Texas Law Review

Articles

Book Reviews

Notes

February 2015 Vol. 93 No. 3 Pages 557 to 788

Texas Law Review (ISSN 0040-4411) is published seven times a year—November, December, February, March, April, May, and June. The annual subscription price is $47.00 except as follows: Texas residents pay $50.88, and foreign subscribers pay $55.00. All publication rights are owned by the Texas Law Review Association. *Texas Law Review* is published under license by The University of Texas at Austin School of Law, P.O. Box 8670, Austin, Texas 78713. Periodicals Postage Paid at Austin, Texas, and at additional mailing offices.

POSTMASTER: Send address changes to The University of Texas at Austin School of Law, P.O. Box 8670, Austin, Texas 78713.

Complete sets and single issues are available from WILLIAM S. HEIN & CO., INC., 1285 MAIN ST., BUFFALO, NY 14209-1987. Phone: (800) 828-7571.

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The *Texas Law Review* is pleased to consider unsolicited manuscripts for publication but regrets that it cannot return them. Please submit a single-spaced manuscript, printed one side only, with footnotes rather than endnotes. Citations should conform with *The Greenbook: Texas Rules of Form* (12th ed. 2010) and *The Bluebook: A Uniform System of Citation* (19th ed. 2010). Except when content suggests otherwise, the *Texas Law Review* follows the guidelines set forth in the *Texas Law Review Manual on Usage & Style* (12th ed. 2011), *The Chicago Manual of Style* (16th ed. 2010), and Bryan A. Garner, *Black's Law Dictionary* (10th ed. 2014).

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Texas Law Review

Volume 93 2014–2015

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Texas Law Review

Volume 93, Number 3, February 2015

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Articles

Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform

Jill E. Fisch,* Sean J. Griffith** & Steven Davidoff Solomon***

Shareholder litigation challenging corporate mergers is ubiquitous, with the likelihood of a shareholder suit exceeding 90%. The value of this litigation, however, is questionable. The vast majority of merger cases settle for nothing more than supplemental disclosures in the merger proxy statement. The attorneys that bring these lawsuits are compensated for their efforts with a court-awarded fee. This leads critics to charge that merger litigation benefits only the lawyers who bring the claims, not the shareholders they represent. In response, defenders of merger litigation argue that the lawsuits serve a useful oversight function and that the improved disclosures that result are beneficial to shareholders.

This Article offers a new approach to assessing the value of these claims by empirically testing the relationship between merger litigation and shareholder voting on the merger. If the supplemental disclosures produced by the settlement of merger litigation are valuable, they should affect shareholder voting behavior. Specifically, supplemental disclosures that are, in effect, "compelled" by settlement should produce new and unfavorable information about the merger and lead to a lower percentage of shares voted in favor of it. Applying this hypothesis to a hand-collected sample of 453 large public

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company mergers from 2005 to 2012, we find no such effect. We find no significant evidence that disclosure-only settlements affect shareholder voting.

These findings warrant a reconsideration of Delaware merger law. Specifically, under current law, supplemental disclosures are viewed by courts as providing a substantial benefit to the shareholder class. In turn, this substantial benefit entitles the plaintiffs' lawyers to an award of attorneys' fees. Our evidence suggests that this legal analysis is misguided and that supplemental disclosures do not in fact constitute a substantial benefit. As a result, and in light of the substantial costs generated by public-company merger litigation, we argue that courts should reject disclosure settlements as a basis for attorneys' fee awards.

Our approach responds to critiques of merger litigation as excessive and frivolous by reducing the incentive for plaintiffs' lawyers to bring weak cases, but it would have an additional benefit. Current practice drags state court judges into the task of indirectly promulgating disclosure standards in connection with the approval of fee awards. We argue, instead, for a more efficient specialization between state and federal courts in the regulation of mergers: public company merger disclosure should be policed by the federal securities laws while state corporate law focuses on substantive fairness.

> It is a fact evident to all of those who are familiar with shareholder litigation that surviving a motion to dismiss means, as a practical matter, that economical rational defendants . . . will settle such claims, often for a peppercorn and a fee.[1]
>
> —Chancellor William T. Allen in *Solomon v. Pathe*

Introduction

Deal litigation is pervasive in the United States. Multiple teams of plaintiffs file lawsuits challenging virtually every public company merger,[2] often in multiple jurisdictions.[3] Moreover, the frequency of merger litigation has risen sharply over the last several years.[4] In 2012, 93% of

1. Solomon v. Pathe Commc'ns Corp., No. CIV. A. 12563, 1995 WL 250374, at *4 (Del. Ch. Apr. 21, 1995) (footnote omitted).

2. Both our empirical analysis and the policy proposals in this Article are limited to mergers that involve publicly traded target companies. We do not address the role of litigation in policing mergers involving private companies.

3. *See infra* note 214 and accompanying text.

4. *See* Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 469 (2015) (reporting that although only 39.3% of transactions incurred litigation in 2005, the frequency of litigation had risen to 92.1% by 2011).

deals over $100 million and 96% of deals over $500 million were challenged in shareholder litigation.[5] In 2013, the frequency was even higher—97.5% of deals over $100 million were challenged through litigation, and each transaction triggered an average of seven separate lawsuits.[6]

Although deal litigation is pervasive, these lawsuits rarely result in a monetary recovery for the plaintiff class. Rather, the vast majority end in settlement or dismissal. In most settled cases, the only relief provided to shareholders consists of supplemental disclosures in the merger proxy statement.[7] In compensation for the benefit produced by these settlements—often worth no more, in the words of a famous jurist, than a "peppercorn"—plaintiffs' attorneys receive a fee award.[8]

The dynamic, in which every deal is challenged but only the lawyers get paid, has led to widespread skepticism concerning the value of public company merger litigation among both academic and professional commentators.[9] The view underlying much of this skepticism is that litigation

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5. ROBERT M. DAINES & OLGA KOUMRIAN, CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS 1 & fig.1 (2013), *available at* http://cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Mergers-and-Acqui, *archived at* http://perma.cc/TRL8-QNTK?type=pdf; *see also* Matthew D. Cain & Steven M. Davidoff, Takeover Litigation in 2012, at 1–2 & tbl.A (Feb. 1, 2013) (unpublished manuscript), *available at* http://ssrn.com/abstract=2216727, *archived at* http://perma.cc/X8HD-PLHC (finding approximately 92% of deals over $100 million resulted in merger litigation in 2012).

6. Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2013*, at 1–2 & tbl.A (Moritz Coll. of Law Ctr. for Interdisciplinary Law & Policy Studies, Public Law & Legal Theory Working Paper Series No. 236, 2014), *available at* http://ssrn.com/abstract=2377001, *archived at* http://perma.cc/XP2B-8C8B.

7. *See* DAINES & KOUMRIAN, *supra* note 5, at 6 fig.7 (finding that shareholders received only supplemental disclosures in 75%–88% of settlements between 2009 to 2012); Cain & Davidoff, *supra* note 5, at 4 (finding that disclosure-only settlements accounted for over 80% of all settlements in 2012); Ann Woolner et al., *When Merger Suits Enrich Only Lawyers*, BLOOMBERG (Feb. 16, 2012, 12:59 PM), http://www.bloomberg.com/news/2012-02-16/lawyers-cash-in-while-investor-clients-get-nothing-in-merger-lawsuit-deals.html, *archived at* http://perma.cc/32HY-A22M (reporting that 70% of merger lawsuits in Delaware during 2010 and 2011 made money for plaintiffs' attorneys but not their clients). The supplemental disclosure may be a part of the target company's proxy statement or prospectus or, in some cases, the target's Schedule 14D-9. For brevity, we will refer to all of these collectively as the "proxy."

8. Solomon v. Pathe Commc'ns Corp., No. CIV. A. 12563, 1995 WL 250374, at *4 (Del. Ch. Apr. 21, 1995).

9. *See, e.g.*, JOEL C. HAIMS & JAMES J. BEHA, II, RECENT DECISIONS SHOW COURTS CLOSELY SCRUTINIZING FEE AWARDS IN M&A LITIGATION SETTLEMENTS 1 (2013) (noting that shareholder suits follow virtually every major merger announcement and the payment of attorneys' fees has essentially become a tax on significant mergers and acquisitions), *available at* http://www.mofo.com/files/Uploads/Images/130418-In-the-courts.pdf, *archived at* http://perma.cc/9NBW-VL2S; Phillip R. Sumpter, *Adjusting Attorneys' Fee Awards: The Delaware Court of Chancery's Answer to Incentivizing Meritorious Disclosure-Only Settlements*, 15 U. PA. J. BUS. L. 669, 688–91 (2013) (describing four types of criticism the Chancery Court has expressed); David

that returns no monetary recovery to the plaintiff class must be without merit.[10] Equating merit and monetary recovery, however, implicitly dismisses the value of nonpecuniary relief. Such nonpecuniary relief may be valuable to shareholders, but it is hard to determine its value.

Importantly, Delaware law explicitly recognizes the potential value of nonpecuniary relief in its litigation incentive structure. Delaware courts award legal fees to plaintiffs' attorneys on the basis of lawsuits that provide nonpecuniary relief to the plaintiff class as long as that relief constitutes a corporate benefit.[11] Nevertheless, Delaware courts recognize that the value of nonpecuniary benefits is difficult to quantify. Courts refer to the value of amendments and supplemental disclosures as "qualitative" and "intangible," meaning, essentially, that they cannot be measured.[12] Without a metric for the value of nonpecuniary relief, it is difficult to determine the utility of the litigation and, in particular, to determine the extent to which courts, by awarding fees, should encourage the pursuit of litigation that tends to result in nonpecuniary settlements.[13]

In this Article, we offer a way out of the impasse. We propose that the value of nonpecuniary relief in merger settlements be measured by its effect on shareholder voting. Because nonpecuniary relief takes three basic forms in the context of merger litigation—settlements that amend the terms of the merger (amendment settlements); settlements that provide only supplemental disclosures (disclosure-only settlements); and settlements which provide for an increase in the merger consideration (consideration-increase settlements)—we separate each and test their effect on how shareholders

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H. Webber, *Private Policing of Mergers and Acquisitions: An Empirical Assessment of Institutional Lead Plaintiffs in Transactional Class and Derivative Action*, 38 DEL. J. CORP. L. 907, 909–10 (2014) (exploring the debate among commentators about the utility of merger litigation); Robert M. Daines & Olga Koumrian, *Merger Lawsuits Yield High Costs and Questionable Benefits*, DEALBOOK, N.Y. TIMES (June 8, 2012, 10:38 AM), http://dealbook.nytimes.com/2012/06/08/merger-lawsuits-yield-high-costs-and-questionable-benefits/, *archived at* http://perma.cc/8V7J-2B6Z (stating that deal litigation may "impose excessive costs on the companies involved and their shareholders" while delivering uncertain benefits).

10. *E.g.*, Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKELEY BUS. L.J. 55, 56–59 (2014).

11. Delaware law provides that the court may award plaintiffs' counsel a fee, payable by the corporate defendant, when the litigation produces a benefit to the corporation and its shareholders. Sugarland Indus., Inc. v. Thomas, 420 A.2d 142, 147 (Del. 1980).

12. *In re* Sauer–Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1136 (Del. Ch. 2011).

13. *See, e.g.*, Transcript of Settlement Hearing and Rulings of the Court at 44, *In re* Gen-Probe S'holders Litig., No. 7495-VCL (Del. Ch. Apr. 10, 2013) [hereinafter *Gen-Probe* Transcript] ("I recognize that the policy is to encourage stockholder champions to bring meritorious litigation but not to confer unwholesome windfalls that result in excessive and unwarranted lawsuits.").

vote on the deal.[14] Our core hypotheses are as follows: First, because amendments should improve the terms of the merger or the quality of the procedures used in reaching a final agreement, amendment settlements should increase shareholder voting in favor of the merger. In contrast, because forced disclosures should produce negative information about the merger, we hypothesize that disclosure-only settlements should decrease shareholder voting in favor of the merger.

Our empirical tests draw upon a hand-collected sample of 453 mergers involving publicly traded target companies announced from 2005 and completed through 2012 along with proxy-voting statistics provided to us by Institutional Shareholder Services (ISS) over the same period. Although in theory it would be best to test the effect of nonpecuniary relief by comparing shareholder votes before and after the settlement, such a comparison is not possible because shareholder votes are tallied only once, when the polls are closed at the meeting to approve the merger agreement. As a result, our tests take the form of regressions. Our regression analyses compare votes cast in cases involving amendment settlements and disclosure-only settlements to votes in other mergers.

Our tests yield two main empirical results. First, we find weak support for our first hypothesis—that is, that amendment settlements increase shareholder voting in favor of a transaction. Second, and more importantly, we find no support for the second hypothesis—that is, disclosure-only settlements do not appear to affect shareholder voting in any way. We also find only weak evidence that consideration-increase settlements increase shareholder voting in favor of a transaction. To gauge the significance of our findings, we also tested the effect of several other variables on shareholder voting, including transaction size and premium paid, the proxy advisors' recommendation and institutional ownership, and the jurisdiction of settlement. We find that transaction value and the proxy advisors' recommendation have a significant effect on shareholder voting; the other variables do not.

The implication of these findings is clear. If disclosure settlements do not affect shareholder voting, it is difficult to argue that they benefit shareholders. Accordingly, the basis upon which courts are awarding fees to plaintiffs' counsel disappears. Moreover, the illusory benefit of supplemental disclosure must be weighed against the clear cost of merger litigation—including litigation expense as well as delay and uncertainty. Accordingly, our Article proposes that the Delaware courts stop awarding fees for disclosure-only settlements. This reform would reduce the

14. Some settlements provide for a combination of relief. We treat settlements that both amend the merger agreement and provide supplemental disclosures as "amendment settlements." *See infra* note 137.

incentive for plaintiffs' attorneys to bring weak merger cases. To the extent that merger disclosures are meaningfully deficient, we argue that plaintiffs should be required to litigate challenges to disclosure quality under the federal securities laws. This would have the effect of efficiently specializing litigation challenges while reducing plaintiffs' counsels' ability to use disclosure as a negotiating point to justify a fee award.

We also argue that state court merger litigation has had the perverse effect of creating a substantive state law of disclosure that is litigated almost exclusively within the artificial context of settlement approval rather than in truly adversarial proceedings. This state law exists within the shadow of federal regulation of mergers, which imposes extensive and explicit disclosure obligations on publicly traded companies. We suggest that the duplication is unnecessary and problematic. Specifically, federal law is expressly tailored to achieving an appropriate balance in disclosure requirements and addressing disclosure deficiencies that are substantially likely to influence the voting decision—that is, material misrepresentations or omissions. In contrast, Delaware law creates an incentive for litigants to generate, and judges to reward, throwaway disclosures that are designed simply to end litigation and generate a release.[15] These settlements produce disclosures that do not matter to shareholders but are instead simply "useful gravy."[16]

Our recommendation would restore merger litigation to the balance articulated by the United States Supreme Court in *Santa Fe v. Green*.[17] In *Santa Fe v. Green*, the Court limited the federal securities law cause of action to challenges to disclosure quality, holding that challenges to the adequacy of the merger consideration should be litigated under state law.[18] We argue that the Delaware courts should reach a similar result—a type of consensual preemption—by concluding that claims about the adequacy of merger disclosure should be litigated under federal law and subject to the materiality threshold and other procedural requirements associated with federal litigation. This efficient specialization would leave for state law issues concerning the fairness of the merger terms.

This Article fits within the body of scholarly literature on representative litigation generally and shareholder litigation in particular.[19]

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15. *See* Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1065 (2013) (describing this dynamic).

16. *Gen-Probe* Transcript, *supra* note 13, at 27.

17. Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977).

18. *Id.* at 479–80.

19. *See, e.g.*, John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications for Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669, 677 (1986) (characterizing plaintiffs' lawyers in representative litigation as "private attorneys general" and theorizing that the litigation and settlement patterns

This literature has frequently questioned the extent to which representative litigation produces meaningful value for plaintiffs.[20] Although many articles criticize merger litigation, to our knowledge none supports its conclusion with empirical evidence on the relationship between merger litigation and shareholder voting.

The remainder of this Article proceeds as follows. In Part I we describe the dynamics of merger litigation and note, in particular, the role that courts have played in encouraging litigation challenges through the terms on which they approve settlements and fee awards. Part I explicitly identifies the motivation for our empirical tests: the assumption that these settlements provide a benefit to plaintiff shareholders. In Part II we report our empirical results. Most significantly, we find that amendment settlements affect shareholder voting but that disclosure settlements do not. In Part III we consider the public policy implications of our findings. Part IV identifies and responds to possible objections to our proposa, and in Part V, we briefly sketch out possible methods for implementation. We conclude that Delaware courts should abandon the practice of compensating plaintiffs' lawyers for disclosure-only settlements.

I. Merger Litigation and Disclosure-Only Settlements

A. The Anatomy of a Merger Claim

State court merger litigation is premised upon the traditional fiduciary duties that target-company officers and directors owe to the company's shareholders[21] in connection with an acquisition, merger, or other business

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will reflect their private incentives). Much empirical work on shareholder litigation is devoted to securities fraud class actions. *E.g.*, Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465 (2004); James D. Cox & Randall S. Thomas, *Mapping the American Shareholder Litigation Experience: A Survey of Empirical Studies of the Enforcement of the U.S. Securities Law*, 6 EUR. COMPANY & FIN. L. REV. 164 (2009).

20. *See, e.g.*, Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343, 1347–48 (2005) (describing coupon settlements of dubious value including one where attorneys received $1.75 million and consumers received a free box of Cheerios if they kept the original grocery receipt to prove purchase); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 84–85 (1991) (concluding that "shareholder litigation is a weak, if not ineffective, instrument of corporate governance"); Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797, 1822, 1855–56 (2004) (examining 104 merger class actions filed in Delaware between 1999 to 2001 and finding that merger litigation is lawyer driven, resulting in opportunistic filing and settlement of claims).

21. Although the shareholders of both target and acquiring companies may be unhappy about a planned merger, target shareholders are the typical plaintiffs in merger litigation. In part, this is because target-company shareholders can typically bring a direct action, while the acquirer's shareholders can only bring a derivative suit in the name of the corporation, which is subject to a variety of procedural limitations. Notably, Delaware law has imposed distinctive duties on target-company boards in the merger context. *See* Paramount Commc'ns Inc. v. QVC Network, Inc.,

combination.[22] In recent years this type of claim has proliferated.[23] State law fiduciary duties encompass several types of claims. In friendly deals,[24] the typical claims are a breach of the duty of care and a failure to act in good faith, based on allegations that the board failed to work diligently to maximize the merger price.[25] The transaction may also trigger a related *Revlon*[26] claim. Claims in the context of a controlling shareholder add more traditional allegations of duty-of-loyalty violations.[27] Finally, shareholders can allege violations of the board's state law duty of disclosure.[28]

The Delaware courts developed the scope of directors' state law disclosure obligations fairly recently.[29] Although the courts have long

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637 A.2d 34, 42 (Del. 1994) (requiring enhanced scrutiny in a stock transaction in which the target company went from being diffusely held to coming under the influence of a controlling shareholder); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 181–84 (Del. 1986) (proscribing enhanced scrutiny in a cash transaction involving a break up of the target company); Weinberger v. UOP, Inc., 457 A.2d 701, 711–15 (Del. 1983) (requiring fair dealing and fair price in non-arm's length transactions). *But see* J. Travis Laster, Revlon *is a Standard of Review: Why It's True and What It Means*, 19 FORDHAM J. CORP. & FIN. L. 5, 7 (2013) (criticizing the so-called "*Paramount* doctrine" and seeking to articulate a new basis for enhanced scrutiny).

22. For the sake of brevity, we refer to all of these transactions collectively as "mergers."

23. *See supra* notes 4–6 and accompanying text.

24. Our analysis does not focus on hostile litigation, which raises independent bases for litigation. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 953–54 (Del. 1985) (articulating the legal principles applicable in a challenge to a board's adoption of defensive measures initiated in response to a takeover attempt).

25. *See, e.g.*, Robert Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 143, 145–47 (2004).

26. Revlon, 506 A.2d at 182.

27. Thompson & Thomas, *supra* note 25, at 196.

28. A target board has a disclosure obligation under Delaware law that stems both from the statute and from the board's fiduciary duty. *See In re* Primedia, Inc. S'holders Litig., 67 A.3d 455, 495 (Del. Ch. 2013) (distinguishing "the statutory obligation to maintain a current and candid merger recommendation . . . and the fiduciary duty to disclose material information when seeking stockholder action"). The statutory duty to disclose in connection with merger transactions arises from the requirement that the board make a recommendation concerning the advisability of an intended merger transaction to the shareholders entitled to vote thereon. *See* DEL. CODE ANN. tit. 8, § 251(b) (2011) (requiring that the board adopt the agreement and declare its advisability prior to the shareholder vote). *See generally* Lawrence A. Hamermesh, *Calling Off the* Lynch *Mob: The Corporate Director's Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087, 1163 (1996) (describing the fiduciary duty of disclosure as "an obligation to use reasonable care in presenting a recommendation for stockholder action and in gathering and disseminating corporate information in connection with that recommendation"). Because shareholders cannot act without information, courts have interpreted the statute to require that the board "disclose fully and fairly all material information within the board's control when it seeks shareholder action." Stroud v. Grace, 606 A.2d 75, 84 (Del. 1992).

29. It is likely that the source is the Delaware Supreme Court's decision in *Stroud v. Grace*. *See* Hamermesh, *supra* note 28, at 1089–91 (describing the development of the duty of disclosure under Delaware corporation law following *Stroud*). Seeds of a broader disclosure duty under Delaware law appear much earlier. For example, Elliott Weiss and Lawrence White characterize the Court's decision in *Lynch v. Vickers Energy Corp.*, 383 A.2d 278 (Del. 1977), as moving

recognized that the board in a merger is responsible for providing shareholders with sufficient information to approve or reject the transaction on an informed basis,[30] the suggestion that directors have an independent duty of disclosure and that directors can breach that duty by failing to provide shareholders with information material to the vote is of recent vintage.[31]

Plaintiffs in merger litigation typically ask for equitable relief—most often in the form of an injunction barring consummation of the transaction or requiring a substantial revision of its terms, such as a higher price.[32] The suits are filed during the pendency of the transaction—usually within days of the public announcement of the merger.[33] Most of the litigation effort, motions practice, and expedited discovery takes place during the relatively brief window between the merger filing and its closing.[34] Because claims that are not resolved on motions or settled prior to closing can theoretically be litigated long after closing, creating a potentially significant contingent liability, defendants have a strong incentive to resolve merger claims before

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"Delaware law from a posture of requiring less disclosure than federal law requires to a posture of requiring more." Elliott J. Weiss & Lawrence J. White, *Of Econometrics and Indeterminacy: A Study of Investors' Reactions to "Changes" in Corporate Law*, 75 CALIF. L. REV. 551, 572 (1987).

30. The seminal case for this proposition is *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), which held that a board had breached its fiduciary duty by failing to disclose the parameters of the negotiations leading to the company's sale. *Id.* at 890–92.

31. Delaware's focus on disclosure can be traced to a series of recent cases that required enhanced disclosure in investment banker fairness analysis, as well as in private equity and other conflicted interest transactions. *See, e.g.*, *In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 449–50 (Del. Ch. 2002) (requiring that a target disclose in a tender offer the underlying information used in preparation of a fairness opinion received by its board). *See generally* Lloyd L. Drury, III, *Private Equity and the Heightened Fiduciary Duty of Disclosure*, 6 N.Y.U. J.L. & BUS. 33, 45–48 (2009) (discussing the heightened duty of disclosure employed in Delaware private equity cases in recent years); Blake Rohrbacher & John Mark Zeberkiewicz, *Fair Summary: Delaware's Framework for Disclosing Fairness Opinions*, 63 BUS. LAW. 881 (2008) (explaining the duty of disclosure in Delaware law in general and specifically addressing how the duty affects fairness opinions).

32. *See, e.g.*, Verified Amended Class Action Complaint for Breach of Fiduciary Duty at 27, Schacher v. Clausen, No. 8396-VCL (Del. Ch. Mar. 21, 2013) [hereinafter *Sauer–Danfoss* Complaint] (seeking to have the proposed merger permanently enjoined).

33. *See, e.g.*, *In re* Sauer–Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1119 (Del. Ch. 2011) (noting that plaintiffs filed their complaint challenging the merger "hours after" the merger plan was announced); DAINES & KOUMRAIN, *supra* note 5, at 1 (explaining that, for lawsuits filed in 2012, "[t]hese lawsuits were filed an average of 14 days after the merger announcement, with plaintiff firms sometimes announcing investigations within hours of the merger announcement").

34. WILMER CUTLER PICKERING HALE & DORR LLP, 2013 M&A REPORT 17 (2013), *available at* http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/2013-wilmerhale-ma-report.pdf, *archived at* http://perma.cc/EN4X-4DGK ("Discovery in these cases can be very fast paced and compressed, since plaintiffs will seek expedited discovery before the shareholder vote on the transaction.").

the merger closes.[35] Empirical studies confirm these incentives, finding that nearly 70% of merger claims settle while the rest are dismissed.[36] The vast majority of the settlements are concluded prior to the closing of the underlying transaction.[37]

Although the complaints in merger cases typically allege that the merger is substantively unfair,[38] few cases result in any monetary recovery for the plaintiff class.[39] Some suits result in amendments to the merger agreement, often to the transaction's deal-protection provisions.[40] The vast majority of suits, however, settle exclusively for supplemental disclosure in the form of additional information in the merger proxy statement.[41] The specific disclosures can vary—they may include details of the negotiating process, the manner in which the investment bankers are being compensated in connection with the deal, or specifics about the manner in which the deal or the target company has been valued, either by the board or its advisers.[42] The supplemental disclosures are provided in an amended proxy statement (Schedule 14A) and are generally disclosed in an 8-K report as well.[43] Commentators typically refer to such settlements, when

35. For an example of a merger case that resulted in a $1.347 billion damage award six years after the deal closed, see *In re* S. Peru Copper Corp. S'holder Derivative Litig., 52 A.3d 761, 766, 819 (Del. Ch. 2011).

36. *E.g.*, Cain & Davidoff, *supra* note 4, at 477.

37. CORNERSTONE RESEARCH, RECENT DEVELOPMENTS IN SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS 9 (2012) [hereinafter RECENT DEVELOPMENTS IN SHAREHOLDER LITIGATION].

38. *See, e.g.*, *Sauer–Danfoss* Complaint, *supra* note 32, at para. 76, at 24 (alleging that, as a result of defendants' breach of fiduciary duty, plaintiffs "have not and will not receive their fair portion of the value of Sauer–Danfoss's assets and will be deprived of a fair process").

39. DAINES & KOUMRIAN, *supra* note 5, at 6 fig.7. In a small number of cases, however, merger litigation can result in substantial damage awards. For example, in 2012, two cases were settled for large money damages—$110 million in the deal between El Paso and Kinder Morgan and $49 million in the acquisition of Delphi Financial Group, Inc. by Tokio Marine Holdings, Inc. *Id.* at 6.

40. *See* Griffith & Lahav, *supra* note 15, at 1093 ("A small number of settlements (approximately thirteen percent) resulted in changes to the merger agreement, most often to the deal-protection provisions . . . ."). Nondisclosure settlements declined to only 12.5% of settlements in 2012. Cain & Davidoff, *supra* note 5, at 4.

41. *See* DAINES & KOUMRIAN, *supra* note 5, at 6 (observing that in 81% of merger cases filed in 2012, the only product of the settlement was additional disclosure); Cain & Davidoff, *supra* note 4, at 478 ("Settlements which only require disclosure constitute 55.1% of the settlement types in the sample and are the most common type of settlement.").

42. *See infra* notes 106–10 and accompanying text.

43. *See, e.g.*, Zygo Corp., Current Report (Form 8-K) (June 6, 2014), *available at* http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?filingid=10039268&tabindex=2&type=html, *archived at* http://perma.cc/Y8DT-DQU9 (disclosing additional information in conjunction with settlement of merger lawsuit).

they are not combined with some other form of relief, as "disclosure-only" settlements,[44] a terminology that we will employ in this Article.

The practical explanation for disclosure-only settlements lies in the financial structure of U.S. shareholder litigation. Although parties to litigation normally must finance their own costs, shareholder suits—both derivative suits and class actions—operate under a long-recognized exception to this so-called "American Rule."[45] Instead the courts have determined that plaintiffs' lawyers in shareholder litigation can have their fees paid directly by the defendant corporation if the litigation results in a "corporate benefit."[46] The key to plaintiffs' counsel recovering fees is the portrayal of the settlement relief as a corporate benefit.[47] In a negotiated settlement, defendants will typically not oppose this characterization, nor will they oppose the sought-after fee award, an important element of the bargain.[48]

Average fee awards for the settlement of merger litigation vary widely. In *Del Monte*,[49] plaintiffs' counsel received one of the largest fee awards—$22.3 million for a case that generated a recovery to the plaintiff of $89.4 million.[50] At the low end of the scale is the recent award of $100,000 in *Gen-Probe*.[51] Given this wide range, reports of average fee awards can easily be misleading. Because most cases settle for disclosure only, however, focusing on disclosure settlements may provide a more realistic view of the incentives under which most plaintiffs' attorneys are operating.

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44. *E.g.*, Sumpter, *supra* note 9, at 678.

45. *In re* Dunkin' Donuts S'holders Litig., No. 10825, 1990 WL 189120, at *3 (Del. Ch. Nov. 27, 1990).

46. *Id.*; *see also infra* subpart I(C).

47. *See supra* note 8 and accompanying text. The corporate benefit doctrine is actually a variant of earlier collective decisions awarding attorneys' fees out of a common fund in cases in which the litigation produced a common fund for the benefit of the corporation or plaintiff class. Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 37–41 (2015).

48. *See In re* Sauer–Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1137 (Del. Ch. 2011) ("'[O]nce a settlement is agreed, the attorneys for the plaintiff stockholders link arms with their former adversaries to defend the joint handiwork.'" (quoting Alleghany Corp. v. Kirby, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting)) (internal quotation marks omitted)); Griffith & Lahav, *supra* note 15, at 1093 ("The approval process that courts follow in determining fees awarded to class counsel is, in an important sense, nonadversarial."); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 46 (1991) (describing settlement hearings as "pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel").

49. *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813 (Del. Ch. 2011).

50. Transcript of Settlement Hearing at 57–58, *Del Monte Foods*, 25 A.3d 813 (No. 6027–VCL) [hereinafter *Del Monte* Transcript].

51. *In re* Gen-Probe Inc. S'holders Litig., No. 7495-VCL, 2013 WL 1465619, at para. 9 (Del. Ch. Apr. 10, 2013).

In disclosure-only settlements, the average requested fee award has declined over the past several years, from an average of $730,000 in 2009 to an average of $540,000 in 2012.[52] Studies show that the average fee awarded in disclosure-only settlements is approximately $500,000.[53]

B. Approving Settlement

Because of the representative nature of merger litigation, the termination of a merger suit by voluntary dismissal or settlement requires court approval.[54] For most cases that are settled, the court's role at a settlement hearing is threefold: the court must approve the certification of the class;[55] the court must assess whether the settlement is fair and reasonable;[56] and the court must decide on the amount of the fee to be awarded to plaintiffs' counsel.[57] While these steps are independent in theory, as a practical matter, they often collapse. If the court determines that the benefits provided by a settlement are illusory, the plaintiff class will not have received any consideration for the releases that accompany a settlement, and the settlement will not be seen as fair.[58] In such a case, the court might properly refuse to approve the settlement. This decision might, however, raise questions about the adequacy with which the class has been represented, suggesting that the court should deny class certification.[59] Similarly, if the court approves the settlement, it has implicitly concluded that the plaintiff class has received something of value, making it difficult to decline to award a fee to class counsel. Notably, the judges in the Delaware Chancery Court are conscious of the incentives that their decisions create with respect to future litigation.[60] As a result, their

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52. DAINES & KOUMRIAN, *supra* note 5, at 9 fig.9.

53. *See, e.g.*, Cain & Davidoff, *supra* note 6, at 4 tbl.B (reporting the mean and median attorneys' fees for disclosure-only settlements in 2013 as $511,000 and $485,000, respectively).

54. *See* FED. R. CIV. P. 23(e) (requiring judicial approval for dismissal or compromise of a class action); *accord* DEL. CT. CH. R. 23(e).

55. At certification, the judge is charged with determining that the class meets the requirements of the class action rule, including adequacy of representation and of class counsel. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 618–20 (1997); *see also In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 957 (Del. Ch. 2010) (finding counsel was inadequate and therefore declining to approve settlement).

