."); *see also, e.g.*, GA. CONST. of 1789, art. IV, § 5 ("All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own."); PA. CONST. of 1776, art. II ("[N]o man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent."); DEL. CONST. of 1792, art. I, § 1 (similar); KY. CONST. of 1792, art. XII, § 3 (similar); N.J. CONST. of 1776, art. XVIII (similar); OHIO CONST. of 1802, art. VIII, § 3 (similar); TENN. CONST. of 1796, art. XI, § 3 (similar); VT. CONST. of 1793, ch. I, art. 3 (similar).

inherently constitutionally suspect."[82] Because the State's antiestablishment interest was "substantial" and the burden imposed by the denial of the scholarship funds was "relatively minor," the respondent's claim "must fail."[83] Tellingly, the majority in *Trinity Lutheran*, by contrast, declined to engage in any such analysis.[84] Because if the majority did, it would have been forced to conclude that Missouri's antiestablishment interest was similarly substantial, the church's burden in having to pay for its own playground surface was similarly minimal, and thus the church's claim must similarly fail.

And as noted earlier, Chief Justice Roberts was only able to distinguish *Locke* by deriving a status–use distinction.[85] The respondent in *Locke* was denied the benefit of the State of Washington's scholarship funds because he proposed to use the money to fund a devotional degree.[86] Here in contrast, according to the Chief Justice, the Trinity Lutheran Church was denied the State of Missouri's money because of what it is, namely a church.[87] But not only is this status–use distinction invented out of whole cloth,[88] it is conceptually wanting. As reasonable as this distinction appears superficially, a deeper analysis reveals the distinction to be more than somewhat facile. To begin with, the respondent in *Locke* was not truly denied the scholarship because he was certain to use the funds to pursue a ministerial degree, but instead because he refused to certify to the State that he would not.[89] In essence, he was denied the scholarship because he was unwilling to foreclose the *possibility* that he would use the funds in such a way. The distinction may seem minor, but it begins to chip away at the logic of *Locke*'s being decided based purely on conduct, as opposed to status. The respondent in *Locke* was a religious student with an interest in pursuing a devotional degree in accordance with his faith.[90] Described in this way, the denial of the scholarship can begin to look more like one based on status than use.

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82. *Locke*, 540 U.S. at 725.

83. *Id.*

84. Instead the Court chose to resuscitate and, contra *Locke*, validate the "inherently constitutionally suspect" argument advanced by the respondent in *Locke* and decisively disavowed by that Court. *See supra* notes 61, 75 and accompanying text.

85. *See supra* Part III.

86. *Locke*, 540 U.S. at 717.

87. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2016 (2017).

88. No such distinction is discussed in *Locke*, nor is one in any way implicated by the decision. Instead, *Locke* makes clear that pursuing antiestablishment interests by prohibiting public funds from aiding religion fails to suggest "animus towards religion." *Locke*, 540 U.S. at 725.

89. *Trinity Lutheran*, 137 S. Ct. at 2023.

90. *See Locke*, 540 U.S. at 717 ("Davey had 'planned for many years . . . for a lifetime of ministry, specifically as a church pastor.'").

Even in concurring with the Chief Justice's opinion and ultimate holding, Justice Gorsuch was able to recognize this conceptual infirmity.[91] Justice Gorsuch admitted that he "harbor[ed] doubts about the stability of such a line."[92] He rhetorically wondered whether it was "a religious group that built the playground[, o]r did a group build the playground so it might be used to advance a religious mission?"[93] The newest member of the Court considered "reliance on the status-use distinction [insufficient] to distinguish *Locke v. Davey*" because "[o]ften enough the same facts can be described both ways" depending on perspective and "[t]he distinction blurs . . . when stared at too long."[94] As just described, the situations in both *Locke* and *Trinity Lutheran* can be described in both use and status terms, depending on the perspective one chooses to take in approaching and defining the issue. As hit on by Justice Gorsuch, the fundamental problem with the Chief Justice's logic is that these fine distinctions begin to blur at the margins. And in which category an issue is placed becomes greatly a matter of interpretation and idiosyncratic application. Such shifting tides are hardly the judicial bedrock upon which successful jurisprudence is based.[95]

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91. Although writing to concur with the Chief Justice, Justice Gorsuch's true heart appeared to be in overruling *Locke* entirely. *See Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring) ("[T]he general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else.").

92. *Id.* at 2025.