56. *In re* Triarc Cos., 791 A.2d 872, 876 (Del. Ch. 2001).

57. *In re* Sauer–Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1135 (Del. Ch. 2011); *see also infra* subpart I(C).

58. The settlement agreement typically requires the plaintiffs to release all claims arising out of the merger. Note how this precludes all related claims as a result of the Full Faith and Credit Clause. Griffith & Lahav, *supra* note 15, at 1058.

59. *E.g.*, Transcript of Teleconference at 10–11, *In re* Transatlantic Holdings Inc. S'holders Litig., No. 6574-CS (Del. Ch. Mar. 8, 2013) [hereinafter *Transatlantic Holdings* Transcript].

60. *See, e.g.*, *Sauer–Danfoss*, 65 A.3d at 1136 (recognizing that consistency among opinions promotes fairness by establishing baseline expectations).

opinions frequently seek to benchmark their judgments about settlement value and an appropriate fee level by reference to comparable cases.[61]

In determining whether a proposed settlement is fair and reasonable, the court attempts to weigh the consideration received by the plaintiff class against the strength of the claims that are being released as part of the settlement. As Chancellor Allen explained in *Caremark*,[62] a motion seeking judicial approval of a proposed settlement "requires the court to assess the strengths and weaknesses of the claims asserted in light of the discovery record and to evaluate the fairness and adequacy of the consideration offered . . . in exchange for the release of all claims made or arising from the facts alleged."[63] This is more easily said than done.

The courts' task in reviewing and approving settlements is complicated by three factors. First, the settlement hearing is likely to be nonadversarial in nature. Second, the factual record presented to the court will be relatively undeveloped. Third, in the absence of an intervening bid, the intended transaction will likely be highly beneficial to shareholders, causing the judge to hesitate to throw additional obstacles in its path. With regard to the nonadversarial nature of the hearing, both plaintiffs and defendants will have a strong incentive to have their agreed-upon settlement approved by the court. Hence, in the absence of objectors, information indicating that the settlement is unfair or unreasonable will not be brought to the court's attention. Second, at a settlement hearing, the court is reviewing a stipulated statement of facts rather than hearing trial testimony or reviewing other direct evidence. Counsel's development of the factual record through discovery may be limited both because of the short window within which merger litigation is conducted and because, once a settlement appears likely, neither side wishes to expend unnecessary resources on additional fact-finding.[64] As a result, even without the potential for collusion inherent in a nonadversarial proceeding, the court is likely to lack all information necessary to evaluate the settlement. Moreover, the counterfactual analysis required to evaluate the strength of plaintiffs' claims is generally impractical. Third and finally, the court is in a difficult position since experience shows that the vast majority of proposed mergers are approved by shareholders, usually by an overwhelming vote, due to the premium mergers provide shareholders over the current market price. Without an

61. *See, e.g.*, *id.* (determining an appropriate fee award by comparing past fee awards granted by the court in similar cases).

62. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del Ch. 1996).

63. *Id.* at 961.

64. *See, e.g.*, *In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 945–46 (Del. Ch. 2010) (describing a "kabuki dance" of deal litigation in which "real litigation activity . . . ceased" once the litigation leadership structure is established).

intervening bidder, the court is unlikely to throw additional obstacles in the way of a transaction that offers plain benefits to shareholders.[65] As a result, there is good reason to doubt the ability even of expert jurists to assess the fairness and adequacy of settlements reliably in this context.

Despite these limitations, Delaware judges take seriously their obligation to safeguard the interests of the class by reviewing settlement quality. Evaluating a settlement that provides increased consideration or damages to the plaintiffs is relatively straightforward. Amendment settlements may benefit the shareholders by increasing the likelihood that a third party will make a topping bid. Thus, in *Compellent*,[66] Vice Chancellor J. Travis Laster explained that the value of therapeutic changes to a merger agreement "can be estimated as a function of the incremental amount that stockholders would receive if a higher bid emerged times the probability of the higher bid."[67] The court went on to consider empirical data in order to quantify the potential frequency and size of a topping bid.[68]

Disclosure-only settlements can benefit the shareholder class if the required disclosures allow the shareholders to exercise their voting rights in a more meaningful manner. In *Sauer–Danfoss*,[69] for example, Vice Chancellor Laster evaluated the eleven supplemental disclosures called for by the settlement agreement and weighed the extent to which each provided meaningful new information to shareholders.[70] He concluded that, of the eleven, only one was material.[71] Similarly in *PAETEC*,[72] Vice Chancellor Sam Glasscock considered each individual disclosure required by the proposed settlement and concluded that, except for one, each was of doubtful materiality, trivial, or of marginal utility to shareholders.[73]

To the extent that a court finds a proposed settlement to be of dubious value or, more problematically, inconsistent with its own assessment of the strength of the case,[74] the court may view the settlement as the product of

65. *See, e.g.*, *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 449–51 (Del. Ch. 2012) (noting the court's reluctance to enjoin merger, despite finding of unfair practices, where an injunction might deprive the shareholders of an attractive opportunity to sell their stock).

66. *In re* Compellent Techs., Inc. S'holder Litig., No. 6084–VCL, 2011 WL 6382523 (Del. Ch. Dec. 9, 2011).

67. *Id.* at *20.

68. *Id.* at *21–25.

69. *In re* Sauer–Danfoss Inc. S'holders Litig., 65 A.3d 1116 (Del. Ch. 2011).

70. *Id.* at 1128–35.

71. *Id.* at 1128.

72. *In re* PAETEC Holding Corp. S'holders Litig., No. 6761–VCG, 2013 WL 1110811 (Del. Ch. Mar. 19, 2013).

73. *Id.* at *6–8.

74. This determination might be assisted through the participation of objectors to the settlement. *See, e.g.*, Prezant v. De Angelis, 636 A.2d 915, 926 (Del. 1994) (remanding settlement for more rigorous inquiry into inadequacy of representation based on objectors' appeal); Griffith

collusion between plaintiffs' counsel and defense counsel.[75] In *Scully v. Nighthawk*,[76] Vice Chancellor Laster appointed special counsel to inquire into the possibility of collusion when the litigants concluded a disclosure-only settlement in an alternative forum[77] after the Vice Chancellor in an earlier hearing had found no colorable disclosure claim but a potentially serious process issue.[78] The special counsel's brief defined the issue narrowly,[79] ultimately concluding that collusion had not in fact occurred because the *Nighthawk* settlement was broadly comparable to other cases.[80]

Although not framing his analysis in terms of collusion, Chancellor Leo Strine expressed similar concerns in *Transatlantic Holdings*.[81] Having been asked to certify the plaintiffs' class, approve the settlement, and award

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& Lahav, *supra* note 15, at 1084–86 (emphasizing the role of objectors in reinvigorating "the adversarial process in an otherwise collusive environment"). The objection rate in class action settlements is low, however. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1533–34 (2004); Jeffries, *supra* note 10, at 59.

75. The principal factors identified by commentators in identifying collusive settlement practices—fees awarded on top of a settlement that involves limited bargaining and nonpecuniary relief—are present in the settlement of virtually every merger claim. *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167, 191–92 (2009) (listing "yellow flags" for collusion, including "settlement bargaining limited to one of the competing groups of plaintiffs' attorneys; settlement with the group of attorneys who present a less substantial threat of carrying the case forward to trial . . . [and] the award of lucrative and potentially justified attorneys' fees").

76. Scully v. Nighthawk Radiology Holdings, Inc., No. 5890-VCL (Del. Ch. dismissed Dec. 8, 2011).

77. *Scully*, No. 5890-VCL (Del. Ch. Dec. 23, 2010).

78. Transcript of Courtroom Status Conference at 5–6, Scully v. Nighthawk Radiology Holdings, Inc., No. 5890-VCL (Del. Ch. Jan. 12, 2011).

79. Brief of Special Counsel at 26–27, Scully v. Nighthawk Radiology Holdings, Inc., No. 5890-VCL (Del. Ch. Mar. 11, 2011). The special counsel summarized the issue as follows:

> [A] collusive settlement in the context of stockholder deal litigation appears to involve, at its core, an explicit or implicit agreement between counsel for plaintiffs and counsel for defendants to require less consideration for the settling class in exchange for (1) exclusive dealings with particular plaintiffs' counsel and/or (2) more consideration for plaintiffs' counsel. Factors that should give rise to heightened scrutiny for collusiveness include the following: settlement consideration disproportionately weak in comparison to the strength of the claims asserted; settlement with a plaintiff's firm that typically does not litigate aggressively when other, more formidable, firms are involved in the litigation; and an agreement to pay attorneys' fees significantly higher than are typical given the settlement consideration.

Id.

80. *Id.* at 28–29.

81. *Transatlantic Holdings* Transcript, *supra* note 59, at 5–6. The ruling—treating class certification, settlement approval, and the fee award together—is an example of how courts may collapse the analysis of settlement approval, corporate benefit, and the ultimate fee award. *See supra* notes 55–61 and accompanying text.

a fee, the Chancellor refused to do all three.[82] In that case, the two class representatives that had been put forward, one of whom held only two shares, either did not vote on the transaction or did not recall how he had voted.[83] Class counsel did not perform "any real investigation."[84] The disclosures amounted merely to additional background information,[85] and the vote was 99.85% in favor of the deal with 93% of the total electorate casting votes.[86] On the basis of these facts, the court concluded that the plaintiffs had "achieved nothing substantial for the class," and therefore the proposed settlement did not justify releasing the claims of absent parties.[87]

Current settlement practices raise a broader concern. As noted earlier, upwards of 90% of mergers in recent years faced litigation challenges.[88] Of the lawsuits filed, 71.6% settled and nearly 77% of the settlements were disclosure-only settlements.[89] In short, plaintiffs negotiate, and courts approve, corrective disclosure in more than 60% of all transactions.[90] It is implausible to think that 60% of all mergers (or 80% in the last several years) with public company targets and a transaction value of more than $100 million, deals that are staffed by top quality lawyers and investment bankers, involve materially deficient disclosures. It is far more likely that merger lawsuits are not filed to correct disclosure problems. The structure of disclosure-only settlements is likely about something else—justification of a fee award to plaintiffs' counsel.

C. *The Fee Award*

Once the court has approved the settlement, it must independently consider the fee award. "[A] litigant who confers a common . . . benefit upon an ascertainable stockholder class is entitled to an award of counsel fees and expenses for its efforts in creating the benefit."[91] The Delaware courts have repeatedly explained that the court has an independent obligation to determine an appropriate fee award, even in a case in which the defendant has agreed not to oppose the plaintiffs' fee request. As the court explained in *PAETEC*: "This Court has unambiguously held that'In both [contested and uncontested fee applications], the Court has an

82. *Transatlantic Holdings* Transcript, *supra* note 59, at 5.
83. *Id.* at 5–6.
84. *Id.* at 8.
85. *Id.* at 7–8.
86. *Id.* at 10–11.
87. *Id.* at 10.
88. *See supra* notes 5–6 and accompanying text.
89. Cain & Davidoff, *supra* note 4, at 478 tbl.III.
90. *See id.* (showing that 385 of 574 litigation cases resulted in corrective disclosure).
91. United Vanguard Fund, Inc. v. Takecare, Inc., 693 A.2d 1076, 1079 (Del. 1997).

independent duty to award a fair and reasonable fee."[92] The court's determination of what constitutes a reasonable fee is based on consideration of the *Sugarland*[93] factors:

> (i) the amount of time and effort applied to the case by counsel for the plaintiffs; (ii) the relative complexities of the litigation; (iii) the standing and ability of petitioning counsel; (iv) the contingent nature of the litigation; (v) the stage at which the litigation ended; (vi) whether the plaintiff can rightly receive all the credit for the benefit conferred or only a portion thereof; and (vii) the size of the benefit conferred.[94]

"Among these factors, the last two receive the greatest weight."[95] Thus, although judicial analysis of the fee award frequently includes a discussion of hours expended, the quality of plaintiffs' counsel, and the complexity of the case, the key consideration is typically the size of the benefit conferred. Additionally, the Delaware Supreme Court has repeatedly noted that, where the benefit provided by the litigation is quantifiable, "*Sugarland* calls for an award of attorneys' fees based upon a percentage of the benefit."[96]

The determination of corporate benefit in the context of a fee award is obviously closely related to the assessment of settlement quality described above. Specifically, enhanced disclosure has long been recognized as a potential benefit.[97] Because of the prevalence of disclosure settlements, the Delaware courts have had frequent occasion to consider the circumstances under which such a settlement justifies a fee award and the relationship between the quality of the disclosures and the size of the reward. As the Court noted in *Sauer–Danfoss*: "All supplemental disclosures are not equal."[98] The courts have sought to achieve relative parity across cases, observing that "[s]imilar disclosures merit similar fee awards."[99] In

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92. *In re* PAETEC Holding Corp. S'holders Litig., No. 6761–VCG, 2013 WL 1110811, at *5 (Del. Ch. Mar. 19, 2013) (alteration in original) (quoting *In re* Sauer–Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1137 (Del. Ch. 2011)) (internal quotation marks omitted).

93. Sugarland Indus., Inc. v. Thomas, 420 A.2d 142 (Del. 1980).

94. *In re* Plains Res. Inc. S'holders Litig., No. Civ.A. 071-N, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005) (citing *Sugarland*, 420 A.2d at 149–50).

95. *In re* Celera Corp. S'holder Litig., No. 6304–VCP, 2012 WL 1020471, at *30 (Del. Ch. Mar. 23, 2012); *accord In re* Anderson Clayton S'holders' Litig., no. 8387, 1988 WL 97480, at *3 (Del. Ch. Sept. 19, 1988) ("[T]his court has traditionally placed greatest weight upon the benefits achieved by the litigation.").

96. Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1259 (Del. 2012).

97. *See, e.g.*, Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162, 1165 (Del. 1989) ("A heightened level of corporate disclosure, if attributable to the filing of a meritorious suit, may justify an award of counsel fees.").

98. *In re* Sauer–Danfos Inc. S'holders Litig., 65 A.3d 1116, 1136 (Del. Ch. 2011).

99. *Id.*

addition, the courts have expressly acknowledged the incentive effect of fee decisions on future litigation and stated that fee awards should encourage counsel to bring meritorious cases.[100]

Recent Delaware decisions display an increasing tendency to apply a common heuristic for awarding fees in disclosure-only cases. The court starts with a fee range based on precedent for the quantity and quality of disclosures provided.[101] A threshold requirement is that the supplemental disclosure be material.[102] One or two "meaningful" disclosures sets a baseline for the fee range.[103] Lower quality (less valuable) disclosures result in a downward departure from this benchmark and "particularly significant or exceptional disclosures" are entitled to more.[104] The fee may then be adjusted further based upon the other *Sugarland* factors.[105]

The question of what types of disclosures are "meaningful" is a critical aspect of the courts' analysis. Meaningful disclosures will be rewarded (incentivized) with more generous fee awards. Trivial or unhelpful disclosures will be compensated less generously or, in the extreme case, may lead to disapproval of the settlement or denial of any fee award. In his opinion in *Sauer–Danfoss*, Vice-Chancellor Laster provided three appendices summarizing prior settlements and fee awards in the normal, low, and high fee ranges.[106] A review of these appendices demonstrates that most meaningful disclosures, for purposes of the courts' analysis, tend to focus on "previously withheld projections or undisclosed conflicts faced by fiduciaries or their advisors."[107] Significantly, the Delaware courts have stressed the importance of information regarding the investment banks'

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100. *E.g.*, Dias v. Purches, No. 7199VCG, 2012 WL 4503174, at *4 & n.29 (Del. Ch. Oct. 1, 2012). The Delaware courts' concern that fee awards provide appropriate incentives, including strong incentives in meritorious cases, is not confined to merger litigation. *See, e.g.*, *Ams. Mining Corp.*, 51 A.3d at 1252 (approving Chancery Court's award of $300 million fee on the ground that it "'creates a healthy incentive for plaintiff's lawyers to actually seek real achievement for the companies that they represent in derivative actions and the classes that they represent in class actions'" (quoting Transcript of Oral Argument on Plaintiff's Petition for Award of Attorneys' Fees and Expenses and Rulings of the Court at 85, *In re* S. Peru Copper Corp. S'holder Derivative Litig., 52 A.3d 761 (Del. Ch. 2011) (No. 961-CS)) (internal quotation marks omitted)).

101. *See, e.g.*, *Sauer–Danfoss*, 65 A.3d at 1136–38 (using three similar cases to arrive at a base range of $75,000 to $80,000).

102. *In re* Celera Corp. S'holder Litig., No. 6304–VCP, 2012 WL 1020471, at *32 (Del. Ch. Mar. 23, 2012); *see also In re* PAETEC Holding Corp. S'holders Litig., No. 6761–VCG, 2013 WL 1110811, at *7 (Del. Ch. Mar. 19, 2013) (commencing fee analysis by determining that, because the package of settlement disclosures contained at least one material disclosure, the settlement was fee eligible).

103. *Sauer–Danfoss*, 65 A.3d at 1136.

104. *Id.* at 1136–37.

105. *Id.* at 1135–36.

106. *Id.* at apps. A, B & C.

107. *Id.* at 1136.

compensation and potential conflicts.[108] As Vice Chancellor Glasscock recently explained: "The materiality of a disclosure of a conflicted financial advisor does not necessarily depend on whether the conflict actually harmed the sales process."[109] Less meaningful disclosures, by contrast, include minor corrections or disclosure of further details concerning, for example, discount rates, negotiation process, and valuation opinions.[110]

D. A Framework for Measuring the Value of Nonpecuniary Relief

As we have summarized, virtually every merger currently faces a litigation challenge. The vast majority of cases settle, but monetary recoveries for shareholder plaintiffs are rare. Courts attempt to evaluate the benefit produced by the proposed settlements and to compensate counsel on the basis of that benefit, but the procedural disadvantages that they face in the process render their judgments highly suspect, especially in the context of disclosure-only settlements. The Delaware courts seem to share this skepticism, given their own oft-repeated characterization of supplemental disclosures as being of marginal utility at best.

We therefore suggest an alternative way of testing the value of supplemental disclosures. Because the purpose of merger disclosure is to inform shareholder voting, it is reasonable to view supplemental disclosure as meaningful if it changes the way reasonable shareholders vote.[111] Furthermore, it is reasonable to hypothesize that merger litigation is only effective if it produces the disclosure of new *negative* information about the merger. This is because the defendant corporation, without the prod of shareholder litigation, already has an incentive to disclose *positive* information in order to win approval of the transaction and minimize dissent.[112] However, the transacting parties might prefer to conceal *negative* information to reduce the risk that shareholders will refuse to approve the transaction. Putting these two insights together, it seems clear

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108. *See, e.g.*, David P. Simonetti Rollover IRA v. Margolis, No. 3694–VCN, 2008 WL 5048692, at *8 (Del. Ch. June 27, 2008) ("[I]t is imperative for the stockholders to be able to understand what factors might influence the financial advisor's analytical efforts.").

109. *In re* PAETEC Holding Corp. S'holders Litig., No. 6761–VCG, 2013 WL 1110811, at *7 (Del. Ch. Mar. 19, 2013).

110. *Sauer–Danfoss*, 65 A.3d at 1143 app. B.

111. *See, e.g.*, TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 439 (1976) ("An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."); *Transatlantic Holdings* Transcript, *supra* note 59, at 4 (stating that the real question in evaluating a disclosure settlement is whether the supplemental disclosures are "in any meaningful way of utility to someone voting on the merger").

112. *See* Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 683 (1984) (explaining that, without disclosure, "[i]nvestors would assume the worst, because, they would reason that if the firm had anything good to say for itself it would do so").

that for supplemental disclosures to be meaningful, they must have a negative impact on shareholder voting in favor of the merger. This leads to a testable hypothesis: disclosure-only settlements should reduce shareholder votes in favor of the deal.

Amendment settlements are different. The principal benefit of an amendment is its potential to increase the value of the merger. An amendment that increases the merger price is of obvious value to shareholders without regard to its effect on the vote. Most amendment settlements do not increase the merger consideration but instead alter an agreement's deal-protection provisions, perhaps reducing a termination fee or increasing a go-shop period.[113] The value of these amendments is in their potential to increase the chance of a subsequent higher bid.[114] Concededly, amendment settlements rarely lead to higher bid prices.[115] Nevertheless, reducing deal protections arguably improves the quality of the market check. As a result, even when amendments do not result in a higher bid, they arguably should increase shareholder confidence in the economics of the deal. Our second core hypothesis then is that merger litigation resulting in an amendment settlement should increase shareholder support for the merger.

In the Part that follows, we identify and test our core hypotheses. We also test a number of ancillary hypotheses relating to shareholder voting. High-premium deals, for example, should lead to more favorable votes than low-premium deals. Deals recommended by proxy advisory firms ought to result in more favorable votes than deals for which those firms recommend a vote against the transaction. Additionally, building upon the discussion above, we hypothesize that attorneys' fees are an ex post facto assessment of merits in merger litigation and thus that, at least in disclosure cases, for the reasons articulated above, higher fees should correspond to fewer votes in favor of the merger.

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113. On deal protections generally, see Steven M. Davidoff & Christina M. Sautter, *Lock-Up Creep*, 38 J. CORP. L. 681 (2013).

114. *In re* Compellent Techs., Inc. S'holder Litig., No. 6084–VCL, 2011 WL 6382523, at *1 (Del. Ch. Dec. 9, 2011).

115. *See* DAINES & KOUMRIAN, *supra* note 5, at 6 & fig.7 (explaining that the parties in only 1 of 119 settling lawsuits in 2012 acknowledged that the settlement contributed to an increase in the merger price). In any event, we would lose what overbids would occur from our dataset as a result of the research design described below. *See infra* subpart II(A).

II. Empirical Analysis of Merger Settlements and Shareholder Voting

A. Our Sample Set

Our sample contains all of the transactions listed in the FactSet MergerMetrics[116] database and announced from 2005 through 2012 that meet the following criteria: (1) the target is a U.S. firm publicly traded on the New York Stock Exchange, American Stock Exchange, or NASDAQ; (2) the transaction size is at least $100 million; (3) the offer price is at least $5 per share; (4) a merger agreement is signed and publicly disclosed through a filing with the Securities and Exchange Commission (SEC); and (5) the transaction has been completed as of the end of 2012. Information on transactions and litigation is drawn from the dataset used in a prior piece by one of the coauthors.[117]

For shareholder voting outcomes and meeting dates we obtain information from the Factset Proxy Data service. We supplement this with information provided by ISS and by hand review of public filings. We also search press wire services and news databases. ISS recommendations are obtained from ISS itself. We then merge in institutional ownership data from the Thomson Reuters database and stock price information from the Center for Research in Security Prices (CRSP) database. We also search by hand in the Bloomberg Law database to determine if appraisal rights were exercised for Delaware incorporated targets. We drop duplicate variables and variables for which we have no voting results information. A substantial number of transactions do not report any voting results even though such a reporting is required under the securities laws.[118] We arrive at a sample size of 453 deal observations.

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116. More information about the database can be found at FACTSET MERGERS (2014), https://www.mergermetrics.com, *archived at* http://perma.cc/7U34-82CR.

117. Cain & Davidoff, *supra* note 4, at 486–87.

118. Effective as of February 28, 2010 the SEC changed its disclosure rules to require that the outcome of shareholder votes be reported on a Form 8-K filed within four business days after the end of the meeting at which the vote occurred. Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,335 (Dec. 23, 2009) (to be codified at pts. 229, 239, 240, 249, 274).

Previously, these results were only required to be disclosed on the issuer's next-filed Form 10-Q or Form 10-K. *Id.* at 68,349. However, a takeover is often completed and the issuer's shares deregistered before this four-business-day period has elapsed. In those circumstances a Form 8-K filing is not required. *Id.* This was true even before the rule revisions when a 10-Q or 10-K could be due weeks or months after the acquisition's completion. Even when the acquisition occurs more than four business days after the shareholders' meeting, issuers sometimes appear to ignore the filing requirements and do not report results. The result is that of our sample size of 822 merged transactions, we have voting data for approximately half—453. We were unable to find reported voting results for the remaining issuers. We thank Jennifer Shotwell of Innisfree for explaining why we could not find voting results for so many mergers in our sample. In addition, we excluded transactions where the reported results were approximate rather than exact.

B. Descriptive Statistics

Set forth in Table I(A) are statistics on the number of transactions in our sample set, the value of these transactions, and transaction offer premia.

Table I(A) Transaction Values and Premiums ($$MM)

	N	Mean	Std Dev	25th %	Median	75th %
Transaction Value *($mm)*	453	$3,119	$6,902	$328	$957	$3,065
Enterprise Value *($mm)*	453	$4,272	$9,827	$399	$1,245	$3,697
Initial Premium	453	32.73%	34.03%	14.86%	26.45%	41.30%
Final Premium	453	33.37%	34.47%	15.17%	26.97%	41.95%

Median transaction value across our sample size is $957 million. Mean transaction size is a significantly higher $3.119 billion, showing that the sample is right skewed with a standard deviation for transaction value of $6.902 billion. The median initial offer premium as calculated thirty days prior to announcement of the transaction is 26.45%. Final offer premium is calculated identically and is a slightly higher 26.97% showing that there is some increase in offer premium over announced and completed transactions. These statistics are comparable to prior studies which have found a similar range of size and premiums for transactions.[119]

Panel I(B) sets forth characteristics of the transactions in our sample.

Panel I(B): Transaction Characteristics

	N	% All Transactions
Total # Transactions	453	100%
Merger Consideration = Cash	303	66.89%
Auction	187	41.28%
Go Shop	58	12.80%
Going Private	22	4.86%
Management Buy Out	14	3.09%

We focus here on transaction characteristics which may affect premium and shareholder voting. 303 or 66.89% of transactions were all

119. *See, e.g.*, Leonce L. Bargeron et al., *Why Do Private Acquirers Pay So Little Compared to Public Acquirers?*, 89 J. FIN. ECON. 375, 376 (2008) (stating that the average premium for private-equity-firm acquisitions is 28.5%).

cash consideration, meaning that shareholders were losing a stake in the future combined entity. 187 or 41.28% transactions involved companies being sold by auction as opposed to a single-bidder negotiation. Auction transactions may be less prone to shareholder objection and therefore receive higher votes because the target company has been more fully shopped to a wider array of possible bidders. 12.80% of transactions contained a go shop, a provision for a target to solicit bidders after announcement of a merger agreement. These are largely private equity transactions, which themselves comprise 15.89% of the sample. Conflicted transactions involving management or a controlling shareholder were a smaller part of the sample. Going private transactions comprise 4.86% of transactions and management buy outs comprise 3.09% of transactions. Because of the potential these transactions present for self-dealing, it may be that shareholder support levels are lower.

Table I(C) examines litigation rates for our sample.

Table I(C): Litigation

	N	% of Total Litigation
Litigation	319	100.00%
Settled	221	69.28%
Dismissed	65	20.38%
Multi-State	133	41.69%
Delaware Filing	142	44.51%
Delaware Settlement	67	21.00%

Litigation is brought in an average of 70.42% of transactions across the time period of our study. The rate of litigation increased substantially over the course of our sample period; one recent study found that litigation rates have risen to 92.10% in 2011.[120] Our sample matches these findings; the litigation rate in our sample rises from 48.57% in 2005 to 95.12% in 2012. For the transactions with litigation, 221 or 69.28% result in some type of settlement, 65 or 20.38% are dismissed, and the remainder are still pending or are abandoned.

120. Cain & Davidoff, *supra* note 4, at 469. As noted earlier, the rate of litigation continues to increase, and litigation was filed in 97.5% of transactions in 2013, meaning that virtually every deal was challenged. *See supra* text accompanying note 6.

Table II(A) sets forth information on voting outcomes for our sample:

Table II(A): Voting Outcomes

	N	Mean	St. Dev.	25th %	Median	75th %
% Yes Votes Per Votes Cast	393	96.73%	6.41%	97.13%	99.00%	99.70%
% Yes Votes Per Outstanding Shares	436	75.82%	8.77%	70.65%	76.00%	81.64%
% Yes Votes Per All Yes & No Votes	294	97.65%	5.25%	98.03%	99.52%	99.85%

Table II(A) reports shareholder voting outcomes by three different metrics: (1) yes votes as a percentage of all votes cast; (2) yes votes as a percentage of all outstanding shares;and (3) yes votes as a percentage of all yes and no votes cast. The difference between the first and third measurements is that the first measurement includes abstentions and broker nonvotes. In our regressions and data analysis below we employ separately run regressions using all three metrics. We believe that yes votes measured as a percentage of votes cast best captures shareholder sentiment for a transaction. The reason is that it captures the sentiment of those shareholders who choose to be present at the meeting and cast a ballot or abstain. Shareholder failure to vote at all can indicate a lack of support for a transaction, but it may also be caused by a variety of factors that are independent of the merits.[121] However, by examining all three metrics we provide a robustness check to our results.

The mean percentage of yes votes per outstanding shares is 75.82% with a standard deviation of 8.77%. However, the median percentage of yes votes as a percentage of votes cast is 99.00%, meaning that half of all transactions get an even higher number of yes votes. The statistics show that shareholder voting in takeover transactions is largely a yes game among shareholders who do cast votes. There is some dispersion among transactions however, and the standard deviation for transactions as a percentage of votes cast is 6.41%. We note that the median percentage of

121. For example, retail investors typically engage in very low levels of voting. *See, e.g.*, Press Release, Broadbridge Fin. Solutions, Inc. & PwC's Ctr. for Bd. Governance, Broadridge and PwC Announce New Data on 2013 Proxy Voting Trends 1 (June 4, 2013), *available at* http://media.broadridge.com/documents/Broadridge-PwC-ProxyPulse-Press-Release-6-4-13.pdf, *archived at* http://perma.cc/UEA8-TRW3 (reporting that 70% of shares held by retail investors were not voted).

yes votes when measured against outstanding shares is significantly lower, meaning that a significant number of shares in any contest are not voted. When shares are voted, it is almost always overwhelmingly in support of the transaction.

Table II(B) sets forth descriptive statistics on types of litigation settlements and voting outcomes based on percentage of yes votes per votes cast.

Table II(B): Voting Outcomes and Litigation Settlements Per Votes Cast

	N	Mean	St. Dev.	25th %	Median	75th %
Disclosure-Only Settlements	153	97.25%	5.60%	97.80%	99.10%	99.70%
Amendment Settlement	26	97.90%	5.78%	98.54%	99.43%	99.84%
Increase-Consideration Settlement	12	95.64%	7.40%	96.42%	98.84%	99.50%
Total	191					

The number of observations drops to 191 because we do not have voting information as a percentage of yes votes per votes cast for all observations with litigation, and not all litigation ends in settlement. The median percentage of yes votes for disclosure-only settlements is at 99.10% with a standard deviation of 5.60%. Amendment settlements had a higher median percentage of yes votes at 99.43% with a standard deviation of 5.78%. Finally, settlements involving an increase in consideration had a standard deviation of 7.40% with a median percentage of yes votes at 98.84%.

Table II(C) sets forth voting information by yes votes cast, sorted by ISS recommendations.

Table II(C): ISS Recommendations Per Votes Cast

	N	Mean	St. Dev.	25th %	Median	75th %
ISS Rec = No	15	81.72%	12.23%	70.00%	80.90%	97.08%
ISS Rec = Yes	376	97.31%	5.29%	97.36%	99.03%	99.70%

As the table shows, there is a large disparity in voting outcomes between a positive ISS recommendation and a negative one.[122] A transaction with a "yes" ISS recommendation has a median percentage of yes votes per votes cast of 99.03%. A transaction with a "no" ISS recommendation has a median percentage of yes votes per votes cast of 80.90%. In unreported statistics we find that the median percentage of yes votes as a percentage of the outstanding shares for a transaction with an ISS "no" recommendation is 66.88% compared to 76.51% for a "yes" recommendation. We also find similar results when we examine yes votes as a percentage of total yes and no votes. In those circumstances the median percentage of yes votes as a percentage of yes and no votes is 82.01% for a "no" recommendation compared to 99.55% for a "yes" recommendation. We discuss further the possible effect and issues around ISS recommendations below in our regression analysis.

C. Regression Analysis

Our regression analysis uses ordinary-least-squares regression. We regress yes votes against the three types of voting metrics: yes votes per (1) votes cast, (2) per outstanding shares, and (3) yes and no votes. We include in our regressions a number of transaction variables, including final premium paid, the proxy advisors' recommendation, and institutional ownership. In the text of our Article we discuss the main findings from our regressions. The full regressions with all variables are set forth in the Appendix. Table III examines how shareholder voting outcomes are affected by the three types of settlements: disclosure-only settlements, amendment settlements, and settlements that produce increased merger consideration.

122. The potential for ISS recommendations to affect voting outcomes has been discussed extensively in the literature. *See, e.g.*, Stephen Choi, Jill Fisch & Marcel Kahan, *The Power of Proxy Advisors: Myth or Reality?*, 59 EMORY L.J. 869, 870–77 (2010) (identifying various possible reasons for the relationship). As we discuss below, our findings demonstrate a strong correlation between ISS recommendations and voting outcomes but do not provide evidence of causation. *See infra* subpart II(C).

Table III. Shareholder Voting Outcomes and Litigation Settlements[123]

Yes Votes Per	Votes Cast		Outstanding		Yes and No Votes	
	(1)		(2)		(3)	
Final Offer Premium	0.105	**	0.022		0.095	**
	(0.03)		(0.74)		(0.04)	
ISS Position	0.155	***	0.113	***	0.124	***
	(0.00)		(0.00)		(0.00)	
Disclosure-Only Settlement	0.000		0.011		0.003	
	(0.98)		(0.22)		(0.58)	
Amendment Settlement	0.008		0.045	***	0.017	
	(0.51)		(0.01)		(0.12)	
Consideration-Increase Settlement	0.005		0.057	**	0.004	
	(0.80)		(0.022)		(0.809)	
Observations	391		423		293	
R-squared	0.2658		0.1228		0.2252	

The variable with the strongest relationship to voting outcomes is the recommendation made by ISS. The ISS variable, which is a dummy variable representing whether ISS recommends a yes or no vote to its clients, is positive and significant at the one percent level in all columns. In our regressions, an ISS "yes" recommendation is associated with an increase in the number of yes votes by anywhere from 11.30 to 15.5 percentage points. The significance of an ISS "yes" recommendation

123. Includes Year-Fixed Effects. *P*-values are in parentheses, with ***, **, and * denoting statistical significance at the 1%, 5%, and 10% levels, respectively. The following variables are omitted from the table: *Initial Offer Premium*, *Transaction Value (Log)*, *Cash*, *Auction*, *Take Private*, *Go Shop*, and *Super Majority State*. The results for these variables and their definitions are set forth in the Appendix. *Final Offer Premium* is measured over target's trading price thirty days prior to merger announcement and is the final price paid by the buyer. *ISS Position* = 0 means ISS recommended that its' client shareholders do not vote or vote against the transactions. *ISS Position* = 1 means that ISS recommended that its' client shareholders vote for the transaction. *Disclosure Settlement* requires the target to make additional disclosure concerning the transaction; *Amendment Settlement* requires the terms of the transaction to be revised and includes settlements which are both Disclosure and Amendment settlements; and *Consideration-Increase Settlement* provides for an increase in the consideration payable to target shareholders. *Consideration-Increase Settlement* also includes settlements that have as a component Amendment or Disclosure Settlements. The sample is defined in subpart II(A). *See supra* subpart II(A).

explains in part why there is furious lobbying of ISS for its recommendations. It also explains why ISS occupies a controversial role as a proxy adviser.[124]

It is unclear whether our findings with respect to the ISS recommendation reflect causation or simply correlation. In other words, as one of us has observed elsewhere, ISS recommendations may directly influence shareholder votes; alternatively they may simply reflect how shareholders were going to vote anyway.[125] Furthermore, at least in our sample, ISS "no" recommendations are infrequent. We have only 17 "no" recommendations and 423 "yes" recommendations for the transactions in which we have voting information.[126]

Our variable for final offer premium measures the difference between the final offer price and the target's trading price thirty days before the announcement of the merger. We might expect that mergers involving a higher premium would generate a higher approval rate, and our regressions are consistent with this hypothesis. The variables for final offer premium are significant for the models examining yes votes as a percentage of votes cast and yes and no votes as a percentage of votes. The coefficients on the final offer premium in these models are also positive, meaning that the higher the final offer premium the higher the number of yes votes. We note that our results are not significant in the models for yes votes as a percentage of outstanding shares. We think it is likely that, in these models, the significance of the offer premium is affected by the noisiness of the nonvotes. In addition, it is likely that the premium does not drive the issue of whether or not shareholders vote, although it does drive whether they cast a yes or no vote once they have decided to vote.[127] This is consistent with our earlier intuition that shareholders fail to vote largely for reasons

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124. The SEC recently issued new guidance about investor reliance on proxy advisors. *See Proxy Voting: Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms*, U.S. SEC. & EXCHANGE COMMISSION (June 30, 2014), http://www.sec.gov/interps/legal/cfslb20.htm, *archived at* http://perma.cc/LFJ2-KSFH (providing "guidance about investment advisers' responsibilities in voting client proxies").

125. Choi et al., *supra* note 122, at 881.

126. For shareholder voting results reported where the results are per yes and no votes there were 9 ISS "no" recommendations and 284 "yes" recommendations, and for yes votes per outstanding shares there are 16 "no" recommendations and 407 "yes" recommendations.

127. In order to exercise appraisal rights shareholders must vote no, so the intention to exercise appraisal rights may affect shareholder voting. *See* DEL. CODE ANN. tit. 8, § 262 (2011) ("[A] stockholder . . . who has neither voted in favor of the merger or consolidation nor consented thereto in writing . . . shall be entitled to an appraisal . . . ."). However, in regressions reported in the Appendix containing other settlement variables we do not find the inclusion of a variable reflecting whether shareholders to seek appraisal percentage to be consistently significant.

that are independent of the merits of the issue on which they are being asked to vote.[128]

In terms of our primary hypothesis—that disclosure-only settlements would have a negative effect on shareholder voting because they reflect the introduction of additional negative information about the merger—our regression results do not support this hypothesis.[129] Rather we find a non-effect. The coefficient for the variable *Disclosure Settlement* is not significant in any columns, meaning that in none of our models is a disclosure-only settlement correlated with a significantly different level of shareholder support for the merger.[130] The lack of a significant relationship between disclosure-only settlements and shareholder voting suggests that shareholders may not value the additional information from these disclosures at least in a way that affects their vote.[131]

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128. In unreported regressions we substitute the initial *Offer Premium* and *Final Offer Premium* variable with a *Low Offer Premium* variable. *Low Offer Premium* is constructed by taking the trailing one-year *Final Offer Premium* and toggling the variable *Low Offer Premium* to 1 if it is below the median and 0 otherwise. We find no significant change in the regressions, including the insignificant effects on the *Disclosure Settlement* variable. In models (1) and (3) above the variable is negative and significant at the 10% and 5% level, respectively.

129. As a robustness test we also run time-series analysis to examine if there are any excess returns upon the announcement of a disclosure settlement. We hypothesize two alternative hypotheses based on the fact that once a takeover is announced, the main driver of a stock price is whether or not the takeover will be completed at the price paid. Our first hypothesis is that disclosure settlements will have no effect or a positive effect on share prices. The reason why is that the information is unlikely to significantly affect shareholder voting to an extent significant enough to cause shareholders to vote down the transaction. In this regard, the settlement of the litigation may actually cause a target's share price to increase because any possible delay that may be caused by the litigation, such as an injunction, has been removed or the deal has otherwise now been vetted. Alternatively, if disclosure settlements are valued by shareholders to the extent that the disclosures in a disclosure settlement may influence the outcome of a transaction or otherwise to cause them to agitate to increase the share price or against the transaction, then the share price should go down. In light of these hypotheses, we run a time series analysis using 2, 3, 4, and 5 day annual returns as measured against the S&P 500 index. We find significant results at the 5% level for all returns with mean excess returns of .0041, .0062, .0069, and .008 and *p*-values of .019, .011, .024, and .017, respectively. The results provide support for our first hypothesis, that disclosure settlements have no effect with some evidence that they may be seen as providing deal certainty because of the settlement of the litigation on favorable returns. Alternatively, the favorable result may be seen as shareholder satisfaction with the "vetting" process of this litigation and their subsequent confirmation that this is a good deal due to the settlement and perhaps the additional disclosure. We find no support for the second hypothesis that disclosure settlements provide information materially and adversely affecting the shareholder vote.

130. Because our models are linear, we also run in unreported results the models using the log value of each shareholder vote. We do not find any significant results on the *Disclosure-Settlement* variable.

131. We acknowledge that there also may be some unobserved factor present in these transactions that produces more negative votes. However, we also note the relatively high *R*-squared for our regressions in columns (1) and (2), indicating that we appear to account for many of these variables in our regressions.

We note the tension between this finding and the general practice of the courts in accepting supplemental disclosure as a benefit to shareholders. Chancellor William Chandler appears to have been correct in concluding in *National City*[132] that "[n]o evidence exists that the additional disclosures significantly affected the outcome of the shareholder vote."[133] The court nonetheless awarded the attorneys who conducted the litigation that produced these "modest" disclosures a $400,000 fee.[134] In contrast, our findings suggest that Chancellor Strine's similar conclusion in *Amylin*[135] was correct: "[N]one of the disclosures anybody got changed the vote."[136] Similarly, to the extent that courts characterize supplemental disclosures as material, meaning information that a reasonable shareholder would consider important in deciding how to vote, our regressions suggest that shareholders do not, in fact, consider the disclosures important.

In contrast, the coefficient on amendment settlements is positive and significant in column (2). The coefficient is .045, which means that the shareholder yes vote as measured against outstanding shares increases an average of 4.50% points for amendment settlements relative to other transactions. We do not find these results for other measurements of shareholder voting in columns (1) and (3). The reason for the difference may be that yes votes as a measure of outstanding votes picks up whether shareholders vote or not, while the other metrics are whether shareholders vote yes or no. We do not have an explanation why an amendment settlement may pick up more shareholder votes as opposed to more yes votes. We note that of settlements in our sample involving an amendment to the merger agreement, 55% involved a reduction of the termination fee.[137]

The variable for consideration-increase settlements is also statistically significant but not significantly more than amendment settlements and

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132. *In re* Nat'l City Corp. S'holders Litig., No. 4123-CC, 2009 WL 2425389, at *6 (Del. Ch. July 31, 2009), *aff'd*, 998 A.2d 851 (Del. 2010).

133. *Id.* at *6.

134. *Id.* at *4, *6.

135. *In re* Amylin Pharm., Inc. S'holders Litig., No. 7673-CS (Del. Ch. Feb. 5, 2013).

136. Transcript of Hearing on Peter Doucet's Motion to Intervene and for an Award of Attorneys' Fees and Expenses, Settlement Hearing, and Rulings of the Court at 23–24, *In re* Amylin Pharm., Inc. S'Holders Litig., No. 7673–CS (Del. Ch. Feb. 21, 2013) [hereinafter Transcript of *Amylin* Hearing]; *see also id.* at 23 (making the further point that "not one of [the supplemental disclosures] would any rational investor think was materially important").

137. In unreported regressions, we do not find any significance when we include a disclosure-plus variable. These settlements include disclosure plus an amendment. Our findings support one hypothesis—that the disclosure component is an add-on that does not significantly contribute value to the settlement. This finding is also consistent with judge and practitioner criticism that these settlements simply change a term or two of the merger agreement and add on a disclosure component to maximize attorneys' fees. In other words, our findings support the conclusion that shareholders view these settlements as neither value enhancing nor value destroying.

again only in column (2). This result may seem counterintuitive—if a deal has been litigation tested and that litigation generated a higher price, one might think shareholder approval rates would be significantly higher. One possible explanation is that deals in which the litigation produces a higher price are deals that were suspect to begin with—deals that raise serious issues about process or conflicts of interest. While these concerns warrant an economically meaningful settlement, the price increase negotiated as a result of the settlement may still be lower than the reserve price of some shareholders.[138]

Hypothesizing that because courts attempt to award attorneys' fees in cases that produce meaningful benefits to shareholders, we next test the significance of the attorneys' fee award in predicting the percentage of yes votes.

138. We note that *Increase-Consideration Settlements* disproportionately occur in going-private transactions. 5 of 12 such settlements occur in transactions that are going private, or 41.67%, yet only 22 out of 453 transactions in our sample are going private transactions.

Table IV. Shareholder Voting, Attorneys' Fees, and Settlements[139]

Yes Votes Per	Votes Cast		Outstanding Shares		Yes and No Votes	
	(1)		(2)		(3)	
Final Offer Premium	0.172	***	0.08		0.18	***
	(0.00)		(0.37)		(0.00)	
ISS Position	0.195	***	0.14	***	0.169	***
	(0.00)		(0.00)		(0.00)	
Attorney Fee > 500	0.006		0.01		–0.003	
	(0.54)		(0.52)		(0.74)	
Attorney Fees (Log)	–0.013	**	–0.005		–0.005	
	(0.03)		(0.57)		(0.36)	
Disclosure-Only Settlement	0.006		–0.010		0.016	
	(0.67)		(0.64)		(0.21)	
Amendment Settlement	0.027	*	0.029		0.034	**
	(0.09)		(0.27)		(0.03)	
Consideration-Increase Settlement	0.035		0.046		0.024	
	(0.11)		(0.19)		(0.23)	
Observations	175		190		144	
R-squared	0.4259		0.1558		0.3354	

Contrary to the hypothesis that attorneys' fees are ex post facto assessments of the merit of merger litigation, we do not find any consistent relationship between the fee and the shareholder vote. In column (1) we find a slight relationship between attorneys' fees and the percentage of yes votes per vote cast. The coefficient is significant and negative, meaning the lower the attorneys' fee, the lower the number of yes votes as a percentage of votes cast. But the models measuring yes votes as a percentage of

139. Includes Year Fixed Effects. The following variables are omitted from the table: *Initial Offer Premium*, *Transaction Value (Log)*, *Cash*, *Auction*, *Take Private*, *Go-Shop*, and *Super Majority State*. The results for these variables and their definitions are set forth in the Appendix. *Attorneys' Fees (Log)* is the log value of attorneys' fee awarded in the litigation. *Attorneys' Fee > 500* coded = 1 if the attorneys' fees awarded in the litigation are greater than $500,000 and = 0 if the attorneys' fees awarded are less than $500,000. The sample and all other variables are defined in *supra* note 123.

outstanding shares and yes and no votes are not significant for this variable. In addition, we do not find significance when we include a dummy variable for whether attorneys' fees are above or below $500,000, a threshold that some scholars have found to be the approximate average for disclosure settlements and that has been cited by the courts as a starting point in determining the appropriate award for a meritorious settlement.[140]

These findings are cause for concern. To the extent that courts are making fee determinations to incentivize litigation that is valuable to shareholders, there does not appear to be a significant relationship between the size of the award and the subsequent shareholder vote. Yet if the disclosure does not affect the shareholder vote, it is difficult to see how shareholders benefit from it.[141] Notably, the coefficients for *ISS Position* in this model become more significant, implying that a "yes" recommendation for this sample correlates with a percentage change in votes ranging from 14.00% to 19.50%.[142]

We note that in columns (1) and (3) the coefficient on amendment settlements is positive and significant, meaning those transactions with such a settlement obtain a higher percentage of yes votes. In contrast, the variable consideration-increase settlement is not significant in any model. We are not certain of the reason for the differences in this model for amendment settlements and increased consideration settlements from our prior model in Table III. We note that in this model, we include only settlements with attorneys' fees, meaning that we have a smaller sample than in Table III and that, in addition, our sample sizes for both these categories are substantially smaller than for disclosure-only settlements. It may also be the case that outlier cases, in which the merger is substantively unfair, may be driving the results in these categories.

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140. *See Gen-Probe* Transcript, *supra* note 13, at 46 ("I try to stick to the ranges [for fee amounts], and I have said repeatedly about the $450 to $500,000 range as being something that I start on."); Cain & Davidoff, *supra* note 4, at 482 tbl.IV.B (providing statistics on average fee awards by state).

141. One could hypothesize that shareholder voting rights, like voting rights of citizens, implicate autonomy considerations such that a shareholder derives some value from voting in the same way but while in possession of better information about the choice. Even if this were true, it is not clear that merger litigation is intended to foster these democratic values as opposed to shareholders' economic interests.

142. We also note in the Appendix that in models including the appraisal variable, the disclosure variable is also not significant and negative, meaning that in the presence of a disclosure settlement, there are fewer yes votes as a percentage of outstanding shares. However, the variables for amendment settlement and consideration-increase settlement are significant in all models.

Table V. Shareholder Voting Outcomes & Institutional Ownership[143]

Shareholder Yes Votes Per Votes Cast						
	All Transactions				Transaction Value < $500M	
	(1)		(2)		(3)	
Institutional Ownership %	0.041	**	0.023		–0.043	
	(0.01)		(0.52)		(0.74)	
Top 5 Institutional Ownership			–0.108		0.086	
			(0.56)		(0.84)	
Top 10 Institutional Ownership			0.086		0.141	
			(0.58)		(0.74)	
ISS Position			0.154	***	0.232	***
			(0.00)		(0.00)	
Disclosure-Only Settlement			–0.003		–0.021	
			(0.68)		(0.19)	
Amendment Settlement			0.009		–0.035	
			(0.47)		(0.31)	
Consideration-Increase Settlement			0.002		0.025	
			(0.91)		(0.75)	
Observations	393		391		140	
R-squared	0.0543		0.2642		0.3439	

In our final table, we regress shareholder yes votes as a percentage of votes cast against various institutional ownership variables. We hypothesize that institutional shareholders may be better able to assess merger-litigation settlements, particularly any additional disclosure made upon a disclosure settlement. If this hypothesis is true, we would expect to

143. Includes Year-Fixed Effects. The following variables are omitted from the table: *Initial Offer Premium*, *Final Offer Premium*, and *Transaction Value (Log)*. In models (2) and (3), the variable *Maximum Institutional Ownership* is also omitted. The results for these variables and their definitions are set forth in the Appendix. *Institutional Ownership %* is the percentage of total institutional ownership. *Top 5 Institutional Ownership* is the percentage ownership of the largest 5 institutional owners. *Top 10 Institutional Ownership* is the percentage ownership of the largest 10 institutional owners. Institutional ownership for each of these variables is as of the quarter end immediately prior to the shareholder meeting date. The sample and all other variables are defined in *supra* note 123.

see settlements have a greater effect on merger votes in companies with high levels of institutional ownership. Measured in a variety of ways, however, we find no effect of institutional ownership on shareholder assessment of merger-litigation settlements. However, the *R*-squared in column (1) is relatively low, meaning that the drivers of voting in this model are attributable to other variables. This implies that while the institutional investor ownership percentage does affect voting, it may be captured by these other variables.

To further test the effect of institutional ownership on shareholder voting, we theorize that in smaller transactions (less than $500 million), institutional shareholders may affect the outcome more greatly. In column (3) we do not find this to be the case; the institutional shareholder variable is not significant. We also do not find any significance in these smaller transactions for institutional ownership variables.

We run the same regressions in unreported models using the dependent variable percentage of yes votes per yes and no votes. We find in all models that the disclosure settlement variable is insignificant. Again, the most significant variable for institutional investors is the ISS recommendation, which is positive and significant at the one percent level. Similar to our earlier findings, institutional investors do not appear to find disclosure settlements to be significant.

III. Policy Implications: Ending Fees for Disclosure Settlements

The findings in Part II raise serious concerns about the existing state of merger litigation, in which the vast majority of mergers are challenged and the resulting litigation produces a disclosure-only settlement, but the disclosures do not seem to affect shareholder voting on the merger. Insofar as disclosure-only settlements do not provide shareholders with useful information, they are wasteful, clogging the courts and increasing transaction costs for no reason. Nevertheless, the current practice of treating disclosure-only settlements as a shareholder benefit sufficient to entitle plaintiffs' attorneys to a fee award incentivizes attorneys to file claims in order to win those settlements. On the basis of our empirical findings, we argue that this incentive is misplaced.

The fundamental claim in state court merger litigation is based on allegations that the merger process and the merger price are unfair.[144] It appears that, when plaintiffs' attorneys are unable to demonstrate unfairness, they turn to supplemental disclosures to justify an award of fees for their time and expense. In contrast, private litigation under the federal

144. *See generally* Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (defining substantive fairness as involving issues of process and price).

securities laws focuses precisely on material deficiencies in disclosure against a backdrop of extensive disclosure regulation.[145] In our view, this is a form of efficient specialization that ought to be recognized as a matter of law. Merger litigation, under state law, should address substantive and procedural fairness. Merger litigation, under federal law, should address disclosure quality.

The U.S. Supreme Court has already taken the first step in this direction, holding in *Santa Fe v. Green* that the federal antifraud provisions do not address issues of merger fairness.[146] In this Part, we propose that Delaware cooperate by limiting the role of state law in regulating merger disclosure. Specifically, we propose that the courts reject disclosure-only settlements as providing a benefit to shareholders sufficient to justify the award of attorneys' fees, at least in cases involving publicly traded target companies. The subparts that follow develop this proposal in greater detail, explaining how the federal securities laws are better suited to regulating merger disclosure, anticipating and answering objections, and then offering specific suggestions on how the solution might be implemented.

A. Federal Regulation of Merger Disclosure

The federal securities laws are all about disclosure.[147] The public offering process has, as its central feature, a detailed disclosure document—the Registration Statement—the role of which is established by Section 5 of the Securities Act of 1933.[148] The applicable rules concerning subjects such as prefiling offers, prospectus delivery, liabilities, and due diligence are all designed to enhance the effectiveness of the disclosure mandate. Following an initial public offering, federal law subjects public companies to continued periodic disclosure obligations through the reporting requirements of the Securities Exchange Act of 1934, as amended, and the rules promulgated thereunder.[149]

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145. *See generally* Joel Seligman, Commentary, *The Merits Do Matter: A Comment on Professor Grundfest's "Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority,"* 108 HARV. L. REV. 438, 456 (1994) (describing the role of private securities fraud litigation in enforcing the federal mandatory disclosure system).

146. Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 477–78 (1977).

147. 1 LOUIS LOSS ET AL., FUNDAMENTALS OF SECURITIES REGULATION 10 (6th ed. 2011).

148. Securities Act of 1933 § 5, 15 U.S.C. § 77f(c) (2012).

149. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78pp (2012). What it means to be a public company is somewhat different for purposes of the registration requirements of the Securities Act and the periodic reporting requirements of the 1934 Act. *See* Donald C. Langevoort & Robert B. Thompson, *"Publicness" in Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 343–46 (2013) (describing "bifurcation" in the concept of "publicness").

Federal law also mandates disclosure in connection with shareholder voting through the federal proxy rules.[150] As a result, the federal securities laws have long been the primary source of explicit disclosure obligations in connection with mergers and acquisitions involving public companies.[151] The SEC mandates certain disclosures in the Schedule 14A proxy statement,[152] and it supplements these requirements with particularized additional disclosures in connection with tender offers and going-private transactions.[153] Thus, in most cases, the disclosure deficiencies challenged in state merger litigation are located within a federally mandated disclosure document. In addition, the supplemental disclosures that are agreed upon in the settlement of state court litigation are ultimately incorporated into the federally mandated form.

The federal disclosure requirements are primarily rule based.[154] The federal statutes and the SEC rules thereunder require the disclosure of information concerning many of the same items that are frequently the subject of state law disclosure-only settlements, including valuation procedures, financial advisor opinions, and potential conflicts of interest.[155] For example, the proxy rules require detailed transaction information, including information relating to reports, opinions, or appraisals given by financial advisors.[156] Disclosure concerning the selection and compensation of outside financial advisors is likewise required in going-private transactions, along with disclosure of any other material relationships between the company and the advisor.[157]

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150. 15 U.S.C. § 78n(h)(1)(D).

151. State corporation law does require corporations to disclose shareholder appraisal rights. *E.g.*, DEL. CODE ANN. tit. 8, § 262(d) (2011); *see also* Gilliland v. Motorola, Inc., 859 A.2d 80, 85–88 (Del. Ch. 2004) (addressing the disclosure requirements under the appraisal statute).

152. 17 C.F.R. § 240.14a-101 (2014).

153. *Id.* §§ 240.14d-100, 240.13e-100.

154. *See, e.g.*, Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1023 (2013) (describing how Sarbanes-Oxley replaced flexible state law standards with "firm rules"). *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (articulating the distinction between using rules versus standards to regulate).

155. *See* Wilson v. Great Am. Indus., Inc., 855 F.2d 987, 991, 993–94 (2d Cir. 1988) (holding that in a merger between corporations A and B, failure to disclose that general counsel of corporation A personally represented senior executives of corporation B and that he and his firm served as counsel to several entities controlled by these executives constituted material omissions); Kas v. Fin. Gen. Bankshares, Inc., 796 F.2d 508, 513 (D.C. Cir. 1986) ("The violation arising from the failure to disclose such a potential conflict of interest does not turn on the failure to disclose a director's true motivations but rather stems from the failure to disclose a fact that puts the shareholder on notice of a potential impairment of the director's judgment."); Joel Seligman, *The New Corporate Law*, 59 BROOK. L. REV. 1, 38–46 (1993) (discussing disclosure obligations under 13e-3 for going-private transactions).

156. 17 C.F.R. § 240.14a-101.

157. *Id.* § 229.1015(b).

The disclosure requirements of federal law reflect a delicate balance. On the one hand, some commentators argue that, in general, more information is better.[158] Other commentators argue that even some material disclosures might be counterproductive if they overwhelm investors with too much information that cannot be used properly.[159] The SEC's disclosure requirements are subject to ongoing debate, public scrutiny, and, on occasion, legal challenge,[160] as the SEC seeks to strike an appropriate balance both in terms of providing useful information and imposing reasonable costs on market participants. As some commentators have noted, the SEC's rule-making process offers particular advantages in evaluating the costs and benefits of proposed disclosure requirements, such as the opportunity for affected market participants to provide input.[161]

The principal difference between state and federal disclosure mandates in connection with merger transactions is that federal law involves proscriptive rules of general application, whereas Delaware judges articulate disclosure requirements in the fact-specific context of individual transactions.[162] Under federal law, the failure to disclose even material information is not actionable unless SEC rules specifically mandate disclosure of that information or unless the omission renders other disclosures misleading.[163] The failure to include all material information in a proxy statement does not violate federal law.[164] As the Third Circuit explained: "[O]mission of information from a proxy statement will violate

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158. *See, e.g.*, Joan MacLeod Heminway, *Personal Facts About Executive Officers: A Proposal for Tailored Disclosures to Encourage Reasonable Investor Behavior*, 42 WAKE FOREST L. REV. 749, 795 (2007) (arguing for codification of disclosure rules relating to executives' private facts).

159. *E.g.*, Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH U. L.Q. 417, 419 (2003); *see also* Steven M. Davidoff & Claire A. Hill, *Limits of Disclosure*, 36 SEATTLE U. L. REV. 599, 603 (2013) ("[T]he role of disclosure in investment decisions is far more limited, and far less straightforward, than is typically assumed.").

160. *See, e.g.*, Going Private Transactions by Public Companies or Their Affiliates, 73 Fed. Reg. 60,090, 60,090–91 (Oct. 9, 2008) (to be codified at 17 C.F.R. pt. 240) (describing and defending proposed amendments to disclosure requirements in connection with going-private transactions); Petition for Review at 1, Nat'l Ass'n of Mfrs. v. SEC, 956 F. Supp. 2d 43 (D.D.C. 2013) (No. 12-1422) (challenging the SEC's conflict minerals disclosure requirement).

161. *See* David Friedman, Note, *The Regulator in Robes: Examining the SEC and the Delaware Court of Chancery's Parallel Disclosure Regimes*, 113 COLUM. L. REV. 1543, 1573–75 (2013) (arguing that the SEC should codify Delaware's disclosure rules through notice-and-comment rule making and eliminate the existence of two different sets of disclosure requirements).

162. *See id.* at 1553 ("[T]he fact-specific nature of Chancery decisions differentiates them from the broad, prospective rules typically generated by regulatory agencies.").

163. Resnik v. Swartz, 303 F.3d 147, 151 n.2 (2d Cir. 2002).

164. *See, e.g.*, Perelman v. Pa. Real Estate Inv. Trust, 432 F. Supp. 1298, 1304 (E.D. Pa. 1977).

[§ 14(a) and Rule 14a–9] if either the SEC regulations specifically require disclosure of the omitted information in a proxy statement, or the omission makes other statements in the proxy statement materially false or misleading."[165]

The distinction is perhaps best illustrated with respect to the disclosure of compensation and conflicts of financial advisors. The SEC requires a descriptive summary of the financial advisors' compensation.[166] Staff interpretations have often required a breakdown of how much of the advisor's fee was fixed versus contingent.[167] Delaware precedent, in contrast, requires disclosure of "substantial" contingent fees without clearly articulating the standard by which a fee is judged to be substantial.[168] Likewise, federal law requires the disclosure of "material relationships" existing between the advisor and the other party in the transaction over the prior two years,[169] but several Delaware decisions have compelled considerably more detailed disclosure about investment banker relationships and potential conflicts.[170] Finally, Delaware has recently required the disclosure of a financial advisor's interest in a deal, through institutional or personal holdings, while SEC rules are silent on this issue.[171] Thus, in *El Paso*,[172] Chancellor Strine termed Goldman's lead banker's failure to disclose a personal $340,000 ownership interest in the buyer's stock "very troubling," although it was unclear that disclosure of this interest was required under federal law.[173]

Shareholders can enforce their disclosure rights under federal law through litigation. Rule 14a-9 prohibits fraud in connection with the solicitation of proxies, and the U.S. Supreme Court has held that it provides a private right of action for false and misleading proxy statements.[174] In addition, to the extent that shareholders sell their stock in connection with a merger, they have a cause of action under SEC rule 10b-5.[175] The elements

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165. Seinfeld v. Becherer, 461 F.3d 365, 369 (3d Cir. 2006) (alteration in original) (quoting *Resnik*, 303 F.3d at 151) (internal quotation marks omitted).

166. 17 C.F.R. § 229.1015(b)(4) (2014).

167. For more information on staff interpretations of the rule, see generally Steven M. Davidoff, *Fairness Opinions*, 55 AM. U. L. REV. 1557, 1592–93 (2006).

168. Friedman, *supra* note 161, at 1554–56.

169. 17 C.F.R. § 229.1015(b)(4); FIN. INDUS. REGULATORY AUTH., FINRA MANUAL § 5150(a)(3) (2008), *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=6832, *archived at* http://perma.cc/6QBN-9PG4.

170. Friedman, *supra* note 161, at 1556–58.

171. *See id.* at 1553 (comparing Delaware decisions to the SEC's "lax" rules for disclosure of financial advisors' conflicts).

172. *In re* El Paso Corp. S'holder Litig., 41 A.3d 432 (Del. Ch. 2012).

173. *Id.* at 442.

174. J.I. Case Co. v. Borak, 377 U.S. 426, 429–31 (1964).

175. 17 C.F.R. § 240.10b-5(b) (2014).

of proxy fraud and securities fraud are quite similar. Both require a material misstatement or omission, damages, and a causal relationship between the two.[176]

Importantly, liability under federal law turns on materiality.[177] Misstatements and omissions in federally mandated disclosure documents are actionable if and only if they are material.[178] In the context of the proxy statement, the Supreme Court stated that a fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[179] Critically, as Richard Booth has explained, this means that some investors must react to the information.[180]

The federal courts have developed an extensive jurisprudence concerning the materiality requirement.[181] Courts consider the role of specific statements within the context of the document in which they are contained, the relevance of other disclosures and general information environment applicable to the issuer, the nature of the information involved (including its capacity to affect the market and the degree to which it is speculative or subjective), the importance of the speaker's identity to the materiality determination, and a host of other factors.[182] Although the legal definition of materiality is broadly inclusive,[183] courts have also adopted various qualifications to evaluate the specific disclosures in the context of the particular document in which it is contained, the transaction that it involves, and the overall amount of information present in the market.[184]

Private litigation is a viable remedy for truly deficient disclosures in a proxy statement. Federal litigation offers two potential mechanisms for redress. First, federal courts will provide expedited proceedings and issue an injunction mandating corrective disclosure prior to the shareholder

176. *Compare* Tracinda Corp. v. DaimlerChrysler AG, 502 F.3d 212, 228 (3d Cir. 2007) (describing elements of a claim under Rule 14a-9), *with* Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2184 (2011) (listing elements of a violation of Rule 10b-5). The Supreme Court has reserved the question of whether scienter, which is required in a private action under Rule 10b-5, is also required under Rule 14a-9. Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1090 n.5 (1991).

177. Notably, the federal courts have interpreted the materiality requirement analogously with respect to proxy fraud and federal securities fraud. Heminway, *supra* note 158, at 759.

178. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 444 (1976).

179. *Id.* at 449.

180. Richard A. Booth, *The Two Faces Of Materiality*, 38 DEL. J. CORP. L. 517, 519 (2013).

181. *See* Heminway, *supra* note 158, at 756–59 (describing decisional law on materiality).