93. *Id.*

94. *Id.* at 2025–26. To add color and rhetorical flourish to this point, Justice Gorsuch gave the example of "whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him)." *Id.*

95. The difficulty is all the more compounded because this decision threatens an unacknowledged revolution in the Court's Establishment Clause jurisprudence. Religious status is the sine qua non of cases arising under the Establishment Clause. It is the challenge to laws of conduct on the basis of their religious implications or character that brings them under the Establishment Clause's ambit in the first place. State action pursuant to the rules laid down in many long-since-decided cases might not be able to withstand renewed judicial analysis if challenged before a court under Chief Justice Roberts's reformulation of Free Exercise principles. In *McCollum v. Board of Education*, private religious teachers were prohibited from providing religious education to students on public school grounds during school hours. 333 U.S. 203, 206, 212 (1948). Were these teachers prohibited because they wanted to teach religious doctrine, or were they prohibited because they were religious people who wanted to teach children? In *Edwards v. Aguillard*, a public education law was struck down because it required teaching creation science if evolutionary theory were also to be taught. 482 U.S. 578, 581–82 (1987). Was the law at issue held to be improper because it required teaching a religious doctrine or because the particular doctrine it concerned was a religious one? In *County of Allegheny v. ACLU*, the display of a nativity scene in a courthouse was held to be unconstitutional. 492 U.S. 573, 601–02 (1989). Was this religious iconography improper because it was being used to share a religious message, or was it improper because the message it shared was religious? Although we might content ourselves by saying such cases fall on the use side of the Chief Justice's ledger, as Justice Gorsuch cautions and as these examples demonstrate, the distinctions blur at the margins, and all it might take would be the right facts and the right framing, and a receptive court. After all, compare the diametrically opposite conclusions reached in *Locke* and *Trinity Lutheran* despite shockingly similar fact patterns.

VI. *Trinity Lutheran*'s Glossing Over of the Establishment Clause

But one more aspect of the *Trinity Lutheran* decision demands discussion: the Establishment Clause. It is not even certain that *Trinity Lutheran* properly belongs in the "play in the joints" between the Religion Clauses established by *Locke* in the first place. The Court seemed content to proceed from the premise that it was to be taken for granted that the State of Missouri *could* have awarded Scrap Tire Program grants to religious institutions like Trinity Lutheran Church without infringing the Establishment Clause; the parties themselves had stipulated to no less.[96] But as perceptively reminded by Justice Sotomayor in dissent, "[c]onstitutional questions are decided by [the Supreme Court], not the parties' concessions."[97]

If the Establishment Clause stands for anything, it is the basic premise that public funds cannot be used for the financial support of religious activities.[98] As no less than Thomas Jefferson wrote, it was intended to erect "a wall of separation between Church and State."[99] Since the founding of the Republic, direct procurement of taxpayer funds was considered "one of the hallmarks of 'established' religion."[100] The recognized danger, in the words of James Madison,[101] was that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one

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96. *Trinity Lutheran*, 137 S. Ct. at 2019.

97. *Id.* at 2028 (Sotomayor, J., dissenting).

98. *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) ("Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."); *see also* Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring) (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 847 (1995)) ("[O]ur decisions 'provide no precedent for the use of public funds to finance religious activities.'").

99. Reynolds v. United States, 98 U.S. 145, 164 (1878).

100. Locke v. Davey, 540 U.S. 712, 722 (2004). In one famous example, during the Confederation era, Patrick Henry had proposed before the Virginia Legislature "A Bill Establishing A Provision for Teachers of the Christian Religion" that would assess a tax for "Christian teachers" for the purposes of supporting them in their function as teachers of Christianity. *Id.* at 722 n.6; James Madison, *Memorial and Remonstrance Against Religious Assessments, [ca. 20 June] 1785*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-08-02-0163#JSMN-01-08-02-0163-fn-0001 [https://perma.cc/N79K-VFR9] [hereinafter *Memorial and Remonstrance*]. After a public outcry, this act was rejected, and in its stead was enacted the "Virginia Bill for Religious Liberty," written by Thomas Jefferson and providing "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." *Locke*, 540 U.S. at 722 n.6. This statute would become the conceptual model for the Religion Clauses contained within the First Amendment. Merrill D. Peterson, *Jefferson and Religious Freedom*, ATLANTIC MONTHLY (Dec. 1994) https://www.theatlantic.com/past/docs/issues/96oct/obrien/peterson.htm [https://perma.cc/BUE8-TZPX].