182. *See* Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1312 (2011) (explaining that "assessing materiality". . . "is a fact-specific inquiry"); Heminway, *supra* note 158, at 756–59.

183. Dale A. Oesterle, *The Overused and Under-Defined Notion of "Material" in Securities Law*, 14 U. PA. J. BUS. L. 167, 169 (2011).

184. *See id.* at 184–86 (identifying examples such as the "bespeaks caution" doctrine and the truth-in-the-market exception).

vote.[185] Second, federal courts can provide *ex post* money damages.[186] That these remedies are meaningful is illustrated by the fact that federal litigation frequently settles for meaningful monetary consideration. For example, in the merger of Bank of America and Merrill Lynch, it was later revealed that Bank of America had learned of massive losses at Merrill Lynch just before the Bank of America shareholder vote on the transaction.[187] Shareholders filed a federal claim under Rule 14a-9 in the Southern District of New York and subsequently settled, not for a form of nonpecuniary relief, but rather for $2.4 billion in money damages.[188]

Notably, federal litigation also addresses the potential for frivolous litigation. In the Private Securities Litigation Reform Act (PSLRA),[189] Congress adopted a variety of substantive and procedural reforms designed to discourage meritless cases while retaining meaningful litigation challenges. For example, the PSLRA imposes a heightened pleading standard for the allegation of disclosure violations. Pursuant to the PSLRA, to state a claim a complaint must (1) "specify each statement alleged to have been misleading, [and] the reason or reasons why the statement is misleading,"[190] and (2) "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[191] This standard applies to claims under Rule 14a-9 as well as Rule 10b-5.[192] Courts have also concluded that many of the procedural reforms of the PSLRA, for example, apply to proxy fraud litigation, such as the stay of discovery pending the resolution of a motion to dismiss.[193] Similarly, courts have noted that the causation requirement prevents every disclosure

185. *E.g.*, Lone Star Steakhouse & Saloon, Inc. v. Adams, 148 F. Supp. 2d 1141, 1150 (D. Kan. 2001); Gillette Co. v. RB Partners, 693 F. Supp. 1266, 1267–68, 1295 (D. Mass. 1988).

186. *E.g.*, Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1303–04 (2d Cir. 1973).

187. Halah Touryalai, *Bank of America Will Pony Up $2.4 Billion to Investors over Merrill Lynch Merger*, FORBES (Sept. 28, 2012, 10:45 AM), http://www.forbes.com/sites/halahtouryalai/2012/09/28/bank-of-america-will-pay-investors-2-4-billion-over-merrill-lynch-merger, *archived at* http://perma.cc/RCE7-HGC8.

188. Timothy Raub, *Final Approval of $2.4Billion Settlement Granted in Bank of America Securities Suit*, LEXISNEXIS LEGAL NEWSROOM LITIG. (Apr. 8, 2013, 4:45 PM), http://www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/archive/2013/04/08/final-approval-of-2-4billion-settlement-granted-in-bank-of-america-securities-suit.aspx, *archived at* http://perma.cc/9GA6-PJRE.

189. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

190. 15 U.S.C. § 78u-4(b)(2)(A) (2012).

191. *Id.* § 78u-4(b)(1).

192. *See* Little Gem Life Scis. LLC v. Orphan Med., Inc., 537 F.3d 913, 915, 917 (8th Cir. 2008) (applying the heightened pleading requirements under the PSLRA to a claim under Rule 14a-9).

193. *See, e.g.*, Smith v. Robbins & Myers, Inc., No. 3:12–cv–281, 2012 WL 5479061, at *1–2 (S.D. Ohio Oct. 26, 2012) (applying the PSLRA discovery stay to proxy fraud litigation); Dipple v. Odell, 870 F. Supp. 2d 386, 392–93 (E.D. Pa. 2012) (same).

failure from constituting a violation of Rule 14a-9.[194] Accordingly, both federal regulation and federal litigation attempt to strike a balance in terms of the scope of disclosure that they mandate and the extent to which violations of the regulatory requirements can be challenged through litigation.

B. State Law Disclosure Litigation

Although, as noted above, the core concern of state fiduciary duty litigation with regard to mergers is the substantive fairness of the transaction, state law merger complaints often include disclosure claims. Delaware courts have adopted a materiality requirement that is akin to the federal standard. According to the court in *Sauer–Danfoss*, in order for supplemental disclosures to constitute a substantial benefit sufficient to justify an award of attorneys' fees, the disclosures must be material.[195] This standard was applied by Chancellor Strine in *Amylin* to deny a fee request on the basis of the finding that the supplemental disclosures amounted only to "additional meaningless disclosures that did not materially change the mix of information."[196] Noting that not all information can be disclosed[197] and that all details, even of a financial advisor's analysis, are not required,[198] the Chancellor reaffirmed the materiality standard.[199] The Chancellor emphasized that materiality is best demonstrated by a comparative analysis showing how a set of supplemental disclosures meaningfully altered the information previously available.[200]

Nevertheless, materiality analysis operates differently in Delaware merger litigation from the way it operates in federal securities law cases. First, courts decide Delaware merger cases on an expedited basis, according to the lifecycle of the underlying transaction.[201] If a case is not disposed of through a motion during the pendency of the transaction, it will most likely

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194. *See, e.g.*, Lane v. Page, 649 F. Supp. 2d 1256, 1289 (D.N.M. 2009) ("Omissions that might ultimately be minor in a particular factual scenario, but which contravene an SEC regulation . . . must satisfy causation requirements, preventing insubstantial violations of disclosure requirements from becoming actionable claims for damages.").

195. *In re* Sauer–Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1127 (Del. Ch. 2011). Under the federal definition, a disclosure is material if "the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

196. Transcript of *Amylin* Hearing, *supra* note 136, at 22.

197. *Id.* at 24.

198. *Id.* at 25.

199. *Id.* at 28.

200. *Id.* at 30.

201. *See* Griffith & Lahav, *supra* note 15, at 1063–64 (explaining that both parties to merger litigation will seek expedited processes because of the potential for a transaction delayed by litigation to fall apart).

be settled prior to the transaction's close so that the transacting parties can eliminate it as a contingent liability.[202] This means that Chancery Court judges reviewing merger disclosures always do so under substantial time pressure, either in the context of a motion to dismiss or in the context of approving a disclosure settlement. As a result, most of the court's rulings on materiality come in the form of transcript opinions.[203] Delaware's release of transcript opinions seeks to strike a balance between efficiency of time, on the one hand, and clarity of precedent, on the other. By contrast, federal cases are more frequently litigated postclosing and can offer the more formal, precedent-driven consideration of materiality described above.[204]

Second, Delaware courts analyze the materiality of disclosures in connection with the review and approval of settlements, a judicial act that is typically, as we emphasized above, nonadversarial.[205] As a result, defendants generally do not oppose and often tacitly support plaintiffs' assertions concerning the materiality of disclosures.[206] To put this into context, the courts in Delaware are rarely faced with arguments on both sides of questions such as whether a proffered supplemental disclosure is largely duplicative of other information already disclosed to the market or is insufficiently factual or too tentative to be useful. By contrast, federal judges rule on materiality as a critical element establishing fraud.[207] As a result, the issue is fully briefed and argued by both sides to the dispute. Hence, federal judges routinely receive better information in connection with each materiality determination. When federal judges articulate the basis of their materiality determination in formal judicial opinions, this information produces a higher quality body of precedent that judges can draw upon in future determinations. By contrast, unopposed settlements, as even the Delaware judiciary acknowledges, make poor reference points.[208]

In addition, the structure of state court litigation claims creates an odd bifurcation. The primary allegations of the complaint challenge the merger's substantive and procedural fairness, typically encompassing

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202. *See supra* notes 35–37 and accompanying text.

203. Griffith & Lahav, *supra* note 15, at 1125–26.

204. *See supra* subpart III(A).

205. *See supra* subpart I(B). In a minority of proceedings there are objectors, but these are often pro se litigants, and their objections while noted do not interfere with the main settlement. *See* Jeffries, *supra* note 10, at 59 ("[T]hese fee awards are rarely objected to and thus rarely appealed.").

206. *See* Griffith & Lahav, *supra* note 15, at 1093 (discussing potential for agreement or collusion between litigants seeking to win judicial approval of settlements).

207. *See supra* note 177 and accompanying text.

208. *See In re* Sauer–Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1137 (Del. Ch. 2011) ("In actuality, when reviewing an uncontested fee application, the Court suffers from an informational vacuum created when the adversity of interests that drives the common law process dissipates.").

possible conflicts of interest, failure to shop the company adequately or otherwise maximize the sales price, or concerns about provisions in the merger agreement such as termination fees. In contrast, the incidental disclosure claims are generally not well developed in the complaint nor, because they are incidental, are disclosure claims subjected to careful scrutiny at the pleading stage pursuant to a motion to dismiss. What all of this reveals, of course, is that state court litigation really is not about disclosure.

Consider, for example, the *Sauer–Danfoss* complaint.[209] Count III alleges a breach of the defendants' fiduciary duty of disclosure in that "[t]he Recommendation Statement fails to disclose material information, including financial information and information necessary to prevent the statements contained therein from being misleading."[210] The complaint does not identify a single piece of omitted information as a basis for this claim. Nor does the complaint identify a basis upon which the allegedly omitted information was required to be disclosed. Simply put, the allegations fall woefully short of the pleading standard that would be required to file a federal claim under Rule 14a-9.[211]

Most problematically, perhaps, the merits of the materiality question are not squarely before the state court in merger litigation. State courts address materiality not in connection with deciding fraud claims, but rather in connection with approving negotiated settlements. In this context, the court is not asked to decide whether the proxy would have been materially misleading to investors without the supplemental disclosure but rather whether a negotiated package of supplemental disclosures, once added to the proxy statement, benefits shareholders.[212] Put in these terms, it is difficult for a court to say that shareholders would not like to know an additional piece of information, especially when there is no adverse party briefing the court on why the additional information provides no real benefit.[213] Our empirical results, however, are fairly clear that supplemental disclosures do not in fact change shareholder behavior and, in that sense at least, provide no real benefit. The next subpart addresses what ought to be done about it.

C. Eliminating the State Law Claim for Disclosure

Delaware courts provide a bounty for plaintiffs' lawyers to settle for disclosure by requiring the defendant corporation to pay their fees. This

209. *Sauer–Danfoss* Complaint, *supra* note 32.

210. *Id.* para. 88, at 26.

211. *See supra* notes 189–93and accompanying text.

212. Griffith, *supra* note 47, at 22–25.

213. *Id.* at 21–22.

bounty is based on the premise that disclosure-only settlements provide a "substantial benefit" to the shareholder class. Our findings demonstrate that this premise is misguided. The benefit produced by disclosure-only settlements is anything but substantial. Indeed, it would be closer to the truth to say that it is imaginary.

The cost of these suits, however, is very real. These suits generate litigation costs—specifically the attorneys' fees on both the plaintiff and defense sides—as well as court costs and the uncertainty and risk created by subjecting every merger to litigation, often in multiple jurisdictions.[214] The cases also may distort Delaware law, if the Delaware courts seek to accommodate these claims and keep them from migrating to other jurisdictions.[215] Basic cost–benefit analysis therefore suggests that something ought to be done to significantly reduce these settlements. Our suggestion is simple. We propose that Delaware stop recognizing disclosure-only settlements as a substantial benefit for the purposes of a fee award in class litigation involving public company mergers.[216]

Our rule would have the effect of eliminating the financing for disclosure-only settlements, but only disclosure-only settlements, in state court merger litigation. Our proposal explicitly recognizes that merger litigation can produce substantial shareholder benefit—the *Southern Peru*[217] decision, for example, clearly shows that it can—and we do not limit the right of shareholders to sue in connection with mergers. Nor do we seek to address the scope of the duty of disclosure under state law.[218]

Delaware courts have been struggling for several years to accomplish a similar outcome by more modest means—a searching and case-specific inquiry into whether the supplemental disclosures are really

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214. *See* Cain & Davidoff, *supra* note 6, at 3 (noting frequency of multijurisdictional litigation).

215. *See* Cain & Davidoff, *supra* note 4, at 495 (observing that Delaware courts tend to award higher fees in cases that may be filed in multiple jurisdictions).

216. We confine our proposed rule to public company mergers because our empirical evidence is limited to that context and also because the proxy rules regulate only publicly traded companies. Delaware courts have recognized a difference between the disclosure obligations of public and private companies in other contexts as well. *Compare* Skeen v. Jo–Ann Stores, Inc., 750 A.2d 1170, 1174 (Del. 2000) (limiting disclosure obligations in an appraisal case involving a publicly held corporation), *with* Erickson v. Centennial Beuregard Cellular LLC, No. Civ.A. 19974, 2003 WL 1878583, at *6–9 (Del. Ch. Apr. 11, 2003) (expanding disclosure obligations in an appraisal case involving a privately held corporation and differentiating *Skeen* on the public–private distinction).

217. *In re* S. Peru Copper Corp. S'holder Derivative Litig., 52 A.3d 761 (Del. Ch. 2011).

218. Others have questioned the utility of a state law duty of disclosure that differs from the duties applicable under the federal securities laws. *See, e.g.*, Friedman, *supra* note 161, at 1577–79 (advocating unification of the legal standard through SEC rule making adopting the Delaware duty of disclosure).

"meaningful."[219] Nevertheless, our empirical results suggest that the inquiry in the context of the settlement approval decision is ineffective. The vast majority of cases settled for supplemental disclosures—in which the lawyers receive a nonzero fee award—appear to have no effect on the shareholder vote. We can find no statistically significant relationship between the amount of attorneys' fees awarded and the quality of the resulting disclosure as measured by its effect on the shareholder vote.[220] To the extent that the courts are trying to award nominal fees in weak cases in order to discourage nonmeritorious litigation, the practice does not seem to be effective—litigation rates have been consistently increasing even as the average fee award declines in size. It is simply implausible to explain the growth in litigation challenges by a decline in the quality of merger disclosures. Rather, existing doctrine, which treats a disclosure-only settlement as providing shareholders with a substantial benefit, is creating bad incentives.

D. *Elimination of Disclosure-Only Fee Awards as Conceptual Preemption*

The obvious objection to our proposal is that by eliminating fee awards in disclosure-only settlements we reduce the incentive for litigation in cases in which the proxy statement is truly deficient. Moreover, removing the threat of shareholder litigation in these cases might lead to an increase in materially deficient disclosure by eliminating the deterrent effect of disclosure claims. Barring disclosure settlements may open the door to materially deficient disclosure.

Our proposal does not eliminate litigation challenges to merger disclosure, however; it simply relegates those challenges to a highly developed body of law and regulation and a forum specialized in applying that law—litigation under the federal securities laws in federal courts. Federal law is, as we explained, better designed to address merger disclosure standards than Delaware's duty of disclosure, and federal courts are well-situated to enforce that law efficiently. Delaware law and Delaware courts, by contrast, are well-suited to pass on the substantive fairness of merger transactions. We would reserve for state courts the promulgation of legal standards for evaluating the substantive and procedural fairness of mergers, and we would reserve for federal law the regulation of merger disclosure.

Our proposal borrows from and extends the fundamental balance of regulatory authority between Delaware, on the one hand, and the SEC, on

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219. *See supra* subpart I(C).

220. *See supra* Table IV.

the other, as articulated by the United States Supreme Court in 1977. In *Santa Fe Industries, Inc. v. Green*, the Supreme Court considered a challenge under Rule 10b-5 to a short-form merger pursuant to Delaware law.[221] The plaintiffs' claim was that the merger was fraudulent because it deprived plaintiffs of the fair value of their stock at an inadequate price.[222] The Court concluded that this allegation failed to state a claim under federal law.[223] Substantive fairness is not the same as deception, and the Court held that federal law provides a remedy only for the latter.[224] With respect to substantive fairness, the Court stated that this was an issue for state corporate law.[225] The Court refused to federalize this body of law and override state regulatory policies.[226] The Court thus drew a line with respect to the regulation of mergers: federal law would regulate disclosure quality, and state law would address substantive fairness.[227]

The expansion of directors' disclosure duties under Delaware state law encroaches upon the line articulated by the Court in *Santa Fe*. Concededly, nothing in the *Santa Fe* decision or the federal securities laws precludes states from imposing disclosure duties in connection with mergers that supplement those imposed by federal law.[228] But the broader message of *Santa Fe* is a message about the balance of power and the specialization of expertise. Indeed, the Court in *Santa Fe* explicitly noted that the plaintiffs had an appraisal remedy available to them, which would have given them the opportunity to have the Chancery Court conduct a valuation of their stock, but that they had chosen not to pursue that remedy.[229] By implication, the Court's decision was based in part on the existence and perhaps superiority of state court as a forum for adjudicating claims about merger fairness. Since *Santa Fe*, the Delaware Courts have developed considerable expertise in understanding and applying complex principles of

221. Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 464–65 (1977).

222. *Id.* at 467.

223. *Id.* at 479–80.

224. *Id.* at 475–76.

225. *Id.* at 478.

226. *Id.* at 478–79.

227. *See id.* at 478–80.

228. Indeed, the Exchange Act expressly preserves rights and remedies available under state law, leaving room for federal and state disclosure regimes to exist side by side. *See* Securities Exchange Act of 1934 § 28(a)(2), 15 U.S.C. § 78bb(a)(2) (2012) ("[T]he rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity."). *But see* 15 U.S.C. § 78bb(f)(1) (preempting state court litigation for "covered class actions").

229. *Santa Fe*, 430 U.S. at 466–67.

valuation,[230] as well as in analyzing the procedures by which mergers and other control transactions are conducted and negotiated.[231]

In contrast, the federal courts have developed expertise both in evaluating disclosure quality and in evaluating the quality of litigation challenging that disclosure. This expertise is enhanced within the subject of merger disclosure because the substantive content of a proxy statement in connection with a shareholder vote on a merger is largely determined by the SEC's disclosure requirements. Thus the federal courts' analyses of disclosure challenges are informed by the choices that the SEC has made in formulating affirmative disclosure requirements and balancing those requirements against competing values. This makes the federal courts particularly well-suited to evaluate the extent to which supplemental disclosures add material value to the information provided in a specific proxy statement.

We argue here that the Delaware courts should follow a similar approach to that taken by the Supreme Court in *Santa Fe* and restore the conceptual boundary between state and federal regulation. We propose that the courts conclude that claims about the adequacy of merger disclosure should be litigated under federal law (and subject to the materiality threshold established therein), leaving state law to focus on the fairness, both procedural and substantive, of the merger terms.

Our proposal locates merger litigation within the space in which federal and state law potentially overlap and in which both Wilmington and Washington should consider the possibility of upsetting a "well-tuned balance" through greater regulatory intervention.[232] Federal and state law take very different approaches to the regulation of mergers and, in the same manner that the Supreme Court has recognized the superiority of state mechanisms for evaluating substantive merger fairness, state courts might do well to rethink the intrusion into disclosure duties.

IV. Objections and Responses

A. Multiforum Litigation

The core objection to our proposal may be that the hands of the Delaware courts are tied. While they might prefer to refuse to award attorneys' fees in disclosure-only settlements, they face a real risk that, in doing so, they will drive merger litigation outside of Delaware and into

230. *See, e.g.*, *In re* Emerging Commc'ns, Inc. S'holders Litig., No. Civ.A. 16415, 2004 WL 1305745, at *12–28 (Del. Ch. May 3, 2004).

231. *See, e.g.*, Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1239, 1244–49 (Del. 2012).

232. Mark J. Roe, *Delaware and Washington as Corporate Lawmakers*, 34 DEL. J. CORP. L. 1, 16 (2009).

other states in which the judges subject proposed settlements to lower levels of scrutiny.[233] Recall that not only has the percentage of mergers facing a litigation challenge risen, but that mergers today typically face multiple litigation challenges in different fora. If Delaware courts do not pay plaintiffs' lawyers, they will file and settle their cases elsewhere.[234] Indeed there is evidence that litigants have done precisely that, engaging in forum shopping and then, on occasion, entering into reverse auctions in which they agree to settle cases for limited value as long as they receive a fee award.[235]

While it may be that forum shopping has thus far limited the ability of Delaware to reduce the volume of low-value merger litigation, since the judicial acceptance of forum-selection bylaws, however, the problems associated with multiforum litigation have entered a new phase.[236] Forum-selection bylaws allow a corporation to select, in advance, Delaware court as the exclusive forum for corporate governance disputes.[237] The bylaws are expressly intended to apply to merger litigation.[238] Hence, a corporation can effectively opt in to the Delaware approach to merger litigation by adopting a forum-selection bylaw, and, provided that the out-of-state court likewise defers to the bylaw provision, Delaware law will be applied by Delaware courts.[239]

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233. *See, e.g.*, John Armour et al., *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605, 634 (2012) (suggesting that courts in other states will scrutinize proposed settlements and fee awards less carefully); Cain & Davidoff, *supra* note 4, at 484–85 (discussing problems presented by multijurisdictional litigation).

234. *See* John Armour et al., *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1370–72 (2012) (explaining that Delaware's historical approach to attorneys' fees has been "widely believed to be more generous" but that fee cuts could lead to more out-of-Delaware litigation); Cain & Davidoff, *supra* note 4, at 496 ("[S]tate courts compete for litigation and attorneys respond rationally to the incentives provided by settlements . . . , and . . . fee awards themselves."); Griffith & Lahav, *supra* note 15, at 1066–70 (examining a trend of cases moving out of Delaware).

235. *See* Brief of Special Counsel, *supra* note 79, at 7 (discussing the danger that counsel will settle for too low an amount in order to secure a fee in a reverse auction situation); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370, 1372–73 (1995) (explaining how forum shopping can lead to reverse auctions).

236. *See, e.g.*, Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 942, 963 (Del. Ch. 2013) (concluding that such bylaws were facially valid under the statute as applied to cases arising under the internal affairs doctrine).

237. *See id.* at 951–52 (explaining that forum-selection bylaws regulate where stockholders may file suit).

238. *Id.*

239. *Cf.* City of Providence v. First Citizens BancShares, Inc., No. 9795-CB, 2014 WL 4409816, at *1, *5, *11 (Del. Ch. Sept. 8, 2014) (deferring to a forum-selection bylaw in favor of North Carolina). *But see* Roberts v. Triquint Semiconductor, Inc., No. 1402–02441, slip op. at 9 (Ore. Cir. Ct. Aug. 14, 2014) (refusing to defer to forum-selection bylaw in favor of Delaware).

We note that we do not, in this Article, address the question of whether or to what extent courts should defer to forum-selection clauses.[240] Nonetheless, to the extent that courts accept such clauses, they enable our proposed rule to operate as a form of private ordering. Were our proposal to be enacted, shareholders of corporations that adopted forum-selection bylaws would effectively be opting into a rule that barred the funding of disclosure settlements from the corporate treasury. By contrast, shareholders of corporations that did not adopt forum-selection bylaws would effectively be electing to keep open the possibility of paying for a disclosure settlement in an alternative jurisdiction.[241] Were Delaware to choose the clear rule we propose over its current haphazard approach, shareholders could decide for themselves, via the mechanics of forum-selection clauses, which rule was optimal for them.

Notably, even if other states do not uniformly defer to forum-selection provisions,[242] the cases that our proposal would exclude from the Delaware courts are the weakest[243]—those in which the Delaware courts have the least interest in channeling deal makers' conduct by critiquing the actions of the parties who are brought before them.[244] As some commentators have observed, these critiques and exhortations are as vital to the development of Delaware law as the holdings themselves because they guide the conduct of transaction planners in future cases.[245] We suggest, however, that the Delaware courts can perform these "teaching moments" most effectively not in the cases that settle for disclosures and small attorneys' fee awards but rather those that, like *El Paso* and *Del Monte*, produce substantial

240. *See generally* ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 560 (Del. 2014) (suggesting deference in the context of a loser-pays bylaw).

241. This assumes, of course, that the alternative jurisdiction does not itself have a rule barring the payment of plaintiffs' attorneys' fees for disclosure settlements, an assumption that may not be warranted for every jurisdiction. *See infra* notes 272–77.

242. *See supra* note 239.

243. The message courts appear to be sending in many of these disclosure-only cases is that the plaintiffs' bar should stop bringing such weak cases. *See, e.g.*, *In re* PAETEC Holding Corp. S'holders Litig., No. 6761–VCG, 2013 WL 1110811, at *6 (Del. Ch. Mar. 19, 2013) (stressing that close judicial scrutiny is warranted, especially "in the context of merger litigation that produces a disclosure-only settlement"). The effect appears to be limited though given the continued high rate of litigation.

244. A good recent example of such an opinion is *In re El Paso Corp. Shareholder Litigation*, in which Chancellor Strine declined to enjoin the merger but excoriated the conduct of the parties involved. 41 A.3d 432, 434–35 (Del. Ch. 2012). Because the court did not issue an injunction, the opinion is technically all dicta, but the critique of the parties' conduct gives transaction planners a clear sense of what to avoid in future deals.

245. *See, e.g.*, Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1097–99 (1997) (remarking that shareholder litigation plays a beneficial role in the creation of corporate norms).

damage awards and attorneys' fees.[246] As a result, our proposal should not affect the pedagogical content of Delaware law in any meaningful way and instead sends a message to plaintiffs' counsel to concentrate their efforts on the most problematic cases.

An alternative to the use of forum-selection bylaws would be for the Delaware courts to adopt the restriction on attorneys' fee awards in disclosure-only cases as a part of Delaware's substantive corporate law. As a substantive rule, this limitation would preclude other state or federal courts from awarding fees in these cases under *Erie*[247] and the internal affairs doctrine. We note that a substantive law approach would have the salutary effect of preserving the incentive for Delaware courts to continue their leadership role by maintaining the potential for competition with respect to the "good" merger cases.

B. The Litigation Response to Barring Disclosure-Only Fee Awards

We have focused in this Article on the incentive effect of settlement-only fee awards. We recognize, however, that our proposal creates an alternative set of incentives that may, in turn, impact future merger litigation. Possible such effects include: (1) reducing merger litigation to the point that it allows bad deals to proceed unchallenged; (2) creating negative spillover effects in other forms of corporate litigation, such as appraisal actions; and (3) shifting to an alternative type of low value settlements in merger litigation. We address each of these in turn.

One challenge to our proposal is that it would undercut what is often seen as the basic value of merger litigation—that is, its ability to serve as a screen for deal quality. According to this view, the real purpose of merger litigation is to identify and prevent bad deals from being consummated. However, because litigants cannot necessarily evaluate deal quality until the case gets into discovery—*Del Monte* is an example of a transaction that did not show its flaws until shareholder claimants reached discovery[248]—merger litigation must be overinclusive at the filing stage in order to get potentially good cases into discovery. Hence, the argument goes, our proposal inhibits the screening function of merger litigation because it is likely to result either in fewer claims being brought or in fewer claims being

246. The settlement amount in *El Paso* was $110 million (with $26 million going to legal fees and expenses), while the settlement amount in *Del Monte* was $89.4 million (with $23.3 million going to legal fees and expenses). *El Paso*, 2012 WL 6057331, at *para. 19; Stipulation and Agreement of Settlement at 10, *El Paso*, 41 A.3d 432 (No. 6949-CS); *Del Monte* Transcript, *supra* note 50, at 53, 58.

247. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

248. *See In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 817 (Del. Ch. 2011) (noting that "[d]iscovery revealed a deeper problem" with the sale process).

pursued with any real vigor. Because fewer claims are being pursued, the screening function of merger litigation may not function optimally—that is, it may allow bad deals to proceed unchallenged.

First, we acknowledge that our proposal is likely to lead to a reduction in merger litigation overall. This is because the inability to win fees for disclosure settlements will reduce the profitability of merger litigation for plaintiffs' firms on a portfolio basis, creating an incentive to curtail claims activity. This is not necessarily a bad thing. Indeed, in light of the ubiquity of litigation challenges to mergers, we view this as a virtue of our proposal.[249] What we are advocating simply is a return to the state of merger litigation circa 2003 before the current litigation explosion. In that year, 25 cases were brought or approximately 28.7% of deals using the same sample criteria that we use in this Article.[250] We have little reason to believe that this level of litigation exposure was insufficient to deter misconduct.

In addition, the Delaware courts can offset the effect of our proposal completely by simply paying higher attorneys' fees for meritorious cases. Tailoring the fee award more closely to case quality would provide more appropriate incentives than paying counsel a nominal fee in every case, no matter how weak. In contrast, current law seems to encourage plaintiffs' firms to bring weak cases in the hope of winning fees for supplemental disclosures. We would be happy if our proposal resulted in these claims not being brought.

Moreover, a reduction in claims activity is problematic only if good claims and bad claims are equally deterred—in other words, that it is impossible to identify good and bad cases early in the process. We doubt the accuracy of this proposition. There are strong reasons to believe that plaintiffs' firms are able to screen for case quality early in the litigation process and to expend their resources in the highest quality cases. Litigation experience under the federal securities laws subsequent to the adoption of the PSLRA strongly suggests both that plaintiffs' lawyers respond to incentives and that, when the law structures incentives to reward only high quality cases, plaintiffs' lawyers respond.[251]

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249. *See supra* Part III.

250. This number is derived from unreported statistics used in our data compilation for another paper coauthored by one of the authors. C.N.V. Krishnan, Steven Davidoff Solomon & Randall S. Thomas, *Zealous Advocates or Self-Interested Actors? Assessing the Value of Plaintiffs' Law Firms in Merger Litigation* (Vanderbilt Univ. Law Sch. Law & Econ., Working Paper No. 14-25, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2490098, *archived at* http://perma.cc/G26B-EMEX.

251. *See, e.g.*, Stephen J. Choi, *Do the Merits Matter* Less *After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598, 622–23 (2007) (empirically testing the effect

Alternatively, a ban on fee awards in disclosure-only settlements might lead plaintiffs' counsel to shift the nature of the cases they file. One possibility is a shift from fiduciary duty claims to appraisal proceedings. At least one empirical study has found that investors are making growing use of the appraisal remedy[252] and, at least in some cases, recovering substantially more than the merger consideration.[253]

To the extent our proposal generates a shift to appraisal proceedings, we would view that shift as an unmitigated benefit for two reasons. First, the Delaware courts are experts in valuation methodology and continue to refine the appraisal proceeding to modernize the mechanism for shareholders to challenge merger price. Second, appraisal focuses directly on the issue that is most central to a merger challenge—are shareholders receiving fair value for their stock?[254] At the end of the day, whatever disclosure or process issues are involved, the primary issue from a shareholder perspective is the merger price.[255] By focusing exclusively on that question, we view appraisal as the optimal method for providing shareholders with redress. Indeed, as the Delaware courts have explained, the appraisal proceeding may provide shareholders with a better remedy than the standard fiduciary duty claim if the true concern is merger consideration because an appraisal proceeding requires a judicial determination of fair value, while a court will reject a fiduciary duty claim so long as the merger price is "within the range of fairness."[256] The difference is illustrated by the *Cede & Co. v. Technicolor*[257] litigation, in which the court determined, in ruling on a breach of fiduciary duty claim, that the merger consideration of $23/share was fair,[258] yet in an appraisal proceeding awarded the plaintiffs $28.41/share.[259] Accordingly, we view the appraisal proceeding as creating appropriate litigation incentives for

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of PSLRA on filing decisions by plaintiffs' attorneys and finding significant effect on the choice of cases filed).

252. *See* Minor Myers & Charles R. Korsmo, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. (forthcoming 2015) (manuscript at 14–18) (documenting a large increase in appraisal activity), *available at* http://ssrn.com/abstract=2424935.

253. *See id.* (manuscript at 36 tbl.3) (showing the mean amount allocated to shareholder to be much greater with "all appraisal" than with "no appraisal").

254. *Id.* (manuscript at 1); *see also In re* Trados Inc. S'holder Litig., 73 A.3d 17, 35 (Del. Ch. 2013) ("The appraisal proceeding seeks a statutory determination of fair value . . . .").

255. *See Trados*, 73 A.3d at 78 (finding no breach of fiduciary duty where merger price was determined to be fair).

256. *Id.*

257. Cede & Co. v. Technicolor, Inc., 884 A.2d 26 (Del. 2005).

258. Cinerama, Inc. v. Technicolor, Inc. (*Technicolor III*), 663 A.2d 1156, 1176–77 (Del. 1995).

259. *Cede*, 884 A.2d at 30.

both shareholders and their counsel to bring challenges if and only if they have a reasonable chance of recovering additional consideration.

A third possible concern is that our proposal eliminates only one pathway to wasteful settlement while leaving several others, notably amendment settlements and securities claims, completely unaffected. The predictable result of this change, then, is that litigants with weak claims will seek to channel their rent-seeking efforts along these other paths, seeking fees in exchange for meaningless amendments to the merger agreement or, alternatively, seeking to conclude a meaningless disclosure settlement of their securities claim.

Our first response is that we should not allow the perfect to become the enemy of the good. If disclosure-only settlements do not benefit shareholders, they should not be incentivized. This conclusion holds regardless if our proposal does not, at the same time, eliminate other opportunities for rent-seeking by plaintiffs' lawyers. Our second response is to question the extent to which these alternatives provide effective substitutes for disclosure-only settlements. We have reasons to think they do not.

At first glance, amendment settlements seem to be the most promising alternative pathway for plaintiffs' lawyers' rent-seeking efforts. It may be possible for plaintiffs' lawyers to negotiate very small modifications to the merger agreement and then to argue that these modifications benefit the shareholder class. Indeed, this happens today. Studies find that many common merger-agreement amendments involve modest changes to deal protections, such as a slightly longer go-shop period or a slightly smaller termination fee, generally with no observable effect, such as the subsequent appearance of an intervening bidder.[260] Such changes might become more common were our proposal to be implemented. Moreover, to prevent such amendments from disturbing their bargain, transacting parties could anticipate them in the terms of the original agreement by agreeing to a shorter go-shop period or a higher termination fee at the outset.

While some such behavior may take place, we believe it is generally far less easy to settle for an amendment to the merger agreement than to settle for supplemental disclosures. Our empirical results clearly support this view—in our sample, 13.60% of settlements are amendment settlements while 80.10% are disclosure-only settlements. One explanation is that before plaintiffs' lawyers and the target company can agree to amend the merger agreement, they must get the approval of a significant party at interest—namely, the acquiring company. By this point in the process, the

260. *See* RECENT DEVELOPMENTS IN SHAREHOLDER LITIGATION, *supra* note 37, at 10 (listing termination fees as a common amendment); Cain & Davidoff, *supra* note 4, at 479 (same).

acquiring company will have invested considerable effort and expense in the merger agreement and, having achieved agreement, will likely be loath to alter it. In addition, even if the amendments are minor, the acquiring party arguably has something meaningful to lose from them, leading the settlement negotiation to be more adversarial in nature. Simply put, the involvement of a third party with something to lose in the transaction inhibits collusion between the plaintiffs' attorney and the defendant.[261] In contrast, the negotiation of a disclosure settlement involves only the plaintiffs' lawyers and the target corporation, enabling low-value disclosures to be traded more freely.[262]

Furthermore, should the involvement of the counterparty to the merger agreement not be sufficient to prevent litigants from concluding low-value amendment settlements, the Delaware courts could once again become involved. Chancery Court judges have a comparative advantage in evaluating merger agreements generally and deal-protection provisions in particular. There is a large and well-developed body of substantive jurisprudence on the gamut of deal-protection devices—from poison pills and crown-jewel lockups to termination fees and no-talk or no-shop provisions.[263] The judges of the Chancery Court regularly evaluate how a given provision affected a particular deal and would be especially well-suited to determine whether a given amendment produced substantial benefit to the shareholder class.[264]

The other obvious litigation alternative is for plaintiffs' lawyers to file disclosure claims under the federal securities laws and to resolve those claims through disclosure-only settlements. As noted earlier, we do not view this alternative as problematic, largely because of the existing body of procedural and substantive requirements designed to limit the potential for

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261. The acquiring company is unlikely to go along with whatever the target company and the shareholders' lawyers suggest, potentially viewing the suggested amendments as negotiating gambits and insisting instead upon the deal as agreed.

262. It is true that insofar as the plaintiffs' attorneys' fees are paid by directors and officers (D&O) insurance, as indeed they typically are, there is theoretically a third party at the table—namely, the D&O insurers—who could constrain the ability of plaintiffs and defendants to collude, much as the acquiring company would constrain the parties in the context of an amendment settlement. That the D&O insurer frequently does not live up to this role, however, is well documented. *See* TOM BAKER & SEAN J. GRIFFITH, ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION 138–41 (2010) (discussing the constraints on D&O insurers' authority and influence over settlements).

263. *See, e.g.*, Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 933–36 (Del. 2003) (evaluating multiple deal-protection devices); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (analyzing the use of a lock-up agreement).

264. *See, e.g.*, *In re* Compellent Techs., Inc. S'holder Litig., No. 6084–VCL, 2011 WL 6382523, at *18–26 (Del. Ch. Dec. 9, 2011) (evaluating the benefit conferred to shareholders by modification of the deal protections in a merger agreement).

frivolous litigation.[265] Substantively, a federal cause of action is more limited than a state law duty-of-disclosure claim, both because of the threshold materiality analysis and because of the fact that omissions are actionable only in the context of an affirmative duty to disclose. As we have noted, federal courts have developed expertise in the application of these legal standards.[266] Procedurally, the pleading standard of the PSLRA requires plaintiffs to identify specific misstatements and omissions at the outset rather than filing a boilerplate claim of inadequate disclosure, and the discovery stay prohibits plaintiffs from using the cost of discovery as leverage to induce a settlement.[267] Studies suggest that the federal courts have been diligent in applying these standards to dismiss weak disclosure claims at an early stage.[268]

V. A Roadmap to Implementation

Having laid out our proposal, we briefly consider possible methods of implementation. Because of Delaware's leadership role in corporate litigation, and because of the high percentage of merger targets that are incorporated in Delaware, we look to Delaware to set the standard. We believe that the likely proliferation of forum-selection bylaws will enhance Delaware's ability to do so. We note, however, that our proposal is available to other states and, indeed, that the state of Texas has adopted an approach that is analogous to what we suggest, albeit not focused specifically on the context of merger litigation.[269]

Perhaps the most straightforward approach for eliminating fee awards in disclosure-only settlements would be for courts to stop recognizing disclosure-only settlements as producing a shareholder benefit sufficient to entitle plaintiffs' lawyers to a fee award. Because the corporate benefit doctrine is a judicially created doctrine,[270] courts could implement this change themselves. We note that some Delaware judges seem to be moving in this direction on a case-specific basis. However, we recognize that judges are accustomed to applying discretion on a case-by-case basis and generally prefer rules that preserve rather than restrict their discretion. As a

265. *See supra* notes 189–94 and accompanying text.

266. *See supra* notes 189–94 and accompanying text.

267. *See supra* notes 189–94 and accompanying text.

268. *See, e.g.*, Michael Klausner et al., *When Are Securities Class Actions Dismissed, When Do They Settle, and for How Much?—An Update*, PLUS J., Apr. 2013, at 1, 8 (reporting, based on a study of all securities class actions filed between 2006 and 2010, that "38% of cases ended relatively quickly and painlessly for the defendants").

269. *See infra* notes 272–76 and accompanying text.

270. *See supra* notes 97–100 and accompanying text.

result, the courts may be unwilling to adopt a per se rule that binds their own hands.[271]

An alternative would be for the courts, again as a matter of common law, to cut back on the breadth of the substantive duty of disclosure. As we noted earlier, the Delaware duty of disclosure is of relatively recent origin, arguably broader than the federal law course of action, and somewhat imperfectly articulated because of the procedural context in which it is most frequently applied. We suspect that the emergence of the duty of disclosure and the articulation by several courts of broad disclosure obligations, particularly with respect to the work and incentives of investment bankers in connection with control transactions, has contributed to the proliferation of merger litigation, especially because, under the existing obligation, disclosure challenges cannot readily be resolved on a motion to dismiss. A substantive change to Delaware fiduciary duty law is a more ambitious response than our proposal requires, but it would be an effective solution as well. Notably, a modification to the substantive duty of disclosure would reduce the ability of plaintiffs to evade the change through forum shopping.

A third option would be for the Delaware legislature to adopt our proposed solution. The most straightforward mechanism would be a statute that bars the award of attorneys' fees in disclosure-only settlements of merger litigation. As an example of such an action, the Texas Legislature recently instructed the Texas Supreme Court to amend the rules of civil procedure to prohibit the award of cash attorneys' fees in class actions that are settled for coupons or other nonpecuniary benefits, a rule that goes farther than our own proposal.[272] A recent decision of the Texas Court of Appeals, *Kazman*,[273] held that this provision precluded the trial court from awarding monetary fees to class counsel in connection with a proposed disclosure-only merger settlement.[274]

An important distinction between the Texas provision and our proposal is that the Texas legislation is not confined to merger cases.[275] The motivation for the Texas law was a concern about coupon settlements in

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271. On the other hand, members of the Chancery Court might be relieved not to have to wade into the morass of fee disputes for what is now a large category of cases. *See* Daniel Fisher, *Delaware Judge Strine: 'I'm Not Going to Give Big Fees for Junk,'* FORBES (Oct. 24, 2012, 3:10 PM), http://www.forbes.com/sites/danielfisher/2012/10/24/delaware-judge-strine-im-not-going-to-give-big-fees-for-junk/, *archived at* http://perma.cc/F3KQ-P739 (quoting Chancellor Strine as stating "I'm not going to give big fees for junk" and that "[w]hat does trouble me is the hundreds and hundreds of lawsuits where the only beneficiary is the trial lawyer").

272. Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 1.01, secs. 26.001–.002, 2003 Tex. Gen. Laws 847, 847–48 (codified at Tex. Civ. Prac. & Rem. Code Ann. §§ 26.001–.003 (West 2014)).

273. Kazman v. Frontier Oil Corp., 398 S.W.3d 377 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

274. *Id.* at 387.

275. TEX. CIV. PRAC. & REM. CODE ANN. §§ 26.001–.003 (West 2014).

class litigation generally.[276] This concern has been raised in other substantive contexts such as consumer and antitrust class actions.[277] Yet from a political-economy perspective, enacting merger-specific legislation is a logical approach for Delaware given its interests in protecting target corporations incorporated within the state from unfounded and excessive litigation challenges.[278] Delaware also benefits by removing unnecessary obstacles to the merger of Delaware corporations because such an action increases the expected value of corporations incorporated in the state.[279]

A deeper question occasioned by our proposal is whether Delaware will willingly cede some of the authority it now possesses in merger regulation to federal courts. Our proposal would have the effect of making federal courts, rather than Delaware, the central authority for evaluating the quality of disclosures in public company mergers.[280] Ceding this role would go against the state's seeming incentive to maximize its authority over businesses incorporated within the state.[281] We argue that our empirical findings provide convincing evidence that the power conferred on the Delaware courts by ubiquitous and weak merger litigation challenges is illusory. The cases resolved through disclosure-only settlements do not

276. *See* Michael Northrup, *Restrictions on Class-Action Attorney-Fee Awards*, 46 S. TEX. L. REV. 953, 961 (2005) ("The adoption of the coupon rule evidences the legislature's dissatisfaction with the practice of leveraging the class-action device into settlements that provide insignificant recoveries (or effectively no recovery) to class members, while the class attorneys recover large cash awards.").

277. James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443, 1445–47 (2005); *see also* 28 U.S.C. § 1172(d) (2012) (barring coupon settlements without court approval).

278. *See* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 8–9 (1993) (describing political-economy reasons for the Delaware legislature's responsiveness to corporate interests). Delaware derived $534,236,586 in revenue in 2008 from fees paid by corporations and other business associations. Mark J. Roe, *Delaware's Shrinking Half-Life*, 62 STAN. L. REV. 125, 136 tbl.3 (2009).

279. *See* Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 527–28 (2001) (hypothesizing that the value of Delaware firms reflect, in part, their amenability to a takeover under a balanced regulatory regime).

280. This would encompass a reallocation of authority to the federal government after a long period of acquiescence. Steven M. Davidoff, *The SEC and the Failure of Federal Takeover Regulation*, 34 FLA. ST. U. L. REV. 211, 269 (2007).

281. *See* Steven M. Davidoff, *A Case Study:* Air Products v. Airgas *and the Value of Strategic Judicial Decision-Making*, 2012 COLUM. BUS. L. REV. 502, 505–06 (2012) (positing that *Airgas* provides insight into how Delaware courts seek to maximize Delaware's dominance); Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 55 (2005) (recognizing the direct threat, imposed by the possibility of corporate migration, to Delaware's revenue as a likely reason for the legislature's responsiveness to corporate suggestion); Marcel Kahan & Edward Rock, *How to Prevent Hard Cases from Making Bad Law: Bear Stearns, Delaware and the Strategic Use of Comity*, 58 EMORY L.J. 713, 714–15 (2009) (noting Delaware's immense financial success as a result of its control of corporate lawmaking).

provide the Delaware courts with a meaningful role in implementing merger standards. Freeing the courts from these cases would empower the courts to do what they do best—deciding real cases and setting substantive and procedural standards that matter from the perspective of business practices and shareholder value.

Conclusion

We have examined the value of nonpecuniary relief in merger litigation from a heretofore neglected angle—its effect on shareholder voting. We find that amendment settlements have some demonstrable effect on shareholder voting but that disclosure-only settlements do not. The clear implication of these findings is that disclosure-only settlements do not produce a corporate benefit.

Because disclosure-only settlements produce costs but no benefits, we argue that they should be eliminated. An easy way to accomplish this is removing the judicially created incentive for plaintiffs' attorneys to bring these cases by rejecting the claim that a disclosure-only settlement is a corporate benefit for purposes of Delaware law. This approach would not leave shareholders without recourse if merger disclosures are materially deficient; instead they would be required to litigate true disclosure claims under the federal securities laws, preserving state merger litigation for challenges to the substantive and procedural fairness of the merger terms. The effect of adopting this policy would be to eliminate much wasteful litigation while still preserving the ability of Delaware courts to decide more substantial challenges to deals.

Appendix

Table III (All Variables)

Table III reports ordinary least squares regressions in which the dependent variable in columns (1) and (2) is *% Yes Votes Per Votes Cast*; columns (3) and (4) is *% Yes Votes Per Outstanding Shares*; and columns (5) and (6) are *% Yes Votes Per All Yes & No Votes*. *% Yes Votes Per Votes Cast* is the percentage of yes votes out of all votes cast at the meeting, including abstentions. *% Yes Votes Per Outstanding Shares* is the percentage of yes votes out of the total outstanding voting shares of the target and eligible to vote as of the record date for the meeting. *% Yes Votes Per All Yes & No Votes* is the percentage of yes votes out of the total number of yes and no votes cast at the meeting. The sample is as described in subpart II(A), *infra*. *Initial Offer Premium* is the initial offer price over target's trading price thirty days prior to merger announcement. *Final Offer Premium* is the final price paid over target's trading price thirty days prior to announcement. *Cash* indicates the consideration paid is all cash, *Auction* indicates the transaction is initiated as an auction among multiple bidders instead of a privately-negotiated sale, *Go shop* indicates that the merger agreement includes a provision that allows the target company to actively solicit other potential bidders for a specific limited period of time after the merger agreement has been signed, *Take Private* indicates that a Schedule 13E-3 has been filed with the SEC for the transaction due to the buyer being an affiliated party. *ISS Position* = 0 means ISS recommended that its' client shareholders do not vote or vote against the transactions. *ISS Position* = 1 means that ISS recommended that its client shareholders vote for the transaction. *Appraisal Exercise* = 1 if any shareholder exercised appraisal rights and = 0 otherwise. *Disclosure Settlement* requires the target to make an additional disclosure concerning the transaction; *Consideration-Increase Settlement* provides for an increase in the consideration payable to target shareholders; and *Amendment Settlement* requires the terms of the transaction to be revised. *Amendment Settlement* also includes settlements that have as a component a Disclosure Settlement. *Consideration-Increase Settlement* also includes settlements that have as a component Amendment or Disclosure Settlements. *Supermajority State* = 1 if the state of incorporation of the target requires greater than 50% of shareholders to approve a merger and = 0 otherwise. *P*-values are in parentheses, with ***, **, and * denoting statistical significance at the 1%, 5%, and 10% levels, respectively. The models in columns (1), (3), and (5) include only targets incorporated in Delaware and where the acquisition is all cash. All models include year-fixed effects. *P*-values are in parentheses, with ***, **, and * denoting statistical significance at the 1%, 5%, and 10% levels, respectively.

Yes Votes Per	Votes Cast				Outstanding Shares				Yes and No Votes			
	(1)		(2)		(3)		(4)		(5)		(6)	
Initial Offer Premium	−0.177	***	−0.089	*	−0.096		−0.013		−0.216	***	−0.083	*
	(0.00)		(0.07)		(0.28)		(0.85)		(0.00)		(0.07)	
Final Offer Premium	0.21	***	0.105	**	0.073		0.022		0.241	***	0.095	**
	(0.00)		(0.03)		(0.40)		(0.74)		(0.00)		(0.04)	
Transaction Value (Log)	0.005	*	0.007	***	−0.002		0.001		0.003		0.005	**
	(0.07)		(0.00)		(0.64)		(0.82)		(0.27)		(0.01)	
Cash	0.006		0.003		−0.005		−0.013		0.017	*	0.002	
	(0.49)		(0.64)		(0.71)		(0.16)		(0.06)		(0.76)	
Auction	0.010		0.008		0.001		0.005		0.002		0.005	
	(0.17)		(0.23)		(0.96)		(0.55)		(0.75)		(0.45)	
Go-Shop	−0.008		−0.002		0.001		0.005		−0.009		0.000	
	(0.39)		(0.83)		(0.95)		(0.68)		(0.33)		(0.96)	
Take Private	−0.008		−0.005		0.066	***	0.073	***	−0.014		−0.009	
	(0.61)		(0.74)		(0.01)		(0.00)		(0.38)		(0.50)	

Yes Votes Per	Votes Cast				Outstanding Shares				Yes and No Votes			
	(1)		(2)		(3)		(4)		(5)		(6)	
ISS Position	0.231	***	0.155	***	0.153	***	0.113	***	0.184	***	0.124	***
	(0.00)		(0.00)		(0.00)		(0.00)		(0.00)		(0.00)	
Appraisal Exercise	0.033	**			0.030				0.020			
	(0.05)				(0.22)				(0.16)			
Disclosure Settlement	0.008		0.000		0.023	*	0.011		0.009		0.003	
	(0.31)		(0.98)		(0.06)		(0.22)		(0.20)		(0.58)	
Amendment Settlement	0.018		0.008		0.068	***	0.045	***	0.03	**	0.017	
	(0.13)		(0.51)		(0.00)		(0.01)		(0.01)		(0.12)	
Consideration Increase Settlement	0.036	*	0.005		0.100	***	0.057	**	0.025		0.004	
	(0.07)		(0.80)		(0.00)		(0.022)		(0.15)		(0.809)	
Supermajority State			−0.015	**			0.014				−0.010	
			(0.05)				(0.17)				(0.19)	
Observations	215		391		237		423		168		293	
R-squared	0.5007		0.2658		0.21		0.1228		0.4401		0.2252	

Table IV (All Variables)

Table IV reports ordinary least squares regressions in which the dependent variable in columns (1) & (2) is *% Yes Votes Per Votes Cast*; columns (3) and (4) is *% Yes Votes Per Outstanding Shares*; and columns (5) and (6) are *% Yes Votes Per All Yes & No Votes. % Yes Votes Per Votes Cast* is the percentage of yes votes out of all votes cast at the meeting, including abstentions. *Attorneys Fee > 500* is coded = 1 if the attorneys' fees awarded in the litigation are greater than $500,000 and = 0 if the attorneys' fees awarded are less than $500,000. *Attorney Fees (Log)* is the log value of the attorneys' fees awarded in the settlement. All other variables are as defined in Table III(A). All models include year-fixed effects. *P*-values are in parentheses, with ***, **, and * denoting statistical significance at the 1%, 5%, and 10% levels, respectively.

Yes Votes Per	Votes Cast				Outstanding Shares				Yes and No Votes			
	(1)		(2)		(3)		(4)		(5)		(6)	
Initial Offer Premium	−0.456	***	−0.170	***	−0.337	**	−0.107		−0.413	***	−0.175	***
	(0.00)		(0.00)		(0.03)		(0.26)		(0.00)		(0.00)	
Final Offer Premium	0.479	***	0.172	***	0.294	*	0.08		0.436	***	0.18	***
	(0.00)		(0.00)		(0.06)		−0.374		(0.00)		−1E-04	
Transaction Value (Log)	0.008	**	0.009	***	−0.012	*	−0.006		0.008	**	0.007	**
	(0.01)		(0.00)		(0.07)		(0.23)		(0.04)		(0.02)	
Cash	0.005		0.010		−0.006		−0.015		0.014		0.007	
	(0.62)		(0.29)		(0.78)		−0.336		(0.20)		−0.438	
Auction	0.012		0.005		0.006		0.009		0.008		0.008	
	(0.15)		(0.51)		(0.72)		(0.47)		(0.42)		(0.31)	
Go-Shop	−0.019	*	−0.004		0.015		0.012		−0.010		0.004	
	(0.06)		(0.70)		(0.44)		(0.44)		(0.37)		(0.71)	
Take Private	−0.014		−0.01		0.079	**	0.076	***	−0.016		−0.015	
	(0.42)		(0.54)		(0.02)		(0.00)		(0.41)		(0.39)	
ISS Position	0.216	***	0.195	***	0.223	***	0.14	***	0.201	***	0.169	***
	(0.00)		(0.00)		(0.00)		(0.00)		(0.00)		(0.00)	

Attorney Fee > 500	−0.001		0.006		−0.01		0.01		−0.006		−0.003	
	(0.95)		(0.54)		(0.62)		(0.52)		(0.55)		(0.74)	
Attorney Fees (Log)	−0.009	*	−0.013	**	0.002		−0.005		−0.007		−0.005	
	(0.09)		(0.03)		(0.86)		(0.57)		(0.25)		(0.36)	
Appraisal Exercise	0.012				0.026				−0.002			
	(0.47)				(0.40)				(0.89)			
Disclosure Settlement	0.009		0.006		0.000		−0.010		0.017		0.016	
	(0.45)		(0.67)		(1.00)		(0.64)		(0.19)		(0.21)	
Amendment Settlement	0.03	**	0.027	*	0.054	*	0.029		0.037	**	0.034	**
	(0.05)		(0.09)		(0.09)		(0.27)		(0.02)		(0.03)	
Consideration Increase Settlement	0.054	***	0.035		0.08	**	0.046		0.047	**	0.024	
	(0.01)		(0.11)		(0.05)		(0.19)		(0.03)		(0.23)	
Supermajority State			−0.037	***			0.006				−0.024	**
			(0.00)				(0.72)				(0.03)	
Observations	109		175		118		190		93		144	
R-squared	0.6473		0.4259		0.318		0.1558		0.5527		0.335	

Table V (All Variables)

Table V reports ordinary least squares regressions in which the dependent variable in columns (1) & (2) is *% Yes Votes Per Votes Cast*; columns (3) and (4) is *% Yes Votes Per Outstanding Shares*; and columns (5) & (6) are *% Yes Votes Per All Yes & No Votes. % Yes Votes Per Votes Cast* is the percentage of yes votes out of all votes cast at the meeting, including abstentions. Columns (1)–(4) include all transactions in the sample, and columns (5) and (6) include only mergers with a transaction value less than $500 million. *Institutional Ownership %* is the percentage of total institutional ownership. *Top 5 Institutional Ownership* is the percentage ownership of the largest five institutional owners. *Top 10 Institutional Ownership* is the percentage ownership of the largest ten institutional owners. *Maximum Institutional Ownership* is the percentage ownership of the largest institutional owner. Institutional ownership for each of these variables is as of the quarter end immediately prior to the shareholder meeting date. All other variables are as defined in Table III(A). All models include year-fixed effects. *P*-values are in parentheses, with ***, **, and * denoting statistical significance at the 1%, 5%, and 10% levels, respectively.

Shareholder Yes Votes Per Votes Cast

	All Transactions					Transaction Value <$500M		
	(1)	(2)	(3)	(4)		(5)	(6)	
Institutional Ownership %	0.041 **	0.033	0.023	0.008		0.062	−0.043	
	(0.01)	(0.41)	(0.52)	(0.89)		(0.14)	(0.74)	
Initial Offer Premium	−0.062	−0.062	−0.098 **	−0.151 **		−0.158	−0.173 **	
	(0.24)	(0.25)	(0.04)	(0.04)		(0.11)	(0.04)	
Final Offer Premium	0.086	0.085	0.113 **	0.186 ***		0.175 *	0.182 **	
	(0.10)	(0.11)	(0.02)	(0.01)		(0.07)	(0.03)	
Transaction Value (Log)	0.004 *	0.004	0.004	0.007		−0.034 *	−0.001	
	(0.10)	(0.19)	(0.14)	(0.20)		(0.07)	(0.94)	
Top 5 Institutional Ownership		−0.124	−0.108	−0.128			0.086	
		(0.55)	(0.56)	(0.65)			(0.84)	
Top 10 Institutional Ownership		0.085	0.086	0.151			0.141	
		(0.62)	(0.58)	(0.53)			(0.74)	
Maximum Institutional Ownership		0.056	0.031	0.031			−0.191	
		(0.64)	(0.78)	(0.83)			(0.44)	

Shareholder Yes Votes Per Votes Cast							
		All Transactions			Transaction Value <$500M		
	(1)	(2)	(3)		(4)	(5)	(6)	
ISS Position			0.154	***			0.232	***
			(0.00)				(0.00)	
Disclosure Settlement			0.00		0.01		−0.021	
			(0.68)		(0.48)		(0.19)	
Amendment Settlement			0.01		0.01		−0.035	
			(0.47)		(0.67)		(0.31)	
Consideration Increase Settlement			0.00		−0.03		0.025	
			(0.91)		(0.20)		(0.75)	
Appraisal Exercise					−0.01			
					(0.68)			
Observations	393	393	391		216	140	140	
R-squared	0.0543	0.055	0.2642		0.0897	0.063	0.3439	

Deference Asymmetries: Distortions in the Evolution of Regulatory Law

Melissa F. Wasserman*

Deference asymmetries are unevaluated phenomena in administrative law. These asymmetries occur when an administrative agency's decision that overly favors its regulated entities is either less likely to be subjected to judicial reexamination, or if it is subjected to judicial challenge, will be afforded a more deferential standard of review than a decision that overly disfavors its regulated entities. Because decisions that are afforded a more deferential standard are more likely to be upheld, deference asymmetries could potentially function as a one-way ratchet, pushing the development of regulatory law in the pro-regulated-entity direction. In addition to providing a theoretical basis for the bias development of regulatory law that may arise from deference asymmetries, this Article identifies the formal and informal structures in the administrative state that give rise to the skewed application of deference regimes. In doing so, this Article demonstrates that deference asymmetries are not isolated to a few areas of regulation. Rather, a surprising number of agencies that regulate fields ranging from the environment, to patent law, to disability benefits face asymmetric deference with respect to their decision making. Finally, this Article explores the implications of these asymmetries for administrative law.

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Introduction

Chevron.[1] *Skidmore*.[2] De novo. Non-reviewable. These resounding phrases represent our policy makers' efforts to calibrate the sharing of legal authority across the judiciary and administrative agencies.[3] Standards of review, including non-reviewability, modulate the ability of an agency to diverge from what a reviewing court believes are the aims encoded in the statute the agency administers.[4] They dictate the extent to which an agency's

1. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (proscribing a highly deferential "reasonableness" standard of review when evaluating an agency's interpretation of a statute subject to that agency's administrative and interpretive authority); *see also infra* section II(B)(3).

2. Skidmore v. Swift & Co., 323 U.S. 134 (1944) (requiring less deference to agency decision making in areas over which authority was not delegated to the agency); *see also infra* section II(B)(4).

3. *See, e.g.*, MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION 167–73 (1988); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 452–56 (1989); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 833–35 (2001).

4. *See* Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434–35 (1989) (suggesting that, absent any meaningful review or practical consequences, agencies may adopt policies that significantly differ "from the preference of the coalition that enacted its program").

decision will survive judicial review when the agency deviates from the judiciary's preferred construction of a statute and adopts a legal interpretation that either more closely aligns or misaligns with the interest of the entities it regulates.[5]

This Article contends that an agency's adoption of a legal construction that either overly favors or overly disfavors its regulated entities (i.e., favors or disfavors its regulated entities more than the court's preferred construction) and the standard of review it is afforded are often linked at a fundamental level that the existing literature has overlooked.[6] Specifically, this Article's key insight is that in a surprising number of contexts, when an agency's legal interpretation overly favors its regulated entities, the legal interpretation is either less likely to be subjected to judicial reexamination or, if it is subjected to judicial challenge, will be afforded a more deferential standard of review than a construction that overly disfavors its regulated entities. This Article develops the theoretical basis for the consequences of deference asymmetries, identifies the features of the administrative state that give rise to the phenomenon of deference asymmetries, and explores these asymmetries' ramifications for administrative law. This Article uses the terms "deference asymmetry" or "skewed application of deference regimes" not to simply describe when various agency decisions are afforded different standards of review but instead to describe more specifically when an agency's legal interpretation that overly favors its regulated entities will be afforded a more deferential standard of review—including outright preclusion of judicial review—than an agency's legal construction that overly disfavors its regulated entities.

The failure of the literature to conduct a systematic analysis of deference asymmetries is surprising because the stakes are high. As this Article illustrates, a systematic application of deference regimes may cause the standards of law applied by agencies and enunciated by courts to tilt in a pro-regulated-entity direction.[7] This claim follows directly from the observation that the likelihood an agency's legal interpretation is upheld is a function of

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5. This Article conceptualizes an agency's selection of legal constructions as falling upon a spectrum: at one end of the spectrum is the legal interpretation that most aligns with the interests of the agency's regulated entities, and at the other end of the spectrum is the legal interpretation that least aligns with the agency's regulated entities. *See infra* subpart III(A).

6. There is a voluminous literature on the proper scope of judicial review of agency decisions. For a small sampling on this issue, see generally CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 3–4, 105–10 (1990); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505 (1985); Richard J. Pierce, Jr., Essay, Chevron *and Its Aftermath: Judicial Review of Agency Interpretation of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522 (1989). I am, however, unaware of any article that has systematically explored the consequences of deference asymmetries in the administrative state.

7. *See infra* subpart II(C).

the standard of review applied. If an agency's legal construction that unreasonably favors its regulated entities is afforded a more deferential standard of review than an agency's legal interpretation that unreasonably disfavors its regulated entities, the former is more likely to survive judicial reexamination than the latter. This asymmetry in deference could potentially function as a one-way ratchet, pushing the development of regulatory law in the pro-regulated-entity direction. Such pressure on the development of law can result in substantial social-welfare harm, as statutes often balance the rights of the regulated entities against the rights of regulated beneficiaries. To the extent that substantive law tilts too far towards the regulated entities, it is likely that the regulated beneficiaries, which are often the public, will suffer the consequences.[8]

In addition to providing a theoretical basis for the bias development of regulatory law that may arise from deference asymmetries, this Article identifies the formal and informal structures in the administrative state that give rise to the skewed application of deference regimes.[9] In doing so, this Article demonstrates that the phenomenon of deference asymmetries is not isolated to a few areas of regulation but instead can be found throughout the administrative state. A surprising number of agencies that regulate fields ranging from the environment, to patent law, to disability benefits face asymmetric deference with respect to their decision making. Thus, deference asymmetries may be responsible for pushing the development of large swaths of regulatory law in a pro-regulated-entity direction.[10]

Beyond the harm associated with a pro-regulated-entity tilt in substantive law, this Article's development of deference asymmetries has several implications for administrative law. While the result of deference asymmetries mimics that of capture—agencies or courts applying substantive law that tilts in a pro-regulated-entity direction—the skewed application of deference regimes is, in at least one important way, more profound than the conventional account of capture: deference asymmetries result in agencies or judges applying substantive law that tilts in a pro-regulated-entity direction *even when* they are *not* beholden to special interests, do *not* act in any strategic or self-interested manner, and do not *bias* their decision making in any way.

The goal of this Article is not to demonstrate that other possible causes of pro-regulated-entity tilt in the development of regulatory law, such as the

8. *See infra* subpart II(C).

9. *See infra* Part III.

10. There is widespread belief that an agency's decisions overly favor its regulated entities. *See, e.g.*, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1713 (1975) ("It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests." (footnotes omitted)).

revolving door between the private sector and government agencies, are mistaken.[11] Other sources of a pro-regulated pressure in regulatory law may be at work in conjunction with bias identified in this Article. Importantly, however, even if all of these other possible causes were extinguished, the pro-regulated-entity bias in the legal standards would remain, driven by the skewed application of deference regimes in the administrative state.