101. Madison is of course widely regarded as the "Father of the Constitution" as "[n]o other delegate was better prepared for the Federal Convention of 1787, and no one contributed more than Madison to shaping the ideas and contours of the document or to explaining its meaning." Colleen Sheehan, *James Madison: Father of the Constitution*, 8 MAKERS OF AMERICAN POLITICAL THOUGHT 1 (2013).

establishment, may force him to conform to any other establishment."[102] Basically, if the government possesses the authority to force you to pay for a church, it can force you to abide by its precepts and engage in its observances. Since the Founders believed faith to be "a personal matter, entirely between an individual and his god,"[103] such a notion amounted to no less than spiritual tyranny, perhaps the worst kind of tyranny imaginable, and hostile to religious freedom.[104] But such cautions were not thought to be merely in aid of the freedom of conscience, but of the vitality of religious practice itself. Government mandated support for all or any religion was thought only to weaken the faithfuls' "confidence in [their faith's] innate excellence."[105] It would also create "suspicion that its friends are too conscious of its fallacies to trust it to its own merits."[106]

In light of this history, it is no surprise that a line of Supreme Court cases have held that when public funds flow directly from public coffers to houses of worship, the Establishment Clause has been infringed. Houses of worship, such as churches, are a core component of religious expression and activity. Within their walls, the faithful, united by shared belief, convene "to shape [their] own faith and mission,"[107] and to evangelize to the as-yet unconverted. "When a government funds a house of worship, it underwrites this religious exercise."[108]

In *Agostini v. Felton*,[109] the Court announced that government aid that has the "'effect' of advancing . . . religion" violates the Establishment Clause.[110] For instance, the federal program at issue in *Tilton v. Richardson*[111] provided grants to colleges and universities for facilities construction. But it contained a prohibition on using those grants to construct facilities "used for sectarian instruction or as a place for religious worship. . . ."[112] To enforce this provision, the government was permitted to recover the value of the grant if within twenty years the grantee reneged and used a building so constructed

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102. *Memorial and Remonstrance*, *supra* note 100.

103. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2033 (2017) (Sotomayor, J., dissenting).

104. *See Memorial and Remonstrance*, *supra* note 100 (arguing that a bill to establish "a provision for Teachers of the Christian Religion" was incompatible with the "free exercise of Religion according to the dictates of Conscience").

105. *Id.* at 83.

106. *Id.*; *see also* John Leland, *The Rights of Conscience Inalienable*, *in* THE SACRED RIGHTS OF CONSCIENCE 337–40 (Daniel Dreisbach & Mark D. Hall eds., 2009) (arguing that "truth gains honor; and men more firmly believe it" when faith is arrived at by means of "cool investigation and fair argument").

107. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).

108. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2029 (2017) (Sotomayor, J., dissenting).

109. 521 U.S. 203 (1997).

110. *Id.* at 222–23.

111. 403 U.S. 672 (1971).

112. *Id.* at 675 (quoting 20 U.S.C. § 751(a)(2)(C) (2012)).

for such impermissible purposes.[113] This time limitation was held unconstitutional because "the original federal grant w[ould] in part have the effect of advancing religion" as it permitted the grantee to "convert[] [the facility] into a chapel or otherwise use [it] to promote religious interests" after the twenty years had elapsed.[114] Instead, in *Trinity Lutheran*, the Court expressly condones using public money to promote and improve the facilities of a church as such.

It is true that a separate line of cases permits government funding to sectarian institutions where that funding is to be used for purely secular purposes.[115] Presumably to this end, the Scrap Tire Program at issue in *Trinity Lutheran* required an applicant to certify that it would put the program's funds only to a secular use.[116] But Trinity Lutheran had "not offered any such assurances to this Court."[117] Instead, Trinity Lutheran[118] states proudly that its Learning Center functions as "a ministry of the church and incorporates daily religion and developmentally appropriate activities into . . . [its] program" and that "[t]hrough the Learning Center, the Church teaches a Christian world view to children of members of the Church, as well as children of non-member residents."[119] And in fact as part of its very application to the Department to participate in the Scrap Tire Program, Trinity Lutheran specified that the Learning Center's mission was "to provide a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow *spiritually*, physically, socially, and cognitively."[120] It is by no means beyond reason that "developmentally appropriate" religious education encouraging the "spiritual" growth of elementary school students could very well take place on a playground. Nor is it unreasonable to think that the religiously oriented community the Church seeks to manifest[121] finds expression and reinforcement between and amongst children, their teachers, and their parents, on the playground. Given the

113. *Id.*

114. *Id.* at 683.