The remainder of the Article is structured as follows. Part I describes concerns with agencies or the judiciary systematically announcing legal standards that tilt in a pro-regulated-entity direction. Part II explains the basic analytical framework of deference asymmetries, highlighting how a tilt in regulatory law in a pro-regulated-entity direction occurs even when the agency and the judiciary are unbiased. Part III provides a brief primer of the different law-making tools of agencies and then identifies three structures of the administrative state that give rise to a skewed application of the deference regimes: asymmetric review, different adjudicatory settings for different agency decisions, and asymmetric challenges. To this author's knowledge, this Article is the first to recognize that different adjudicatory settings for different agency decisions can give rise to distortions in the evolution of regulatory law. With respect to asymmetric challenges, other scholars have noted the potential for such a problem, but the issue has yet to receive an in-depth analysis in the literature. Finally, although a few scholars (including my own prior work) have argued that asymmetric review of agency decisions may distort the evolution of regulatory law, these prior analyses differ from this Article in that they have assumed biased agency decision making.[12] Part IV relaxes some of the assumptions of Part II. Part V explores implications of deference asymmetries for the administrative state and concludes the Article.

I. Harms with a Pro-Regulated-Entity Bias in Regulatory Law

A voluminous literature sets out the concerns associated with government bodies systematically making decisions that favor special interests over those of the general public.[13] This literature has been

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11. *See infra* notes 18–22 and accompanying text.

12. *See, e.g.*, Jonathan Masur, *Patent Inflation*, 121 YALE L.J. 470, 473 (2011) (attributing bias in the patent system to "the contorted institutional relationship that exists between [the U.S. Patent & Trademark Office (PTO) and the United States Court of Appeals for the Federal Circuit]"); Melissa F. Wasserman, *The PTO's Asymmetric Incentives: Pressure to Expand Substantive Patent Law*, 72 OHIO ST. L.J. 379, 402–05 (2011) (predicting that a bias evolution in legal standards results from the PTO seeking to minimize reversal of its decision making).

13. For a small sample of such literature, see ROGER G. KNOLL, REFORMING REGULATION: AN EVALUATION OF THE ASH COUNCIL PROPOSALS 99–100 (1971); PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES 4 (1981); B. DAN WOOD & RICHARD W. WATERMAN, BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY 18–19 (1994); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 5 (1998); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public*

dominated by capture theory or interest group theory, which posits that well-organized special interests' repeated interactions with an institution may lead that institution to skew its decision making.[14] An institution, for instance, may develop "tunnel vision," pursuing its own technocratic worldview without sufficient regard for larger normative concerns.[15] Or, more insidiously, a narrow set of rights holders may directly capture an institution's viewpoint, harnessing the institution's decision making to vindicate its interests at the expense of the public interest.[16] Although capture theory is most frequently applied to agencies, more recent applications of the theory include the judiciary, as scholars astutely observe that the adjudicative process is also susceptible to the influence of interest groups.[17]

Commentators have put forth a plethora of reasons for why an institution's decisional process may overly favor the entities it regulates, the vast majority of which depend upon agency staff or individual judges biasing their decision making towards special interest groups. Some posit that agency capture may result from regulated entities being well positioned to contribute to political campaigns and to lobby, which in turn may give them influence with an agency's legislative overseers.[18] Similarly, others posit that special interests can exercise disproportionate influence over judicial appointments, ensuring that individuals who become judges share their same priorities.[19] Others contend that the "revolving door" between employment as regulators and in industries affected by regulation compromises the independence and impartiality of agency staff, leading an agency to make decisions that unreasonably favor its regulated entities at the expense of the

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Interest, and the Public Agenda: Toward a Synthesis, 6 J.L. ECON. & ORG. 167, 167–68 (1990); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971).

14. Levine & Forrence, *supra* note 13, at 169.

15. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 11 (1993).

16. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 32 (1991); *see also* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 53–57, 132–34 (1971).

17. *See, e.g.*, Elhauge, *supra* note 16, at 67–68 ("[T]he same interest groups that have an organizational advantage in collecting resources to influence legislators and agencies generally also have an organizational advantage in collecting resources to influence the courts."); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97–104 (1974) (noting that repeat players have advantages over parties that utilize the judiciary less frequently).

18. *See, e.g.*, J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEXAS L. REV. 1443, 1489–90 (2003); Elhauge, *supra* note 16, at 42.

19. *See* Richard D. Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1, 81 (1983) (describing the Senate's refusal of a judicial candidate because "labor unions and the National Association for the Advancement of Colored People regarded [him] as hostile"). *But see* Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 84 NW. U. L. REV. 935, 960 (1990) (arguing that the confirmation process is not dominated or heavily influenced by special interest groups).

public.[20] Still others contend that special interest groups can unduly influence the decisional process through an informational advantage.[21] In order to regulate effectively, an agency must know how the industry works as well as understand the complex issues in question, but this information is often in the exclusive control of the regulated entities.[22]

Irrespective of the exact cause, the harms associated with agencies or courts systematically making decisions that prioritize interests of the regulated entities over the interests of the public are undeniable. Such biased decision making figures prominently in many accounts of recent major human and environmental crises. For instance, agency or regulatory capture is thought to be partly responsible for the Deepwater Horizon explosion and Gulf Oil spill in the spring of 2010.[23] Similarly, both liberals and conservatives have suggested that the reputed capture of state and federal regulatory agencies was in part to blame for the recent financial crisis.[24]

More generally, if agencies' or the judiciary's outcomes unreasonably favor well-organized interest groups, then their decisions are likely harming the general public. Almost all legislation involves a balance between the

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20. *See, e.g.*, KAY LEHMAN SCHOLZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 342 (1986) (describing ways in which the "revolving door" affects agency decisions); Edna Earle Vass Johnson, *Agency "Capture": The "Revolving Door" Between Regulated Industries and Their Regulating Agencies*, 18 U. RICH. L. REV. 95, 95–96 (1983) (stating that public trust is eroding due to the "revolving door" of regulatory agencies).

21. *See* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 464 (1999) (indicating that special interest groups have access to additional information due to their specialization, and this access to information benefits them when communicating with agencies); Stewart, *supra* note 10, at 1713–14 (noting that the information which agencies rely on comes from special interest groups); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1378–79 (2010) (arguing that greater access to information by special interests groups creates oversight problems).

22. *See, e.g.*, Wagner, *supra* note 21, at 1378–79 (illuminating several ways in which resource and information disparities between regulated entities and public interest groups serve to undermine participation of public interest groups and regulation of large industries).

23. Gerald P. O'Driscoll Jr., *The Gulf Spill, the Financial Crisis and Government Failure*, WALL ST. J., June 12, 2010, http://www.wsj.com/articles/SB10001424052748704575304575296873167457684, *archived at* http://perma.cc/XG4L-U75K; *see also* James Surowiecki, *The Regulation Crisis*, NEW YORKER, June 14, 2010, http://www.newyorker.com/magazine/2010/06/14/the-regulation-crisis, *archived at* http://perma.cc/4VJR-XYKB (arguing that but for corruption in the Minerals Management Service—the governmental agency charged with regulating offshore drilling—regulations would have been passed that could have prevented the Gulf Oil spill).

24. *See, e.g.*, Gary S. Becker, *"Capture" of Regulators by Fannie Mae and Freddie Mac*, BECKER-POSNER BLOG (June 12, 2011, 6:45 PM), http://www.becker-posner-blog.com/2011/06/capture-of-regulators-by-fannie-mae-and-freddie-mac-becker.html, *archived at* http://perma.cc/8REN-SCKB ("An economically disastrous example of the capture theory is provided by the disgraceful regulation of the two mortgages housing behemoths, Fannie Mae and Freddie Mac, before and leading up to the financial crisis."); Daniel Kaufmann, *Corruption and the Global Financial Crisis*, FORBES (Jan. 27, 2009, 2:58 PM), http://www.forbes.com/2009/01/27/corruption-financial-crisis-business-corruption09_0127corruption.html, *archived at* http://perma.cc/4UXP-LPWE ("There are multiple causes of the financial crisis. But we [cannot] ignore the element of 'capture' in the systemic failures of oversight, regulation and disclosure in the financial sector.").

interests of the regulated beneficiaries, which is often the public, and the interests of the regulated entities.[25] If this balance is disturbed and tilted too far towards the regulated entities, then the social welfare of the general public may diminish.

Finally, the aim of this Article is not to demonstrate that any other possible causes of pro-regulated-entity bias in the development of regulatory law are incorrect.[26] Instead, it seeks to make the more modest claim that pro-regulated-entity tilt in legal standards may also result from a skewed application of deference regimes in the administrative state.

II. Consequences of Deference Asymmetries: Pro-Regulated-Entity Bias in Substantive Law

In this Part, I construct a simple model of the interaction between a single administrative agency and a single reviewing court.[27] This Part treats both the agency and the reviewing courts as unitary actors, which is an apparent simplification. In reality, the evolution of law is shaped by multiple agencies and multiple courts, as well as a number of other influential actors

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25. *Cf.* McCubbins et al., *supra* note 4, at 446 (noting that the history of air pollution regulation has been shaped by the competing and incompatible desires for economic activity and reduced pollution).

26. *Cf.* Richard C. Ausness et al., *Providing a Safe Harbor for Those Who Play by the Rules: The Case for a Strong Regulatory Compliance Defense*, 2008 UTAH L. REV. 115, 139–40 ("The risk of agency capture is exacerbated by the 'revolving door' between regulatory agencies and private employers which encourage agency personnel to promote the interests of regulated industries in order to enhance their prospects of future employment in the private sector."); Timothy A. Canova, *Financial Market Failure as a Crisis in the Rule of Law: From Market Fundamentalism to a New Keynesian Regulatory Model*, 3 HARV. L. & POL'Y REV. 369, 384 (2009). As Timothy Canova observes:

> Several factors have contributed to the capture of key federal regulatory agencies by the nation's financial services industry. One of these is the so-called "revolving door," the tendency of regulatory officials to leave their government posts for lucrative positions in the private financial industry. The movement of key personnel back and forth between regulators and regulated has become incestuous. Policy naturally comes to reflect the bargain of the moment between the most powerful private interests.

Canova, *supra*; *see also infra* note 138.

27. The model also assumes that agencies, upon receiving an unfavorable decision from their reviewing court, acquiesce to the court's determination. Scholars have noted that at times, administrative agencies are not always subservient to adverse court decisions. *See, e.g.*, Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681–82 (1989) (listing examples of various agencies refusing to follow adverse court rulings, dating back to the 1920s); Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1781 (2011) (observing that agencies continue to engage in contested activities during decades of litigation, even after courts have failed to uphold those actions).

such as Congress[28] and the President.[29] Moreover, governmental bodies, such as agencies and courts, have complex internal decisional dynamics that influence institutional outcomes.[30] As a result, my analysis does not intend to capture the subjective thought processes of judges and agencies. Rather, the analytical structure clarifies the significance and possible consequences of deference asymmetries in the administrative state.

My analysis differs from other models of agency and court interaction in several respects. Most saliently, I am concerned with how a skewed application of different deference regimes may cause the standards of law to shift systematically over time.[31] However, my analysis in this Article also diverges from other models that predict a biased evolution of legal standards,

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28. *See* JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 2 (1990) (detailing Congress's oversight of agencies and bureaucracies); McCubbins et al., *supra* note 4, at 432 (asserting that elected officials utilize administrative procedures as one means of shaping agency decision making).

29. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001) (arguing that President Clinton dramatically expanded presidential control over administrative agencies); Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance,'* 12 LEGIS. STUD. Q. 475, 489 (1987) (explaining that the President and his administration have increasingly used the appointment power to fill agencies with individuals whose political backgrounds "are conducive to presidential control").

30. For a discussion on the internal agency decision-making process, see generally ANTHONY DOWNS, INSIDE BUREAUCRACY (1964) and JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989). On collective decisions by multimember courts, see generally MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING (2000) and Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986).

31. There is a body of literature that models court and agency interaction in the face of standards of judicial review, although most model the agency as strategically attempting to minimize judicial reversal and none (of which I am aware) predict a tilt in substantive law towards a pro-regulated-entity direction. *See, e.g.*, Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 LAW & CONTEMP. PROBS. 65, 68 (1994) (interpreting data to indicate that the Supreme Court's desire for circuit courts "to take a more active role in determining administrative policy"); Yehonantan Givati, *Strategic Statutory Interpretation by Administrative Agencies*, 12 AM. L. & ECON. REV. 95, 96 (2010) (introducing a model predicting that agencies will make more aggressive decisions in response to being granted greater judicial deference); Jud Mathews, *Deference Lotteries*, 91 TEXAS L. REV. 1349, 1372, 1376–79 (2013) (arguing that agencies face uncertainty over what standard of review will be applied to their interpretations of statutes and exploring how this might affect agency behavior); Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 544 (2006) (arguing that agencies engage in strategic substitution, trading administrative costs for increased judicial deference when facing strained "textual plausibility"); Emerson H. Tiller, *Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making*, 14 J.L. ECON. & ORG. 114, 115 (1998) (focusing "on judicial control of agency policy" through the "imposition of process requirements on regulators"); Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349, 351 (1999) (developing models based on bilateral interactions between either an agency and a court or between a lower court and a higher court); Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes* 2 (Coase-Sandor Inst. for Law & Econ., Working Paper No. 679, 2014) (positing that mistakes in the deference regime applied by a court coupled with asymmetries in adjudication can generate systematic shift in the evolution of law).

including some of my previous work, in that it suggests that the law may systematically shift over time *even when* agency staff and the judiciary are *not* acting in a strategic or self-interested manner and are *not* biased in their decision making in any way.[32] Subpart A, below, discusses the objectives of courts during statutory interpretation and explains why an agency may fail to adopt the legal construction that is most preferred by its reviewing court. Subpart B explores how the standards of review modulate the judiciary's ability to effectuate its best construction. Subpart C examines the possible distortions in the evolution of law that result from systematic bias in the application of deference regimes.

A. Court–Agency Divergence in Legal Interpretations of Statutes

My analysis begins with the delineation of courts' statutory interpretation objectives. I assume the primary aspiration of courts during statutory interpretation is fidelity. That is, all else being equal, a court prefers interpretations that correspond as closely as possible to its own view of the "most plausible" interpretation of the statute.[33]

I also assume that an agency will, at least at times, adopt legal interpretations of a statute that differ from a reviewing court's preferred construction of the statute the agency is charged with administering. Such differences may be benign: an agency may faithfully attempt to carry out its congressional charge embedded in the statute but may nevertheless fail to select the legal construction a court deems most plausible because the statute is truly ambiguous.[34] Such differences, however, may also be deliberate. Agencies are undoubtedly influenced by their substantive policy agendas when interpreting statutes. As a result, they may be willing to stretch the plausibility of their interpretation in an effort to adopt a construction that

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32. *See infra* subparts II(A)–(C); *supra* note 12 and accompanying text.

33. The extent to which a court's best or most plausible construction is influenced by interpretive method is irrelevant to this analysis, as well as the debate regarding the legitimacy of various interpretative methods. *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 85 (2005); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 1–5 (1994); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 183–84 (2006); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 10 (Amy Gutmann ed., 1997).

34. Complicating the agency's ability to predict the "best" construction is the fact that a panel of three judges will be drawn at random from the reviewing court to evaluate an agency's statutory interpretation and judges themselves may disagree on the most plausible interpretation of the statute. *See* 28 U.S.C. § 46(b) (2012) (allowing the hearing of cases by separate panels of judges within a circuit); FED. CIR. R. 47.2 (determining that assignment to panels should be random); Kornhauser & Sager, *supra* note 30, at 107 (noting that judges on a multimember court could disagree on the rules applicable to the decisions of a specific case and that in turn could lead to disagreement and inconsistency).

better furthers their preferred policies.[35] The statutory interpretation objectives of administrative agencies, however, are largely immaterial to the present inquiry. All that matters is that an agency may adopt a construction that will deviate from the court's preferred reading of the statute.

Assuming that agencies will adopt legal interpretations that differ from the court's most plausible construction, I also posit that such constructions may be more or less favored by the agency's regulated community than the court's preferred interpretation. In other words, the agency's regulated entities will either prefer the court's most plausible legal interpretation *or* the legal interpretation adopted by the agency, depending on what competing construction an agency ultimately settles upon. This assumption means that various legal interpretations of a statute can be ranked in order of how closely they align with the interests of the agency's regulated entities. More generally, this means that an agency's legal interpretation of a statute can be represented on a continuum, as demonstrated by Figure 1. At one end of the spectrum is a decision that is most favored by the agency's regulated entities (Outcome 10). At the other end of the spectrum is a decision that is least favored by the entities the agency is charged with regulating (Outcome 0). Moving along the continuum from left to right, the agency's legal interpretation becomes more aligned with the interests of its regulated community.

As an illustrative example, suppose that the agency at issue is the Environmental Protection Agency (EPA), and the statute the EPA is interpreting is the Clean Water Act (CWA).[36] The CWA, among other things, prohibits the discharge of dredged or fill materials into "navigable waters" without a permit from the EPA.[37] The scope of the term "navigable waters,"

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35. *See, e.g.*, Stephenson, *supra* note 31, at 544 (arguing that an agency will "stretch the statutory text" in an effort to advance its policy agenda "just shy of the point" where its reviewing court would reject the interpretation).

36. This example is drawn from Stephenson, *supra* note 31 at 538–39, and it is based on a series of cases that have litigated the definition of "navigable waters" in the Clean Water Act. *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 739, 742 (2006) (plurality opinion) (holding that the term "navigable waters" under the CWA includes only relatively permanent standing or flowing bodies of water, not intermittent or ephemeral flows of water, and only wetlands with a connection to bodies of waters of the United States, or that "navigable waters" means waters with a significant nexus or a hydrological connection to waters that could be made navigable); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159, 171 (2001) (holding that isolated ponds, wholly located within two Illinois counties, do not fall under the definition of "navigable waters"); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985) (finding that the Corps of Engineers reasonably interpreted the CWA to require permits for discharging fill materials into wetlands adjacent to "navigable waters").

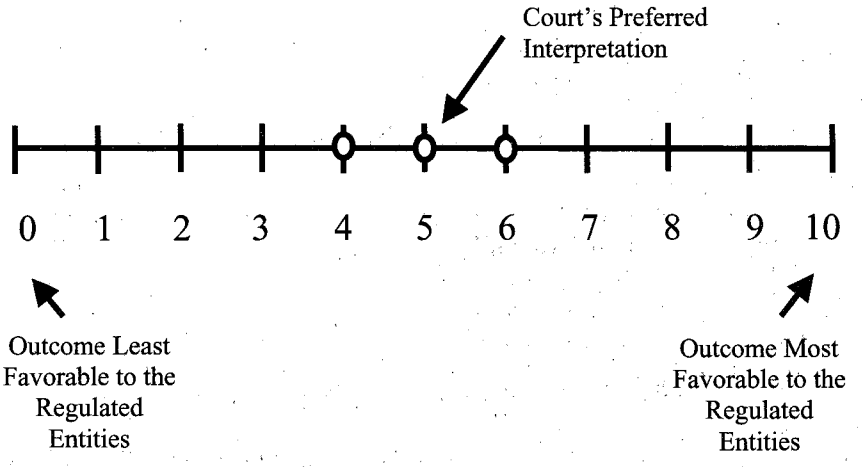
37. 33 U.S.C. §§ 1311(a), 1344(a), 1344(d), 1362(6) (2012). This example is stylized and does not necessarily represent the views of the EPA or its reviewing court. Furthermore, while actual interpretation and enforcement of the CWA involves multiple entities, this example has simplified that relationship to focus on the complex interaction between an agency, the courts, and the regulated industry. *See, e.g., id.* § 1344(a)(d) (granting the Secretary of the Army, acting through the Chief of Engineers of the U.S. Army Corps of Engineers, the power to issue permits).

however, is defined by the CWA only as "the waters of the United States."[38] The EPA's regulated industry will prefer narrower rather than broader definitions of "navigable waters," as the former reduces their administrative burdens and concomitantly the immediate costs to businesses that affect the hydrologic ecosystem. It is possible that the reviewing court believes the most plausible construction of "navigable waters" includes lakes and rivers regardless of whether they currently provide a channel for commerce and transportation (as represented by Outcome 5 in Figure 1). The EPA may fail to adopt this construction if, for instance, it believes another interpretation, which may arguably be less plausible, better advances its policy agenda. If the EPA sees its policy mission as preserving the chemical and biological integrity of the nation's waters, it may prefer to adopt a broader definition that includes not only lakes and rivers but also their tributaries and adjacent wetlands. This construction, which is represented by Outcome 4 in Figure 1, is likely to be less favored by the EPA's regulated entities than the court's preferred construction. Alternatively, if the EPA sees its policy mission as promoting economic development and reducing administrative burdens, it may prefer a narrower definition, which might include only lakes and rivers that are navigable-in-fact and that *currently* provide a channel for commerce and transportation of people and goods. The EPA's regulated community will favor this narrower interpretation (represented by Outcome 6 in Figure 1) over the court's preferred construction.[39]

38. *Id.* § 1362(7).

39. It is of course possible that an agency may regulate communities that have divergent viewpoints on a single issue. The labels at the extremes—outcome most favorable to the regulated entities and outcome least favorable to the regulated entities—are meant to generalize the development of substantive law, not to necessarily require that everyone regulated by an agency would like Outcome 10 the best. Thus, for example, if the agency at issue was the PTO and the agency was determining what constitutes patentable subject matter, Outcome 10 would represent everything and Outcome 0 would represent nothing. It is very likely that some patent applicants would not support Outcome 10, as allowing patents on products of nature or abstract ideas would stunt their innovative prospects more than promote them. Nonetheless, Outcome 10 would, on the whole, be the interpretation *most* preferable to the regulated entities.

Figure 1: Spectrum of Agency Legal Interpretations and the Court's Preferred Interpretation



B. The Interaction of the Legal Spectrum with the Standards of Review

If the only objective of a reviewing court is determining the most plausible reading of a statute, the court will simply reject any construction that deviates from its ideal. The model, however, assumes that the court is also committed to the rule of law and, in particular, is committed to the standards of review that govern examination of an agency's construction of the statute.[40] If an agency's interpretation of a statute is reviewable and

40. A growing empirical literature suggests appellate judges are influenced by ideological preferences. *See, e.g.*, CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 1–3 (2006) (inquiring into the relationship between judicial votes and political convictions); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 825–26 (2006) (finding that "data reveal a strong relationship between the justices' ideological predispositions and the probability that they will validate agency determinations"); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 763 (2008) (identifying emerging concerns that judicial review might reflect judges' individual policy commitments); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1718–19 (1997) (recounting correlative conclusions from a systematic study of the impact of judges' ideologies on judicial decision making). These findings, however, are not inconsistent with a constraining effect of legal doctrine. *See* Frank B. Cross & Emerson H. Tiller, Essay, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2155–56 (1998) (finding substantial empirical support for the theory that the presence or absence of judges with divergent or minority policy preferences bears on whether "judges will perform their designated role as principled legal [decision makers]" or follow personal or partisan policy preferences); Jonathan P. Kastellec, *Panel Composition and Judicial Compliance on the US Courts of Appeal*, 23 J.L. ECON. & ORG. 421, 421–23 (2007) (surveying possible effects that the three-judge panel system may have on U.S. Courts of Appeals decisions). Moreover, even legal realists, like Judge Posner, have noted there is a substantial difference in the mindset of a judge who is applying strong judicial deference versus one who is applying de novo review. *See* RICHARD A. POSNER, HOW JUDGES THINK 114 (2008) ("The only distinction the judicial intellect actually makes is between deferential and nondeferential review.").

challenged, then courts will apply one of three basic standards to the agency's decision: the deferential *Chevron* standard, the less deferential *Skidmore* standard, or the no-deference standard of de novo review. The extent to which the agency decision is subject to judicial reexamination, as well as the standards of review applied if the decision is in fact challenged in court, modulate the judicial scrutiny applied to an agency's decision. This subpart examines how these different deference regimes, including non-reviewability, interact with the agency's spectrum of legal outcomes and the ability of the reviewing court to effectuate its preferred construction of the statute.

1. No Judicial Review or No Judicial Challenge.—Although there is a strong presumption that agency action is subject to judicial review,[41] judicial reexamination is foreclosed when, among other things, Congress has expressly manifested such intent by precluding court review through statute.[42] Much more commonly, however, judicial reexamination may not

41. 5 U.S.C. § 702 (2012) ("A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof."); *see also* Abbott Labs. v. Gardner, 387 U.S. 136, 140–41 (1967) ("[T]he Administrative Procedure Act . . . embodies the basic presumption of judicial review, . . . so long as no statute precludes such relief or the action is not one committed by law to agency discretion . . . ." (citations omitted) (citing 5 U.S.C. §§ 701(a), 702)).

42. 5 U.S.C. § 701(a)(1). Agency action is also not subject to judicial review when it is committed to agency discretion by law. This latter standard is met when "statutes are drawn in such broad terms that in a given case there is no law to apply," Webster v. Doe, 486 U.S. 592, 599 (1988) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 79-752, at 26 (1945))) (internal quotation marks omitted), or when a "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," Heckler v. Chaney, 470 U.S. 821, 830 (1985). This circumstance, however, is not material to the present inquiry. If a statute is drawn so broadly that there is no law to apply, then there is no best construction from which the agency's legal interpretation may diverge.

Even when an agency's legal interpretation does not fall within one of these two enumerated judicial preclusion carve outs, it may nevertheless differ in the likelihood it will be subjected to judicial reexamination. This Article's central premise—that an agency's legal interpretation that overly favors its regulated entities is more likely to be subject to judicial review than agency action that overly disfavors its regulated entities—necessarily depends intimately upon this fact. Scholars have noted that there are at least three categories of agency action that may be less susceptible to judicial review. Importantly, however, these categories do not correlate or have not traditionally been understood to correlate with the interests of the agency's regulated entities. First, agency decisions not to act are often less likely to be subject to judicial review. For instance, an agency's decision not to initiate an enforcement action is presumptively nonreviewable. *See Heckler*, 470 U.S. at 831 (recognizing that an agency's decision not to act "is a decision generally committed to an agency's absolute discretion"); Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 653 (1985) (noting that an agency's choice not to take action is often shielded from judicial review). An agency's nonenforcement decision based on an interpretation of a statute, however, is typically reviewable. Sunstein, *supra*, at 676–78. Second, the mechanism utilized to announce the agency's legal interpretation may affect the availability of judicial review. Whereas legislative rules are typically immediately reviewable, a guidance document or policy statement may be less likely to be reviewable, as it is more likely to be considered nonfinal or unripe. *See infra* subpart III(A). Third, standing jurisprudence may make it easier to secure judicial reexamination of an agency's legal interpretations that injure a concentrated

occur because the agency's decision is not challenged in court. In either circumstance, the effect is the same: the agency's legal interpretation will stand despite where it falls on the spectrum of agency outcomes. As a result, lack of judicial review can be conceptualized as the most deferential form of review. If an agency's legal interpretation is not subject to judicial reexamination, *any* construction will stand, regardless of how implausible the agency's legal interpretation may be. Hence, the lack of judicial review completely inhibits the reviewing court's ability to effectuate its preferred reading of the statute. This Article therefore perceives the lack of judicial challenge or no judicial review as the most deferential standard that can be afforded to an agency's legal construction.

2. De Novo Review.—When an agency's legal interpretation is subject to judicial review and is challenged, de novo review is uncommon and is appropriate only in a limited number of circumstances. De novo review is warranted when an agency is construing a legal provision that it does not have a special responsibility to administer, such as the Constitution or the Administrative Procedure Act (APA).[43] Section 706(2)(F) of the APA also contemplates de novo review of agency action when "the facts are subject to trial de novo by the reviewing court."[44] To date, courts have largely limited

group than those that injure a more diffuse class of regulatory beneficiaries. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992) (holding that an injury cannot be a generalized grievance but must be concrete); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 223–35 (1992) [hereinafter Sunstein, *After* Lujan] (describing how *Lujan* forecloses "pure" citizen suits that are brought to protect the public welfare). The differences in standing jurisprudence may be one reason for why the regulated entities are more likely to challenge agency decisions than groups whose interests diverge from the regulated entities. *See infra* section III(B)(3).

43. No one particular agency is charged with administration of the APA or Title VII. *See* 5 U.S.C. §§ 551–552 (2012); 42 U.S.C. § 2000e(a) (2012) (failing to designate a particular agency to administer the Act).

44. 5 U.S.C. § 706(2)(F). Although this language arguably implies that something other than the APA must make the facts "subject to trial de novo," the Supreme Court has interpreted this section of the APA to allow for no deference under the following two circumstances: (1) when "the agency fact-finding procedures are inadequate" or (2) when "issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." *Citizens to Preserve Overton Park*, 401 U.S. at 415. Nevertheless, it is exceedingly rare for courts to find either of these circumstances present. To date, there appears to be only one case under which a court has applied de novo review because either the agency's fact-finding was inadequate or because issues that were not before the agency were raised in a proceeding to enforce nonadjudicatory agency action. Porter v. Califano, 592 F.2d 770, 782–83 (5th Cir. 1979) (involving substantial bias in the agency disciplinary proceeding); *see also* Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 273–74 (1986) (explaining that the language of § 706(2)(F) has been construed considerably narrower than originally intended, referring to only a few circumstances under which a trial de novo is guaranteed by statute or the Constitution).

the application of § 706(2)(F) to those few situations in which trial de novo is guaranteed by statute.[45]

How does de novo review interact with the agency's legal outcome? Theoretically, under de novo review a court is not required to consider the agency's viewpoint at all.[46] Thus, the reviewing court determines the preferred legal interpretation and that determination prevails. In other words, de novo review enables a reviewing court to perfectly effectuate its most plausible reading of the statute. Only one interpretation out of the agency's conceivable spectrum of legal outcomes—i.e., the court's most plausible interpretation—will be upheld.

3. Chevron *Review.*—In *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*,[47] the Supreme Court announced the standard that is most often applied by reviewing courts to an agency's legal interpretations of a statute that the agency has been charged with administering.[48] The *Chevron* standard of review consists of a two-part test. Under step one, the court, after "employing traditional tools of statutory construction," asks whether "Congress has directly spoken to the precise question at issue."[49] If yes, the statute clearly and unambiguously resolves the issue and the agency is bound by Congress's expressed command.[50] If, however, the statute is unclear, the court proceeds to the second step. Under step two, the reviewing court must defer to an agency's interpretation that is "based on a permissible construction of the statute"[51] or that is a "reasonable" construction.[52]

Chevron deference, however, is not applicable in every case where an agency is interpreting a statute that it administers. The Supreme Court has made clear that an agency's interpretation is eligible for *Chevron* deference only if Congress has delegated interpretative authority—the ability to speak with the "force of law"—to the agency and the agency has "exercise[d] . . . that authority."[53] The Court has further stated that a congressional delegation

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45. *See, e.g.*, Kappos v. Hyatt, 132 S. Ct. 1690, 1694 (2012) (holding that patent denials appealed to the United States District Court for the District of Columbia under 35 U.S.C. § 145 allow for a trial de novo); Agosto v. INS, 436 U.S. 748, 753 (1978) (holding that a de novo trial of citizenship issues in deportation cases is guaranteed by statute); Chandler v. Roudebush, 425 U.S. 840, 863–64 (1976) (recognizing a statutory guarantee of trial de novo of federal employees' Title VII claims).

46. Although it is unlikely that the agency's decision—or at a minimum, its arguments and framing of the issue—have absolutely no effect on the court, the reviewing court does not owe the agency any formal deference.

47. 467 U.S. 837 (1984).

48. Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 3 (1990).

49. *Chevron*, 467 U.S. at 842, 843 n.9.

50. *Id.* at 842–43.

51. *Id.* at 843–44.

52. *Id.* at 844.

53. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

of formal adjudicatory or rule-making power is generally sufficient to infer congressional intent to delegate interpretative authority to an agency.[54]

How does *Chevron* review interact with the agency's possible spectrum of legal outcomes? *Chevron* review provides an agency leeway or space in which to operate. In order to uphold an agency's interpretation under *Chevron*, a court need not determine that the agency's construction was the best interpretation of a statute or the interpretation that the court would have chosen.[55] As long as the agency's interpretation is reasonable, the court must defer to the agency's decision. Thus, *Chevron* restricts the reviewing court's ability to effectuate its preferred reading of the statute by mandating deference to any reasonable legal interpretation of the statute. In contrast to de novo review, there is no longer only one outcome on the agency's legal spectrum that will be upheld. *Chevron* effectively transforms a point source into a zone of safety: under de novo review, a *single* point on the agency's spectrum of legal interpretations is permissible; under *Chevron*, an entire *zone* on the spectrum is permissible. As a result, an agency's legal interpretation is more likely to be upheld under *Chevron* deference than under de novo review.

4. Skidmore *Review.*—The third possible standard of review for an agency's legal interpretation is *Skidmore* deference.[56] If an agency cannot show that it was delegated force of law authority or that it exercised such authority, then its legal interpretations are typically afforded *Skidmore* deference. As a conceptual matter, the differences between the approaches taken by the Court in *Skidmore* and *Chevron* are substantial. The Court in *Skidmore* concluded that the weight afforded an agency's legal interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[57] By contrast, courts applying *Chevron* defer to an agency's "reasonable interpretation" of an ambiguous statute, regardless of its consistency with previous or subsequent

54. *Id.* at 229–31. While the Court has left open the possibility that a grant of less formal mechanisms of agency action may, at times, also satisfy the force of law requirement, the Court has yet to provide substantial guidance on what types of informal procedures are sufficient to infer such a delegation. *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1445–46 (2005) (noting that "courts [have] adopt[ed] inconsistent approaches to the issue of *Chevron* deference when an agency does not use notice-and-comment rulemaking or formal adjudication").

55. *Chevron*, 467 U.S. at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."); *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

56. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

57. *Id.* at 140.

statements.[58] As a result, in a *Chevron* case a court *must* defer to a reasonable interpretation, whereas in a *Skidmore* case, it *may* defer based on how convincing it finds the agency's construction of the statute.[59]

How does *Skidmore* review interact with the agency's possible spectrum of legal outcomes? *Skidmore* deference likely provides an agency with some leeway under which a number of legal interpretations of the statute in question will be upheld. In other words, more than just one outcome on the agency's legal spectrum of interpretation—more than just the *court's preferred* reading—will likely survive judicial challenge. Importantly, however, the leeway or space afforded an agency by *Skidmore* deference is likely to be less than if *Chevron* deference applied. As a result, a larger number of legal interpretations would likely be upheld under *Chevron* than *Skidmore* review.

Figure 2 demonstrates how each of the above standards of review, including non-reviewability, interacts with the agency's legal spectrum of statutory constructions. As Figure 2 illustrates, only the court's preferred interpretation (Outcome 5) is upheld under de novo review. In contrast, if a reviewing court is applying *Skidmore* review three legal interpretations (Outcomes 4 through 6) will be upheld, as demonstrated by the gray diagonally shaded rectangle. Further, a reviewing court applying *Chevron* will uphold even more legal interpretations (Outcomes 3 through 7). Finally, any legal constructions (Outcomes 0 through 10) will stand if the agency's decision is not subject to judicial reexamination. The actual number of legal interpretations that would be upheld under the different standards of review is not important. For the purposes of this Article, the point is: under de novo review, only the court's preferred interpretation of a statute will be upheld; under *Skidmore* review, more than one interpretation may be upheld; under *Chevron* review, an even larger number of agency legal interpretations may be upheld; and when the agency's decision is not reviewed, *any* construction will stand.

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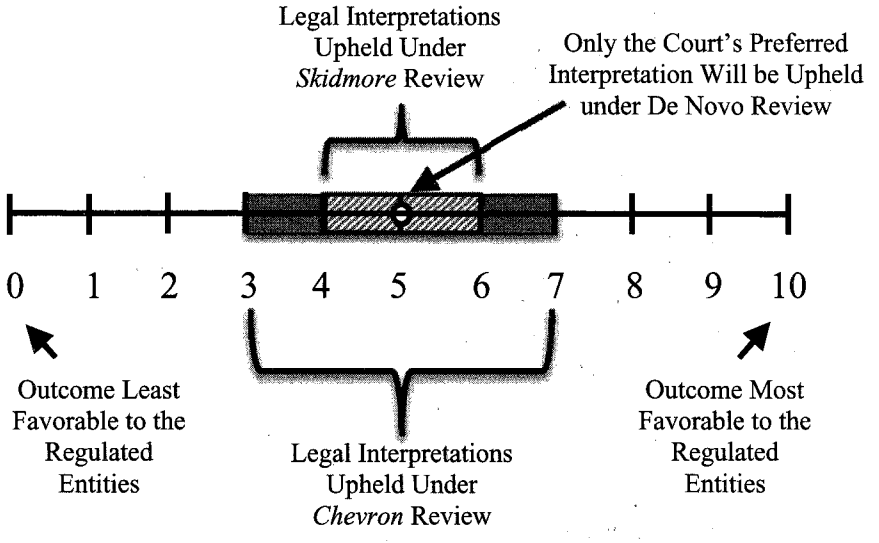
58. *Chevron*, 467 U.S. at 844.

59. Some commentators have suggested that *Skidmore* review is tantamount to de novo review. *See, e.g.*, Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 849 (2010) ("To some, *Skidmore* is no deference at all—the reviewing court goes along with the agency when, all things considered, it agrees with the agency."). Empirical evidence, however, suggests that judges view *Skidmore* as an actual restraint on their decision making. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1267, 1309 (2007) (finding that of the 104 appellate cases from 2001 to 2006 that applied *Skidmore*, the majority of courts tailored their deference in accordance with the factors outlined in *Skidmore* rather than conducting a de novo-style analysis wherein the court adopted its best reading of the statute).

Figure 2: Interaction of *Chevron*, *Skidmore*, De Novo, and No Judicial Review and an Agency's Spectrum of Legal Interpretations



Although theoretically the probability that agency action will be upheld should vary depending on the standard of review applied, some have questioned whether these standards matter in practice.[60] While the model presented in this Article assumes judges are faithful to the rule of law, it allows them, on occasion, to stretch the standard of review to arrive at a decision that they may not have otherwise if the standard of review was properly applied. Importantly, the model assumes only that on average the more deferential standards of review have a greater restraining effect on judicial decision making. At a minimum, this condition holds when comparing no judicial review versus judicial reexamination. An agency's construction of a statute will always stand if it is not challenged in court, whereas there is at least a possibility that an agency's interpretation will be reversed if it is subject to judicial reexamination. Even when agency action *is* challenged in court, however, the standards of review likely matter in practice. Even legal realists, like Judge Richard Posner, have noted the substantial difference in how a judge approaches review under strong judicial deference versus no deference.[61] Moreover, many of the empirical studies typically cited to show that the standards of review are irrelevant in practice[62]

60. *See infra* note 62 and accompanying text.

61. POSNER, *supra* note 40, at 113–14.

62. *See, e.g.*, Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85–86 (2011) (finding that standards of review have "little if any

suffer from a series of selection biases that limit the causal inferences drawn from them.[63] Because these analyses fail, among other things, to take into account how the underlying population of cases that are appealed may differ across the standards of review, using them as the basis for any conclusions as to the effect of standards of review on judicial decision making would be premature.

C. *Pro-Regulated-Entity Bias in Substantive Law*

This subpart illustrates the central theoretical claim of this Article: that a systematic application of deference regimes, including non-reviewability, may cause the standards of law applied by agencies, the evolution of law enunciated by courts, or both to tilt in a pro-regulated-entity direction with respect to the court's preferred construction. To begin, the model assumes that the agency is not biased in its legal interpretations; this assumption is

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explanatory value" because agency action is typically upheld at approximately the same rate, regardless of the standard of review applied); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 136–37 (2010) (arguing that the standards of review do not matter in practice because, in part, of his findings that courts uphold agency action at approximately the same rate regardless of the standard of review applied). Moreover, empirical studies regarding the agency win rates as a function of review standards are mixed at best. Some find that more deferential standards of review correspond to higher affirmance rates for administrative agencies. *See, e.g.*, William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1091 (2008) (finding "some positive correlation" with the application of *Chevron* deference and high agency win rates); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1030 & tbl.3 (analyzing decisions by the courts of appeal that document a pre-*Chevron* affirmance rate of 71% versus a post-*Chevron* rate of 81%). Others, however, find only a weak association between review standards and agency win rates. *See, e.g.*, Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 718–20 (2002) (noting that, of the three standards of review studied, only one supported the proposition that there is a positive correlation between agency wins and the stringency of the standard of review).

63. In order to determine whether a standard of review influences the judicial process, ideally one would want to observe if the court's decision to uphold the agency's legal interpretation varied as the standard of review changed. Of course, such counterfactuals do not exist in our legal system; the same case is not tried across multiple appellate courts that have been randomly assigned different standards of review. Selection biases in affirmance rate studies may confound the conclusions that can be drawn from them. First, the set of agency's legal interpretations that are afforded de novo review likely vary substantially from those that are eligible for *Chevron* deference. As discussed above, de novo review is appropriate when an agency is interpreting a legal provision that it has no special authority to administer, such as the Constitution. *See supra* section II(B)(2). There may be something inherently different in reviewing the construction of the Constitution than reexamining an agency's legal interpretation of its organic act that may skew the results. Second, the standard of review applied can affect a potential litigant's decision to appeal the agency's legal interpretation in the first place. If the potential litigant believes her chance of winning an appeal is inversely related to the strength of the deference afforded the agency's decision, then she may choose not to appeal marginal cases when a strong deference standard will be applied. As a result, the reversal rate of agency action that is afforded *Chevron* deference may be arbitrarily high, as litigants choose only to appeal cases where the agency seems clearly to have adopted an interpretation that was unreasonable. Thus, even if affirmance rate studies suggest there is only a weak association between review standards and agency win rates, the standards of review may still have a significant impact upon judicial decision making.

relaxed in subsequent parts. In other words, utilizing the spectrum of legal interpretations introduced earlier in this Article, this model assumes that the agency's legal interpretations of a statute are equally as likely to fall to the right of the court's preferred interpretation as they are to fall to the left of the court's preferred interpretation.[64]

Finally, for expositional purposes, this subpart *assumes* that a reviewing court will apply a more deferential standard of review, including no judicial reexamination, to an agency's legal interpretation that is more favored by its regulated entities than an agency's legal interpretation that is less favored by its regulated entities. The next section of this Article turns to exploring when such an assumption holds within the administrative state.

1. Pro-Regulated-Entity Bias in Agency-Defined Legal Standards.— Imagine that an agency's legal interpretations that are *more* favored by its regulated entities are *not* subject to judicial review whereas its constructions that are *less* aligned with its regulated entities are routinely challenged in court. This systematic difference in the application of deference regimes can result in a pro-regulated-entity bias in the evolution of legal standards applied at the agency level. Why? Because the reviewing court can only correct agency error—i.e., construe the statute in a manner that is more plausible—in a one-sided manner. An agency's legal interpretation that excessively disfavors its regulated entities could be challenged in court and reversed by the reviewing court. In contrast, an agency's legal interpretation that overly favors its regulated entities would not be challenged in court, and thus the interpretation would stand, regardless of how implausible it may be. The extent to which the reviewing court will be able to "correct" the agency's legal interpretation—i.e., effectuate its preferred construction or a reasonable one—will depend on the standard of review that is applicable. The important point is that the asymmetry in judicial review means the court will only be able to revisit an agency's legal interpretation that deviates from its preferred construction if it unreasonably disfavors its regulated entities. An equally implausible legal interpretation that excessively *favors* the agency's regulated entities will stand, as it will *not* be subject to judicial challenge. The result will be a pro-regulated-entity bias in the substantive standards being applied at the agency level.

There are, however, three points that are noteworthy. First, the bias in agency-applied substantive standards is with respect to the court's preferred construction. To the extent that the court's preferred construction reflects the aims embedded in the statute in question, this pro-regulated bias is quite troubling. As statutes often balance the rights of the regulated entities with those of the public, if agency-applied law tilts too far towards the regulated entities it is likely that the regulated beneficiaries, which are often the public,

64. This assumption is relaxed *infra* Part IV.

will suffer the consequences.[65] Second, the magnitude of the bias in agency-applied law can be substantial, as the courts—under this subpart's assumption—cannot revisit legal interpretations that are overly aligned with an agency's regulated entities.[66] Third, the bias will be localized at the agency level. The appellate courts will not announce standards that are biased in the pro-regulated-entity direction because the courts never have the opportunity to endorse the agency's standards that excessively favor its regulated entities. Nevertheless, a bias in the substantive law applied by an agency is worrisome in its own right. Because agencies make many more decisions in a given time period than courts, any bias in the substantive law being applied at the agency level can be associated with a substantial harm to social welfare.[67]

A return to the CWA example makes this point more concrete. Imagine the EPA is deciding among three different legal interpretations of "navigable waters": the court's preferred construction, which includes lakes and rivers that currently provide a channel for commerce and transportation (Outcome 5, as illustrated by Figure 3), and two others that are implausible. As sketched above, broad definitions of "navigable waters" are likely to be less favored by the EPA's regulated community whereas narrower definitions will be more favored. If, for example, the EPA decides that navigable waters include all land in the United States that occasionally receives rainfall (Outcome 0, as illustrated by Figure 3), this construction, which least aligns with the interest of the agency's regulated entities, could be challenged in court. The reviewing court would likely not tolerate this interpretation, even under a strong deferential standard of review. As a result, the agency's erroneous construction would be reversed and a more plausible interpretation

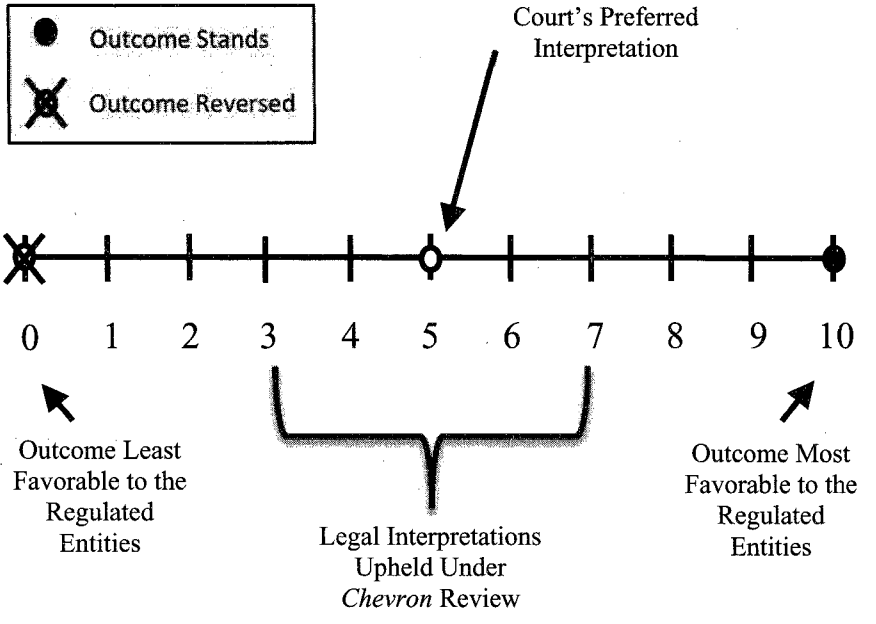
65. If the court itself is biased in its decision making then it is possible that, depending on the court's bias, the pro-regulated-entity tilt identified in this Article will either enhance or counteract the court's own bias. For instance, if the court's preferred construction does not reflect the aims embedded in the statute but instead overly favors the regulated entities then the bias identified in this Article will only be amplified. In contrast, if the court's preferred construction overly disfavors the regulated entities then the bias identified in this Article could help to counteract the court's bias resulting in unbiased agency-applied law.

66. Whether this bias or tilt will grow over time will depend upon several factors, including how frequently a legal construction must be updated. Take for example patentable subject matter, which is the doctrine that limits the types of inventions that fall under the purview of the patent system. 35 U.S.C. § 101 (2012); *see also* Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1642–44 (2003) (explaining that, barring several exceptions, "patentable subject matter has been defined quite broadly" based on § 101). The PTO must decide whether each new technology is patent eligible. 35 U.S.C. § 131. Thus, the tilt in regulatory law described in this Article may take on a dynamic drift, as each time the PTO must determine whether a new technology is patent eligible an opportunity for a bias in the development of patentable subject matter is created.

67. Benjamin Kapnik, Essay, *Affirming the Status Quo?: The FCC, ALJs, and Agency Adjudications*, 80 GEO. WASH. L. REV. 1527, 1531 (2012) ("Agencies 'conduct millions of adjudications each year'—far more than the federal courts." (quoting 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 8.1 (5th ed. 2010))).

adopted—one that is more likely to advance the policies embedded in the CWA. Alternatively, the EPA may define navigable waters to include only oceans and not lakes or rivers (Outcome 10, as illustrated by Figure 3). Such a construction is likely to be highly aligned with the interests of the EPA's regulated entities but, under the assumption of this section, would not be challenged in court. As a result, the agency's erroneous legal interpretation that overly favors its regulated entities would stand.[68] This one-sided correction of the agency's legal constructions would bias the development of substantive law applied in a pro-regulated-entity direction—biased at least with respect to the court's preferred interpretation. While the bias, as illustrated with the CWA example, has the potential to be quite substantial, it would be cabined to the agency level only. Because the appellate court never has the opportunity to review the agency's overly pro-regulated-entity legal interpretations, it obviously cannot endorse these biased standards.

Figure 3: Pro-Regulated-Entity Tilt in Agency-Applied Legal Standards



68. It is of course possible that Congress would step in and override the agency. Congress may also serve as a check on an agency's legal interpretation of a statute. *See* ABERBACH, *supra* note 28, at 2 (noting that Congress may review agency actions and policies via Congressional oversight); McCubbins et al., *supra* note 4, at 431–33 (exploring ways, both *ex post* and *ex ante*, in which Congress "assure[s] agency compliance with the policy preferences of the winning coalition"); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 793 (1983) (concluding that Congress does play an influential role in agency decisions, even when it appears that Congress has not been active in controlling the agency).

2. Pro-Regulated-Entity Bias in Court-Announced Legal Standards.— Now suppose that regardless of the construction the agency adopts, the construction *is* challenged in court. Further suppose, however, that a *more* deferential standard of review is applied to an agency's *pro*-regulated-entity legal interpretations than is applied to legal constructions that are *less* favored by its regulated entities. This systematic bias in the application of the standards of review may cause the courts to announce legal standards that drift towards a regulated entity's interests because the agency's pro-regulated-entity interpretations of law will be more likely to be upheld than its anti-regulated-entity legal interpretations. As discussed above, an agency is given more interpretative leeway under *Chevron* review than it is under either *Skidmore* or de novo review. As a result, a reviewing court is likely to uphold a greater number of legal interpretations under *Chevron* than under the less deferential *Skidmore* review. Furthermore, if de novo review is applied to an agency's anti-regulated-entity interpretations of law, the differences become even starker because only the court's preferred interpretation will survive judicial challenge. This asymmetry in the standards of review could potentially function as a one-way ratchet, pushing the development of substantive law in a pro-regulated-entity direction.[69]

In contrast to the previous section—in which deference asymmetries resulted from one-sided judicial review of an agency's legal constructions—the bias in the evolution of substantive standards in this section's scenario is likely to be less pronounced. Notably, the judiciary under this section's assumption will at least be able to review *all* of the agency's legal interpretations, even if its ability to effectuate its preferred construction will be skewed. More profoundly, however, when both constructions are subject to judicial reexamination, the bias in standards of law will occur at both the agency *and* the court level. Because the courts will actually be reviewing agency legal interpretations that both favor and disfavor the agency's regulated entities, the court will actually be enunciating substantive standards that, over time, will drift in a pro-regulated-entity direction. Importantly, just as in the previous scenario, any pressure in the development of regulatory law in a pro-regulated-entity direction is with respect to the court's preferred construction.

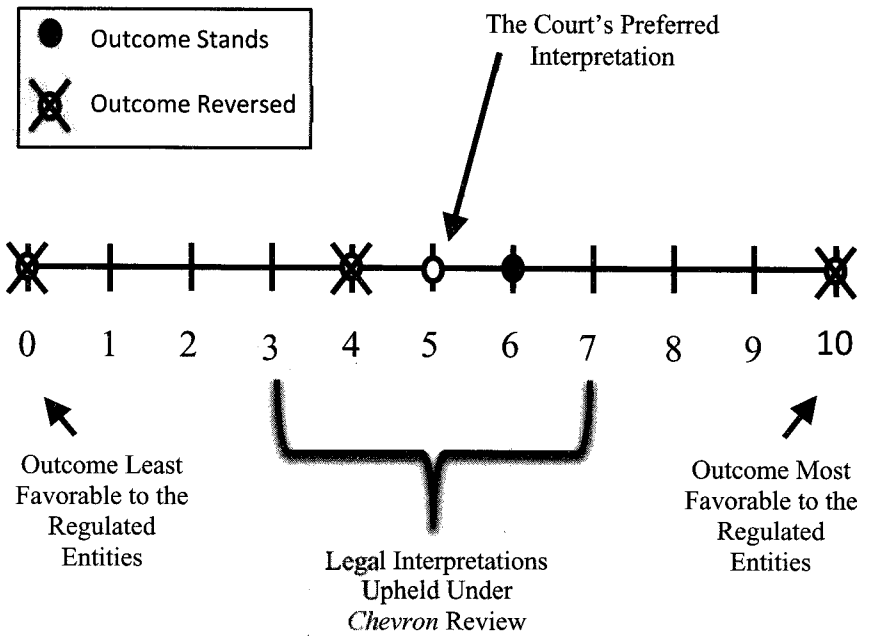
Again, the CWA example helps illustrate these principles. As in the last hypothetical, imagine the EPA is deciding among three different legal

69. It is also possible that the reviewing court applies a less deferential standard of review to an agency's pro-regulated-entity legal interpretations than an agency's legal interpretations that are less favored by its regulated entities. Because the agency's anti-regulated stances will be more likely to be upheld than its pro-regulated-entity stances, an anti-regulated-entity bias in the evolution of legal standards may develop. This Article, however, focuses on the legal standards tilting toward outcomes more favorable to the regulated entities because I was only able to find circumstances in the administrative state where the application of deference regimes was systematically biased to create such an outcome.

interpretations of "navigable waters": the court's preferred construction, which includes lakes and rivers that currently provide a channel for commerce and transportation (Outcome 5, as illustrated by Figure 4), and two others that are implausible—all lands in the United States that occasionally receive rainfall (Outcome 0) or oceans only (Outcome 10). Now assume that the agency's pro-regulated-entity interpretations receive *Chevron* deference (Outcome 10) and its anti-regulated-entity interpretations receive de novo review (Outcome 0). In this situation the skewed applications of deference regimes will have no distortionary effect on the development of law because the agency's position would be reversed regardless of the standard of review applied—Outcome 10 would be reversed under *Chevron* review as it is not within the zone of reasonable interpretations, and Outcome 0 would be reversed under de novo review as it is not the most plausible construction.

The more interesting and substantively important cases are those in which the agency will stretch the plausibility of its interpretation to some degree but not so much that the court would deem the agency's construction implausible under even the most deferential standard. Suppose, for instance, that the EPA is choosing among three competing legal interpretations that include the court's most plausible construction (lakes and rivers that are navigable-in-fact regardless of whether they currently provide a channel for commerce and transportation of people and goods, as represented by Outcome 5 in Figure 4) and two that slightly stretch the plausibility of the CWA (Outcomes 4 and 6 in Figure 4). Under this section's assumptions, the agency's construction that overly favors its regulated entities will still receive *Chevron* deference (Outcome 6) whereas its legal interpretations that excessively disfavor its regulated entities will be reviewed without deference (Outcome 4). If the EPA adopts a broader definition that includes not only lakes and rivers but also their tributaries and adjacent wetlands (Outcome 4), it will not survive judicial review. The reviewing court will apply de novo review and the agency's legal interpretation will be rejected, as the court has determined that Outcome 5—rather than Outcome 4—is the most plausible interpretation. Alternatively, if the agency adopts a narrower definition, for instance only lakes and rivers that are navigable-in-fact and *currently* provide a channel for commerce and transportation of people and goods (Outcome 6), it will be upheld. Outcome 6 will receive *Chevron* deference, and because it falls within the zone of safety—i.e., is a reasonable interpretation of the CWA—it will survive judicial reexamination. Thus, because an agency will only receive deference for its legal interpretations that overly favor its regulated entities and not for its legal interpretations that unreasonably disfavor its regulated entities, the former are more likely to be upheld than the latter. The asymmetry in the standards of review will exert pressure on the appellate court to announce substantive standards that will evolve over time in a pro-regulated-entity direction.

Figure 4: Pro-Regulated-Entity Tilt in Appellate-Announced Legal Standards



III. The Origins of Deference Asymmetries in the Administrative State

The previous Part developed a theoretical basis for the pro-regulated-entity bias in the evolution of law as a result of deference asymmetries. This Part turns to the critical task of identifying the features of the administrative state that give rise to a skewed application of deference regimes. This Part outlines three situations in which an agency's decisions that are more favored by its regulated community are likely to be reviewed under a more deferential standard (including no judicial review) than an agency's decisions that are less favored by the entities it regulates.

Before beginning this discussion, however, this Part outlines the various tools agencies may use to announce their legal interpretations of the statutes they administer. This overview is necessary, as the form an agency uses to announce its legal interpretations can affect both the timing of a judicial challenge and the standard of review used by the court to assess the agency action.

A. *The Multiple Avenues to Construe Statutes and Their Consequences with Respect to Judicial Review*

This subpart provides a brief exposition of agencies' three primary policy-making vehicles, as the standard of review a court uses to assess agency action will likely vary based on the form the agency utilized to announce its legal interpretation of a statute.[70] First, agencies that have the authority to promulgate legislative rules often utilize such authority to interpret ambiguous terms in the statutes they administer.[71] Second, agencies may also interpret the statutes they administer on a case-by-case basis.[72] This includes administrative adjudications wherein the agency announces its legal constructions of statutes in a benefit determination, a licensing proceeding, or in a judicial enforcement action. Finally, agencies also rely on an assortment of guidance documents to express their legal interpretations of the

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70. Typically, a statute referred to as an organic act creates an agency and delineates the agency's powers. Gary J. Edles, *The Revival of the Administrative Conference of the United States*, 12 TEX. TECH. ADMIN. L.J. 281, 287 (2011). While every agency that has been statutorily authorized to judicially enforce a statute has the authority to announce constructions of the statute it administers in guidance documents, see, for example, Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944), Congress at times declines to permit an agency to promulgate legislative rules or conduct adjudications. The PTO, for instance, does not possess substantive rule making authority and thus the agency does not have the authority to issue legislative rules that further define the patentability standards contained in the Patent Act. Merck & Co. v. Kessler, 80 F.3d 1543, 1549–50 (Fed. Cir. 1996). The PTO can, however, offer its construction of the statute through guidance documents and case-by-case adjudications. Melissa F. Wasserman, *The Changing Guard of Patent Law:* Chevron *Deference for the PTO*, 54 WM. & MARY L. REV. 1959, 1973–77 (2013).

More commonly, however, agencies have the full range of law-announcing apparatuses. Administrative bodies that are authorized in at least some contexts to promulgate both legislative rules and conduct administrative adjudications include the EPA, see Clean Air Act, 42 U.S.C. §§ 7409, 7413(a)(2)–(3) (2012); the Federal Communications Commission (FCC), see Communications Act of 1934, 47 U.S.C. § 154(i) (2012); the National Labor Relations Board (NLRB), see National Labor Relations Act, 29 U.S.C. §§ 156, 160 (2012); and the Food and Drug Administration (FDA), see Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 371(a) (2012) and Nat'l Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 695–97 (2d Cir. 1975).

71. Legislative or substantive rules "are the administrative equivalent of public laws passed by Congress. . . . [They] are legally binding, generally applicable, and nonretroactive." Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 788 (2010). The APA uses the term "rule" for what this Article refers to as a "legislative" or "substantive" rule. *See* 5 U.S.C. § 551(4) (2012). As defined by § 551 of the APA:

> (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . . .

Id.

72. Both the NLRB and the Federal Trade Commission (FTC) are known for heavily relying on adjudication to announce legal interpretations of the statutes they administer. Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 274 (1991); *see also* Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 263 ("Adjudication . . . was a substantial part of the business of the [FTC] . . . .").

statutes they administer.[73] Guidance documents can take a variety of forms, including general policy statements, guidelines, memoranda, manuals, and staff instructions.[74] Agencies are increasingly relying on guidance documents to offer their legal constructions of statutes.[75] Moreover, agencies that have a large number of low-level officials making decisions regarding benefits determinations or licensing proceedings have a strong incentive to develop their views on indeterminate areas of the law in an effort to promote internal consistency within the agency.[76]

A reviewing court will only apply the highly deferential standard announced in *Chevron* if the agency has been granted force of law authority and has exercised that authority in interpreting the statute it administers.[77] Typically, a grant of legislative rule-making power or formal adjudication power is sufficient to infer a congressional delegation of interpretive authority.[78] Thus, an agency's interpretation of a statute contained in a

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73. *See generally* Exec. Order No. 13,422, 3 C.F.R. 191, 192 (2007) (defining a guidance document as "an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue").

74. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1320 (1992). While guidance documents are not formally binding on third parties, they undoubtedly influence the behavior of private actors. *See id.* at 1327–30. Moreover, guidance documents are typically binding upon agency officials. *See id.* at 1363–65 (arguing that agency staff "routinely and indeed automatically apply" guidance documents). Thus, agency employees will follow the agency's legal interpretations announced in these documents when performing their duties, such as when making benefit determinations. *Id.*

75. *See, e.g.*, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007) ("[A]gencies increasingly have relied on guidance documents to inform the public and to provide direction to their staffs."). Commentators have argued that agencies are increasingly relying upon guidance documents to issue legal interpretations of statutes in order to avoid the procedures associated with notice-and-comment rule making. *See* H.R. REP. NO. 106-1009, pt. I, at 1 (2000) (noting that guidance documents may allow agencies to avoid procedures that "protect citizens from arbitrary decisions and enable citizens to effectively participate in the process"); Anthony, *supra* note 74, at 1362–63 (discussing situations in which guidance documents can serve as a proxy for other rule making procedures).

76. *See* Michael Abramowicz & John F. Duffy, *Ending the Patenting Monopoly*, 157 U. PA. L. REV. 1541, 1558–64 (2009) (discussing agency mass-justice concerns and how agencies respond by constraining the discretion of employees to increase the chances that judgments of agency employees are of "high quality and highly consistent").

77. *See supra* section II(B)(3).

78. United States v. Mead Corp., 533 U.S. 218, 229–30 (2001). As the Supreme Court explains:

> We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed. . . . Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.

Id. (footnotes omitted).

Importantly, the Supreme Court has left open the possibility that a grant of less formal mechanisms of agency action may, at times, also satisfy the force of law requirement. *Id.* at 231. Ensuing Court opinions, however, have failed to provide substantial guidance on what types of

legislative rule or a formal adjudication may be afforded *Chevron* deference.[79] Importantly, the fact that an agency has statutory authority to adjudicate in some way does not mean the agency has been granted formal adjudicatory authority. Formal adjudication under the APA resembles a civil judicial trial, wherein the parties have the right to present oral arguments,[80] to conduct cross-examination of witnesses,[81] and to make exceptions to prior rulings.[82] The majority of agency adjudications, however, are informal.[83] These adjudications, in contrast to their formal counterparts, lack trial-like features and instead have processes akin to "inspections, conferences, and negotiations."[84] If an agency's interpretation of a statute is contained in an informal adjudication, then the less deferential standard of *Skidmore* deference most often applies.[85] If an agency's interpretation of a statute is contained in a guidance document, the reviewing court will also typically apply *Skidmore* deference.[86]

While substantive rules can typically be challenged immediately after promulgation—that is, before the agency has brought an enforcement action against an allegedly noncomplying party—it is more difficult to challenge legal interpretations announced in guidance documents before enforcement.[87] Thus, an agency's position in such documents may not be judicially

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informal procedures are sufficient to infer such a delegation. *See* Bressman, *supra* note 54, at 1445 ("[C]ourts [have] adopt[ed] inconsistent approaches to the issue of *Chevron* deference when an agency does not use notice-and-comment rulemaking or formal adjudication.").

79. Although there is a debate in the literature on the extent to which judges faithfully apply the *Chevron* framework, see, for example, Mathews, *supra* note 31, at 1372–73, empirical evidence suggests that even before the Supreme Court an agency's legal interpretations advanced in formal adjudications or legislative rules are more likely to be subject to *Chevron* deference than those advanced in less formal proceedings. *Id.* at 1035 (citing Eskridge & Baer, *supra* note 62, at 1149 tbl.18).

80. 5 U.S.C. § 556(d) (2012). While the majority of formal hearings require oral arguments, the APA has excepted oral arguments for hearings "determining claims for money or benefits or applications for initial licenses." *Id.*

81. *Id.* Section 556 requires cross-examination only "as may be required for a full and true disclosure of the facts." *Id.*

82. *Id.* § 557(c).

83. *See* Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1605 (2013) (describing agencies' extensive use of and preference for informal adjudication).

84. COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. REP. NO 77-8, at 5 (1941).

85. *See* Mathews, *supra* note 31, at 1365 (finding that the Supreme Court applied *Chevron* deference in 5% of the cases of statutory interpretation involving informal procedures and finding a high probability the Court would apply *Skidmore* instead).