115. *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13–14 (1993) (allowing publically funded sign language interpreters for students in parochial schools).

116. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2029 n.3 (2017) (Sotomayor, J., dissenting).

117. *Id.* at 2030 n.3.

118. The Trinity Lutheran Church represents that it "operates . . . for the express purpose of carrying out the commission of . . . Jesus Christ as directed to His church on earth." *Our Story*, TRINITY LUTHERAN CHURCH, http://www.trinity-lcms.org/story [https://perma.cc/CT3Q-QNQ2].

119. *Trinity Lutheran*, 137 S. Ct. at 2027 (Sotomayor, J., dissenting). The Church further holds a "sincere religious belief . . . to use [the Learning Center] to teach the Gospel to children of its members, as well to bring the Gospel message to non-members." *Id.* at 2027–28.

120. *Trinity Lutheran*, 137 S. Ct. at 2018 (emphasis added).

121. *See Mission-Vision-Motto*, TRINITY LUTHERAN CHURCH, https://www.trinity-lcms.org/mission [https://perma.cc/5QLJ-8TEN] ("Trinity Lutheran Church will grow as a loving, caring, nourishing, family-oriented, and connected community as we share in the Gospel, the Sacraments, and church life.").

pervasive religious mission of the Learning Center, there is no certainty that the use of the new playground could be limited to secular purposes any more than the use of any of its other facilities.[122] The invasive nature of ensuring religiously oriented institutions like the Learning Center do not put public funds to parochial uses evokes exactly the sort of excessive entanglements disavowed by the Court in announcing its famous "*Lemon* Test" in *Lemon v. Kurtzman*.[123] The majority should have acknowledged this danger and at the very least engaged in an Establishment Clause analysis before simply proceeding to the Free Exercise issue simply on the say-so of the parties.

VII. Conclusion

The Court's opinion in *Trinity Lutheran* is thus wrong on two fronts. First, it glosses over the significant Establishment Clause considerations lurking under the surface. The Founders of our country knew of the dangers of state-sanctioned and state-established churches. They wrote into the Bill of Rights a provision designed exactly to curtail such practices. The Founders were directly motivated by exactly what was at issue in *Trinity Lutheran*: the provision of public funds directly from public coffers to support churches as institutions. Two hundred years' jurisprudence has drawn contours and distinctions around an otherwise absolute prohibition. But the Court neglected to do even its due diligence in addressing these concerns and explaining why in its view requiring the State of Missouri to provide funds to improve facilities on church grounds was not improper under the Establishment Clause. Even if the Court were ultimately to have concluded the requirement was not thereby improper, it owed the American people an explanation, if for no other reason than to settle further the doctrines to be applied in future cases.

Second, Chief Justice Roberts's opinion misapprehends the nature of *Locke v. Davey* and its holding. *Locke* was not concerned with the kind of facile distinctions between status and use that the majority derived to argue its way out of binding, on-point precedent. Instead, *Locke* spoke to the far broader issue of balancing the inherent tension that exists between prohibiting the establishment of religion by the state on the one hand, and guaranteeing religion's free exercise by the individual on the other. This balance does not resolve itself through such hairsplitting distinctions represented by *Trinity Lutheran*, as recognized by Justice Gorsuch. Instead, as *Locke* properly stands for, when the government denies direct financial

122. *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973) ("No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions.").

123. 403 U.S. 602 (1971). The third prong of the *Lemon* Test is that the government conduct "must not foster 'an excessive government entanglement with religion.'" *Id.* at 613 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

backing to a religious institution out of its interest in antiestablishment, it does not thereby evince the kind of hostility towards religion that is the hallmark of free exercise ideals. To paraphrase Justice Scalia's concurrence in *Pleasant Grove City v. Summum*,[124] the state ought not fear that escaping the establishment frying pan by upholding core antiestablishment principles through denying religion direct aid propels it into the free exercise fire.[125] The conclusion of the Court in *Trinity Lutheran* was therefore incorrect and ought to be revised and reversed in the future.

Andrew A. Thompson

124. 555 U.S. 460 (2009).

125. *Id.* at 482 (Scalia, J., concurring).

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