86. *Id.*

87. Although a court is more likely to find a guidance document nonfinal or unripe than a legislative rule, see Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 817–22 (2001), courts nevertheless tend to treat an agency interpretation as final and ripe if it is likely to have a significant practical impact on regulated parties. *See* Seegars v. Gonzales, 396 F.3d 1248, 1253 (D.C. Cir. 2005) (describing "standard rules governing pre[-]enforcement challenges," in which "an affected

reviewed until the agency relies upon the position when taking action against the regulated party, such as an adjudication involving a benefit, licensing, or rights determination.[88] An agency's construction of a statute that is announced in adjudication can be challenged after the proceeding has reached its conclusion and the action is final.

A systematic bias in the application of deference regimes could arise if the agency utilizes different policy forms to announce its pro- versus anti-regulated-entity interpretations of the statutes it administers. Consider the Food and Drug Administration (FDA) and its constructions of the Food, Drug, and Cosmetic Act (FDCA) that affect the costs associated with the approval of prescription drugs. Drug manufacturers are more likely to favor legal constructions that decrease the costs associated with drug approval than constructions that raise the costs associated with drug approval. Imagine the FDA utilized only *legislative rules* to announce its constructions of the FDCA that result in easing the costs associated with drug approval, such as allowing surrogate endpoints—i.e., shrinking of a tumor—rather than the death of a patient to be the outcome measure in cancer clinical trials. In addition, suppose the agency utilized only *informal adjudications* to announce legal interpretations of the FDCA that increased the costs associated with drug approval, such as requiring additional testing for possible drug–drug interactions. This skewed use of policy-making vehicles could result in a bias in the development of drug law. The agency's viewpoints that are more likely to be favored by drug companies are more likely to be reviewed under the deferential *Chevron* standard, whereas the agency's legal interpretations that are less likely to be favored by drug companies are more likely to be reviewed under the less deferential *Skidmore* standard. The result could be a pro-regulated-entity bias in drug law. Of course, this would require the agency to bias its selection of law-making forms.[89] While it is possible that an agency may distort its choice of policy-

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party may generally secure review before enforcement"); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1441 (2004) ("Courts also appear to be treating certain guidance documents as final and ripe, and therefore open to pre-enforcement challenge, in cases where black letter timing doctrines might suggest that the positions they contain are not immediately subject to challenge.").

88. *See, e.g.*, Am. Paper Inst., Inc. v. EPA, 882 F.2d 287, 288–89 (7th Cir. 1989) (finding that a challenge to "EPA's policy statements and other documents published for 'guidance'" was premature).

89. There is some empirical support that this occurs, although the bias in the evolution of law would likely occur in the opposite direction—the agency's pro-regulated-entity views are likely to be afforded more deference than its legal interpretations that are less aligned with its regulated entities. A recent study by Jody Freeman and Joseph Doherty found that the EPA and FCC are most likely to have their legislative rules challenged in court. *See Regulatory Improvement Act of 2007: Hearing on H.R. 3564 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 23 (2007) (statement of Jody Freeman, Professor, Harvard Law School) (finding that out of a sample 282 cases from 1994 to 2004 in which a court reached the merits of a challenge to a rule, 102 were EPA rules and 88 were FCC rules). Connor Raso found that the EPA

making vehicles, resulting in a distortion in the evolution of substantive legal standards, this Article is not primarily concerned with this situation. More profoundly, this Article identifies structures of the administrative state that may give rise to such distortions *even when* the agency itself lacks any bias, including any bias in its selection of policy-making form.

B. Origins of Deference Asymmetries

This subpart identifies the origins of deference asymmetries in the administrate state. As this subpart illustrates, a surprising number of agencies may face a skewed application of deference regimes in which their legal constructions that are more favored by the entities they regulate will be reviewed under a more deferential standard, including lack of judicial review, than their constructions that are less favored by the entities they regulate. To facilitate this discussion, this subpart divides the formal and informal structures that give rise to a skewed application of deference regimes into one of three categories.

1. Asymmetric Review.—Much administrative action can be appealed by two sets of constituents—one set whose interests align with the regulated community of the agency and another set whose interests diverge from the regulated entities.[90] The ability of two different groups to appeal an agency's legal interpretation of a statute creates the possibility to correct agency constructions that either overly favor or unreasonably disfavor the entities the agency regulates. This holds almost universally true for legislative rules. For example, when the United States Department of Agriculture (USDA) promulgates regulations to ensure the safety of food products, the regulations could be challenged by either food-safety groups arguing that the regulation

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and FCC were less likely to avoid the procedures associated with notice-and-comment rule making than other agencies whose rules were less frequently litigated. Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. (forthcoming Mar. 2015) (manuscript at 23), *available at* http://ssrn.com/abstract=2293455, *archived at* http://perma.cc/8BAL-ZJFB. Because an agency's regulated entities are more likely to challenge rules than public interest groups, agencies that are concerned about reversal may utilize formal procedures to announce their interpretations of legal statutes that overly disfavor their regulated constituencies in an effort to assure a more deferential standard will apply. This, of course, assumes that agencies are concerned with reversal and hence make decisions to avoid or minimize being overturned. While many scholars, including myself, have argued that agencies are concerned with judicial reversal, see, for example, Mathews, *supra* note 31, at 1379 and Wasserman, *supra* note 12, at 402, this Article's focus is different. It is concerned with a distortion in the evolution of law that occurs without any strategic behavior on the part of the agency.

90. This is of course a simplification, as discussed *supra* note 39. An agency may regulate numerous constituencies that may themselves have divergent viewpoints on a single issue. These labels are meant to generalize the development of substantive law and not to necessarily require that everyone who is regulated by the agency agree that this legal construction is most favorable. Thus, this subpart labels legal constructions that lead to the granting of entitlements or benefits as favored by the regulated entities and legal interpretations that lead to the denial of entitlements or benefits as disfavored by the regulated entities.

is too weak or by food producers arguing that the regulation is too stringent.[91] Moreover, some agency adjudications are also appealed by two sets of constituents. If, for instance, the EPA decides to reject a permit to discharge pollutants, the aggrieved applicant can appeal the decision and argue that the agency's permit requirements are too restrictive.[92] On the other hand, if the EPA decides to grant the permits to discharge pollutants, then interested parties—such as environmental groups—can appeal the decision and argue that the agency's permit criteria are too permissive.[93] In such a case, the possibility of symmetric review gives the reviewing court the opportunity to correct the full spectrum of agency error—i.e., the court can correct an agency's legal interpretations that systematically favor either side over the other.

Yet not all administrative action is accompanied with a symmetric right of appeal. A number of agency adjudications can only be appealed by one set of constituents. This asymmetry creates a systematic bias in the application of deference regimes, thereby hampering the ability of the reviewing court to correct agency error. Because only one set of constituencies can appeal the agency's decision, the reviewing court will be limited to a one-sided correction of legal error.[94]

Take, for example, federal benefits laws, such as social security disability benefits.[95] The Social Security Administration (SSA) must interpret the term "disability," which the Social Security Act defines only

91. *Compare* Koretoff v. Vilsack, 707 F.3d 394, 396 (D.C. Cir. 2013) (summarizing an almond producer's challenge of the USDA pasteurization rule as too stringent), *with* Ctr. for Food Safety v. Vilsack, 734 F. Supp. 2d 948, 950 (N.D. Cal. 2010) (describing a food-safety group's challenge to USDA approval of genetically modified beets as too lenient).

92. 33 U.S.C. § 1369(b) (2012); *see also* Homestake Mining Co. v. EPA, 584 F.2d 862, 863 (8th Cir. 1978) (describing a mining group's challenge to the EPA's refusal to modify a discharge permit).

93. *See, e.g.*, Resisting Envtl. Destruction on Indigenous Lands v. EPA, 716 F.3d 1155, 1157–58 (9th Cir. 2013) (describing an environmental protection group's challenge to the EPA's decision to issue a permit authorizing exploratory drilling operations, arguing the agency's permit requirements were too lenient).

94. This assumes either that the agency is announcing its legal interpretations of the statute for the first time in the adjudication in question or that the agency had previously announced its legal interpretation in a guidance document, but the agency is for the first time enforcing such interpretation in the adjudication in question.

95. The Social Security Act authorizes payment of disability insurance benefits and supplemental security income to individuals with disabilities. *See* 42 U.S.C. § 401 (2012) (codifying Title II disability insurance benefits); *id.* § 1381 (stating the purpose for Title XVI supplemental security income).

vaguely,[96] in order to determine when a claimant is eligible for benefits.[97] Yet only agency adjudications that deny benefits can be appealed.[98] If the SSA grants disability benefits, then no one has the right to challenge the agency action in court. As a result, an overly restrictive definition of what constitutes a disability—a definition that leads to the erroneous denial of benefits—may be subject to judicial review. In contrast, an overly permissive definition of what constitutes a disability—a definition that leads to the erroneous granting of benefits—is unlikely to be subject to judicial reexamination. To the extent the SSA announces its legal constructions of the term "disability" in adjudications or guidance documents, this asymmetry in appeal rights leads to a skewed bias in the application of deference standards.[99] The SSA's legal interpretations that may lead to excessive granting of benefits—legal interpretations that are more favored by applicants—are less likely to be subject to any judicial scrutiny and thus will continue to remain the agency's position. In contrast, SSA's legal interpretations that are too permissive and erroneously lead to the denial of benefits—i.e., those that are less favored by applicants—are much more likely to be subject to judicial reexamination, thereby providing the reviewing court with the ability to correct this legal error. Thus, the asymmetric appeal right in social security benefits determinations may cause the legal standards utilized by the SSA to drift in a direction that favors disability applicants.

Furthermore, this asymmetric appeal right is not limited to the SSA context. Numerous areas of law—including immigration law,[100] tax law,[101]

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96. The Social Security Act defines disability as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." *Id.* § 423(d)(1)(A); *accord. id.* § 1382c(a)(3)(A).

97. To interpret disability, the SSA has relied upon rule making, see, for example, 20 C.F.R. § 404.1592 (2014); adjudications, see Sullivan v. Zebley, 493 U.S. 521, 534–35 (1990); and guidance documents, see, for example, SSR 82-53, 45 Fed. Reg. 55,566 (Aug. 20, 1980).

98. If the SSA denies disability benefits, the disgruntled applicant can appeal the decision. *E.g.*, 20 C.F.R. § 404.930 (2014) (describing when a claimant may request review of denial by an administrative law judge (ALJ)); *id.* at § 404.967 (stating that a claimant dissatisfied with an ALJ's ruling may request review by an Appeals Council); *see also* 42 U.S.C. § 405(g) (granting individuals the right to seek review of SSA decisions in federal district court).

99. Importantly, because rules can be immediately appealed by both sets of constituents, the bias in the evolution of law will only occur when the agency utilizes guidance documents or adjudications to interpret the term "disability."

100. *See, e.g.*, 8 U.S.C. § 1252(a)(1) (2012) (allowing for judicial review of orders of removal); 28 U.S.C. § 2344 (2012) (allowing aggrieved parties to file a petition against the United States to review orders of removal); John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 GEO. IMMIGR. L.J. 605, 616 (2004) (noting that federal circuit courts can only review decisions by the Board of Immigration Appeals that are adverse to the alien).

101. *See* LEANDRA LEDERMAN & STEPHEN W. MAZZA, TAX CONTROVERSIES: PRACTICE AND PROCEDURE 8 (3d ed. 2009) (explaining the process for adjudicating federal tax controversies).

veteran's benefits,[102] and patent law prior to the enactment of the Leahy–Smith American Invents Act (AIA) in the fall of 2011[103]—involve situations in which agency actions that embody pro-regulated-entity stances on the law are less likely to be subject to judicial review than their anti-regulated-entity views.

2. Different Adjudicatory Settings for Different Agency Decisions.—A systematic bias in the application of deference regimes is not limited solely to agency decisions that are asymmetrically reviewed. Typically, if agency action is appealable by two sets of constituents, the same deference standard is applied to the agency's legal interpretation, regardless of whether it is allegedly too permissive or too restrictive. For example, if the USDA promulgates regulations to ensure the safety of food products, the reviewing court will apply the same standard of deference to the agency's legal interpretations, regardless of whether food-safety groups are arguing that the regulation is too weak or food producers are arguing that the regulation is too stringent.[104]

Yet, symmetric review of agency action is not in itself enough to prevent a skewed application of deference regimes. Even when two sets of constituents can appeal agency action, if Congress has created different adjudicatory settings for different agency decisions, then an agency's legal interpretation that overly favors its regulated entities may be reviewed under a different deference standard than a construction that unreasonably disfavors the entities it regulates. Take, for example, the Patent and Trademark Office (PTO), whose principal task is determining whether an invention merits the reward of a patent.[105] Individuals known as patent examiners make the initial decision regarding the patentability of an invention. If an examiner denies the patent, the disgruntled patent applicant has a statutory right to appeal the decision to the Patent Trial and Appeal Board (the Board).[106] While

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102. *See, e.g.*, DANIEL T. SHEDD, CONG. RESEARCH SERV., R42609, OVERVIEW OF THE APPEAL PROCESS FOR VETERAN'S CLAIMS 2 (2013) (describing numerous opportunities for claimant to seek review of unfavorable decisions).

103. *See* Wasserman, *supra* note 12, at 401 (noting the pre-AIA unidirectional review of PTO decisions, where patent denials, but not patent grants, are subject to immediate review by the Federal Circuit).

104. *Compare* Koretoff v. Vilsack, 841 F. Supp. 2d 1, 9 (D.D.C. 2012), *aff'd*, 707 F.3d 394 (D.C. Cir. 2013) (applying *Chevron* deference in almond producer's challenge to USDA pasteurization rule), *with* Ctr. for Food Safety v. Vilsack, 844 F. Supp. 2d 1006, 1014–15 (N.D. Cal. 2012), *aff'd*, 718 F.3d 829 (9th Cir. 2013) (citing *Chevron* in assessing food-safety group's challenge to USDA approval of genetically modified beets).

105. U.S. PATENT & TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2012, at 13 tbl.1 (2012) (stating the PTO's mission includes "delivering high quality and timely examination of patent and trademark applications").

106. 35 U.S.C. § 6(b) (2012). The Patent Trial and Appeal Board was formerly known as the Board of Patent Appeals and Interferences. *See* 35 U.S.C. § 6(a) (2006) (establishing the Board of Patent Appeals and Interferences); Leahy–Smith America Invents Act, Pub. L. No. 112-29, § 7(a),

historically no one had immediate standing to challenge the grant of a patent, the PTO recently obtained robust authority to adjudicate already-issued patents. As a result, if the examiner grants the patent, a third party may now challenge this decision in a proceeding before the Board, known as post-grant review, once the patent issues.[107] Although the PTO has the authority to adjudicate both patent denials and patent grants, the proceedings associated with these adjudications vary substantially. The PTO's review of an initially denied patent takes place in an informal process that fails to resemble a trial-like proceeding.[108] In contrast, the PTO's review of a granted patent resembles an adversarial, court-like proceeding, in which parties are entitled to oral arguments and discovery.[109] The final decision in either proceedings—the adjudication of a patent denial or a patent grant—can be appealed by the aggrieved party to the United States Court of Appeals for the Federal Circuit (Federal Circuit), which has near exclusive jurisdiction over patent appeals.[110]

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125 Stat. 284, 313 (2011) (codified as amended at 35 U.S.C. § 6 (2012)) (restructuring the Board of Patent Appeals and Interferences as the Patent Trial and Appeal Board).

107. The recently enacted AIA provides the PTO with a robust pathway in which third parties can challenge the validity of an already-issued patent. Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified as amended in scattered sections of 35 U.S.C.). More specifically, the AIA significantly modified a proceeding known as *inter partes* reexamination, renaming the transformed procedure "*inter partes* review," 35 U.S.C. §§ 311–318 (2006) and Pub. L. No. 112-29, § 6a, 125 Stat. 284, 299–304 (codified as amended at 35 U.S.C. §§ 311–319 (2012)), and created an entirely new post-grant opposition procedure called "post-grant review." Pub. L. No. 112-29, § 6d, 125 Stat. 284, 305–11 (codified as amended at 35 U.S.C. §§ 321–329 (2012)).

Prior to the AIA, the PTO was statutorily authorized to conduct ex parte and *inter partes* reexamination, in which a party asked the PTO to reconsider its decision to grant an already-issued patent. 35 U.S.C. §§ 301–307, 311–318 (2006). These proceedings, however, were examinational rather than adjudicative and suffered from severe limitations on third-party participation, narrow substantive grounds for review, and strict estoppel provisions. *Id.* The new proceedings hope to overcome many of these shortfalls. *See* Wasserman, *supra* note 70, at 1975–76 (describing the adjudicatory informalities and changes the AIA brings). Importantly, when this Article refers to the PTO's ability to adjudicate already-issued patents, it is referring only to the agency's new authority to conduct *inter partes* and post-grant review.

108. *See, e.g.*, Craig Allen Nard, *Deference, Defiance, and the Useful Arts*, 56 OHIO ST. L.J. 1415, 1434 (1995) (calling the Board's adjudications informal); Wasserman, *supra* note 70, at 1975–76 (noting the lack of formal adjudication characteristics, such as oral arguments).

109. Specifically, the statute requires the Director to promulgate regulations, for both *inter partes* review and post-grant review, "setting forth standards and procedures for discovery of relevant evidence," 35 U.S.C. §§ 316(a)(5), 326(a)(5) (2012), and "providing either party with the right to an oral hearing as part of the proceeding," *id.* §§ 316(a)(10), 326(a)(10).

110. More specifically, an aggrieved patent applicant can appeal the PTO's decision to deny his or her patent to either the U.S. District Court for the Eastern District of Virginia, wherein new evidence may be submitted, 35 U.S.C. § 145 (2012) and Kappos v. Hyatt, 132 S. Ct. 1690, 1693–94 (2012), or directly to the Federal Circuit, wherein no new evidence may be submitted, 35 U.S.C. § 141 (2006) and *Hyatt*, 132 S. Ct. at 1694, while an aggrieved party can only appeal the PTO's decision regarding the validity of an already-issued patent to the Federal Circuit. 35 U.S.C. § 141(c). Any appeals from the U.S. District Court for the Eastern District of Virginia involving patent denials can then be appealed to the Federal Circuit.

The procedural differences associated with the PTO's review of patent denials and patent grants will likely give rise to different deference standards being applied by the Federal Circuit to the PTO's legal interpretations of the Patent Act that are announced in each proceeding. The Federal Circuit has held that the PTO's legal interpretations of the Patent Act articulated during patent denials are entitled to no deference, seemingly under the belief that an aggrieved patent applicant has a statutory guarantee of a trial de novo and hence § 706(2)(A) governs.[111] Because the PTO only recently obtained

111. *See* 5 U.S.C. § 706(2)(F) (2012) (contemplating de novo review of agency action when "the facts are subject to trial de novo by the reviewing court"); *supra* notes 43–45 and accompanying text. The Federal Circuit, in fact, has held that the PTO legal interpretations announced in patent denials are reviewed de novo regardless of whether the aggrieved patent applicant appealed directly to the Federal Circuit or first to the U.S. District Court of the District of Columbia (now, to the U.S. District Court for the Eastern District of Virginia). *See In re* Kulling, 897 F.2d 1147, 1149 (Fed. Cir. 1990) (stating, without analysis, in a § 141 appeal that the court would review de novo the PTO's decision to deny a patent based on an obviousness determination).

Although the appellate court has not fully explained its decision to adopt this unusual standard, it is possible that the Federal Circuit determined that the possibility of a subsequent trial de novo for patent denials—i.e., an appeal to the U.S. District Court for the Eastern District of Virginia in which new evidence can be submitted—was sufficient to satisfy the standard articulated in § 706(2)(A) and thus concluded that de novo review of the PTO's legal interpretations of the Patent Act was proper. 5 U.S.C. § 706(2)(A) (2012). At the time the Federal Circuit held the PTO's legal interpretations of the Patent Act announced during patent denials were afforded no deference, it was not clear that the court believed ordinary principles of administrative law, including the APA, applied to the agency. *See* Dickinson v. Zurko, 527 U.S. 150, 165 (1999) (finding that the APA applies to the PTO). Nevertheless, the Federal Circuit has reasoned that the de novo standard is appropriate when reviewing the PTO's legal interpretations announced during an interference proceeding because the decision may be appealed to the U.S. District Court for the Eastern District of Virginia and thus is subject to a subsequent trial de novo. *See* Brand v. Miller, 487 F.3d 862, 867–68 (Fed. Cir. 2007) (reasoning that patent statutes allow applicants to appeal the PTO proceedings to district courts de novo and therefore PTO proceedings are not formal adjudications governed by the APA); *In re* Gartside, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000) (holding that legal conclusions made by the Board are reviewed de novo and the factual determinations are reviewed for substantial evidence).

Such reasoning is suspect for at least three reasons. First, a statutory guarantee of a trial de novo does not necessarily mean that an agency's legal interpretation should be afforded no deference. Courts have typically required new evidence be submitted; if no new evidence is submitted, then the reviewing court usually defers to the agency's legal interpretation. The Federal Circuit, however, never defers to the PTO's legal interpretations, even when no new evidence is submitted before the district court. Second, when the patent denial is appealed directly to the Federal Circuit, the patent applicant does not even have the opportunity to submit new evidence. Thus, the appellate court's reasoning that the de novo standards apply regardless of the path by which the patent denials end up before the court also appears to be flawed. Third, in *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), the Supreme Court clarified that a statutorily required trial de novo is not necessarily inconsistent with deferring to an agency's legal interpretation, even when new evidence is submitted. The Court held in *Haggar* that *Chevron* deference can be given to an agency's notice-and-comment rule making "without impairing the authority of the court to make factual determinations, and to apply those determinations to the law, *de novo*." *Id.* at 391. However, caution is warranted in extending the reasoning of *Haggar* to a setting where an agency interprets a statute for the first time in adjudication. When an agency's legal interpretation is predicated on factual findings, the agency's adjudication is subject to trial de novo by statute and new evidence *is* put forth in the court trial; it follows that de novo review of the agency's legal interpretation is warranted.

robust authority to adjudicate patent grants, the Federal Circuit has yet to rule on the level of deference that should be afforded to the PTO's legal interpretations announced during these proceedings.[112] It is clear, however, that de novo review is inapposite, as the exceptions outlined in § 706(2)(A), including the statutory guarantee of a de novo trial, are not applicable.[113] Thus, at a minimum, the PTO's views should be afforded *Skidmore* deference. More provocatively, there is good reason to believe that the PTO's legal interpretations of the Patent Act announced during the review of patent grants should be afforded *Chevron* deference.[114] The Supreme Court has stated that *Chevron* deference is appropriate when Congress has delegated interpretative authority to an agency and the agency has exercised that authority.[115] Moreover, in *Mead*, the Court suggested that a grant of formal adjudicatory authority is typically sufficient to infer that Congress intended the agency to be the primary interpreter of its organic act.[116] The PTO's new adjudicatory power to review patent grants must be effectuated through trial-like proceedings that include both discovery and oral arguments and, hence, bear the hallmarks of formal adjudication.[117] As a result, standard administrative law principles suggest that the PTO's legal interpretations of the Patent Act announced during these proceedings should be entitled to *Chevron* deference.

Accordingly, the PTO's legal interpretations announced during post-grant review will likely receive *Chevron* deference, whereas its statutory constructions announced in patent denials will receive no deference. Whether the PTO's legal constructions of the Patent Act more closely align with the interests of its regulated entities—i.e., expansive—or misalign with those interests—i.e., restrictive—will be strongly correlated with the adjudication in which the legal construction will be challenged. The PTO has strong incentives to provide guidance to the over 8,000 patent examiners on indeterminate areas of the law as soon as possible to promote consistency in the examination process.[118] As a result, the PTO, which lacks substantive

112. The America Invents Act, which grants the PTO this new adjudicatory authority, "is silent as to the deference owed to the PTO's legal [constructions] announced during [these proceedings]." Wasserman, *supra* note 70, at 1977.

113. *See supra* note 111.

114. For a detailed account of this argument, see Wasserman, *supra* note 70, at 2017–18.

115. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

116. *Id.* at 229–31.

117. The PTO itself seems to believe that Congress intended it to effectuate these proceedings through formal adjudication, as it recently proposed regulations for post-grant and *inter partes* review proceedings that provide for the trial-type protections afforded under formal adjudication, including the APA requirements of § 554 and §§ 556–557. *See* Wasserman, *supra* note 70, at 1985, 1986 & n.120 (detailing the PTO's proposed regulations for formal adjudication). *See generally* 5 U.S.C. §§ 554, 556–557 (2012) (listing requirements for agency adjudications, hearings, and decisions).

118. As the PTO has little control over what patents are challenged in patent denials or post-grant review, it may take years for these adjudicatory settings to address an open area of the law,

rule-making authority, routinely uses guidance documents to articulate its views of substantive patent law outside of adjudicatory proceedings.[119] Because the PTO's expansive or pro-patent stance on an indeterminate area of the law—such as a determination that some new technology is patent eligible—will result in the issuance of a patent, the agency's pro-patent legal interpretations are more likely to be challenged during the adjudication of an already-issued patent rather than the adjudication of a patent denial. In contrast, because the agency's restrictive or anti-patent interpretation of the Patent Act—such as a determination that some new technology is patent ineligible—will result in the denial of a patent, the PTO's restrictive legal interpretations are more likely to be challenged in the adjudication of a patent denial than an already-issued patent. As a result, the agency's expansive views of the Patent Act are more likely to receive *Chevron* deference, whereas the agency's restrictive views of the Patent Act are more likely to receive no deference. As long as the PTO engages in prospective policy making, the asymmetry in deference afforded to patent denials and patent grants is likely to exert expansionary or pro-regulated-entity pressure on the development of substantive patent law.

As an illustrative example, suppose that the PTO is determining whether stem cells should constitute patentable subject matter.[120] The Patent Act defines patentable subject matter in broad and vague terms and thus does not clearly dictate what inventions should fall within the purview of the patent system.[121] Imagine that high-level bureaucrats at the PTO decide that social welfare is decreased by extending patent protection to stem cells. As a result, they enact a guidance document stating that stem cells do not constitute patentable subject matter. Accordingly, examiners systematically begin to

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making them less effective than guidance documents in promoting consistency. Moreover, to the extent that the PTO believes its decisional process can be improved by holding hearings, soliciting viewpoints from various stakeholders, and working closely with other federal agencies to craft substantive patent law to promote innovation, the agency will likely continue to rely on guidance documents, which are typically the end result of such collaboration. Arti Rai has persuasively argued that the PTO should partake in more reasoned, *ex ante* policy making, while chronicling the influence of other agencies in *ex ante* PTO policy development. Arti K. Rai, Essay, *Patent Validity Across the Executive Branch: Ex Ante Foundations for Policy Development*, 61 DUKE L.J. 1237, 1281 (2012).

119. *See* Abramowicz & Duffy, *supra* note 76, at 1559–60 (describing how the PTO constrains individual examiner discretion by distributing manuals containing "hundreds of pages of fairly specific rules").

120. Consumer Watchdog recently asked the Federal Circuit to consider this issue. Consumer Watchdog v. Wis. Alumni Research Found., 753 F.3d 1258, 1260 (Fed. Cir. 2014). The Federal Circuit did not reach the merits, however, as it held that the plaintiff lacked standing to challenge the patent eligibility of claims in the Wisconsin Alumni Research Foundation's patent covering a "replicating in vitro cell cultural of human embryonic stem cells." *Id.*; U.S. Patent No. 7,029,913 (filed Oct. 18, 2001).

121. 35 U.S.C. § 101 (2012); *see also* Parker v. Flook, 437 U.S. 584, 588 (1978) (observing that the "plain language of § 101 does not answer the question" whether a given invention is patentable).

reject all patent applications directed towards stem cells. A disgruntled patent applicant seeks review of the examiner's decision to deny her patent application before the adjudicatory body of the PTO. This body will likely uphold the decision to deny the patent application because the Agency's official position is that patentable subject matter does not encompass stem cells.[122] The patent applicant then decides to appeal the PTO's decision to the Federal Circuit. Recall, however, the Federal Circuit has held that the PTO's legal determinations made in patent denials are afforded no deference.[123] Thus, the appellate court would review the PTO's decision that stem cells should not constitute patentable subject matter—a position that is less likely to align with the interests of patent applicants—de novo.

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122. Anthony, *supra* note 74, at 1340 (noting that an agency's adjudicatory bodies tend to uphold guidance documents that "establish standards for approving or granting applications submitted by private parties").

There are a number of reasons why the Board is likely to uphold the policy preferences of the PTO. First, the chief judge of the Board historically has participated in meetings that develop the PTO's position involving substantive patent law, such that administrative patent judges are aware of the PTO's substantive views on patent law. In addition, the chief judge of the Board retains substantive authority over the Board, including the power to designate the administrative patent judges for each panel. Memorandum from Michael Fleming, Chief Administrative Patent Judge, Bd. of Patent Appeals & Interferences, to Vice Chief Administrative Patent Judge and Administrative Patent Judges, Bd. of Patent Appeals & Interferences, U.S. Patent & Trademark Office, Standard Operating Procedure 1 (Revision 13): Assignment of Judges to Merits Panels, Motions Panels, and Expanded Panels 1 (Feb. 12, 2009), *available at* http://www.uspto.gov/web/offices/dcom/bpai/sop1.pdf, *archived at* http://perma.cc/E2YL-HC5G. Therefore, the chief judge could use this ability to designate panels that will reflect the policy views of the PTO. It should be noted that the document outlining designation of administrative patent judges for each panel was written before the passage of the AIA. While the PTO continues to list this document as governing the internal proceedings for the Board, it is possible that the PTO may update or change the policy for post-grant review or *inter partes* review. *See generally Board Procedures*, USPTO, http://www.uspto.gov/ip/boards/bpai/procedures/index.jsp, *archived at* http://perma.cc/KPD5-8YZ4 (providing information on Board procedures and other news).

If the Board decides to stray from agency policy, the Director of the PTO can utilize his substantial supervisory role over the Board to influence its decisions. 35 U.S.C. § 6(a). While this authority is not absolute—the administrative patent judges are not mere alter egos of the Director—the Director of the PTO has the power to determine which Board decisions shall have binding precedential effect on the Board, ensuring that the Director has power over which opinions have a lasting effect on the PTO decision-making process. Memorandum from Michael Fleming, Chief Administrative Patent Judge, Bd. of Patent Appeals & Interference, U.S. Patent & Trademark Office, Board of Patent Appeals and Interferences Standard Operating Procedure 2 (Revision 7): Publication of Opinions and Binding Precedent 5–6 (2008), *available at* http://www.uspto.gov/web/offices/dcom/bpai/sop2.pdf, *archived at* http://perma.cc/LD79-LXMY (discussing binding precedent on the Board).

Yet at the same time, it is important to note that patent administrative judges should not treat such guidelines as binding upon their decisions. *Mead* states that an agency's legislative interpretation may be eligible for *Chevron* deference if Congress has delegated interpretative authority to the agency in question and that the agency has *exercised that authority*. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001). An agency that merely adopts guidance documents wholesale during formal adjudication—or treats such documents as binding—is likely not exercising the authority of formal adjudication to create its policy.

123. *See supra* note 111 and accompanying text.

In contrast, imagine the PTO decides that social welfare is enhanced by extending patent protection to stem cells. The agency instructs examiners that stem cells are patent eligible. As a result, examiners begin allowing patents on stem cells that meet the other statutory requirements of the Patent Act. A third party then challenges the validity of a stem-cell patent before the PTO's adjudicatory board. The Board will likely uphold the examiner's decision because the agency's viewpoint is that stem cells are patent eligible. The third party then appeals the Board's decision to the Federal Circuit. Administrative law principles provide that *Chevron* deference should apply to the PTO's legal determinations announced during proceedings reviewing an already-issued patent. Thus, to the extent the PTO interprets an ambiguous term of the Patent Act and the agency's interpretation is reasonable, the PTO's decision that stem cells constitute patentable subject matter—a position that is highly favored by patent applicants—would be entitled to strong judicial deference.

There is an important caveat to this analysis. While the only entity that has immediate standing to appeal the PTO's decision to finally deny a patent to the Federal Circuit is the aggrieved patent applicant, there are two constituencies present during the agency's review of an already-issued patent: the third-party challenger of the issued patent and the patentee. Thus, the PTO's decision to deny a patent during the adjudication of an already-issued patent is also appealable, and its legal interpretations of the Patent Act that lead to the patent denial would also be entitled to *Chevron* deference. As long as the distribution of cases decided during post-grant review contain a sufficient number of patents that the PTO decides are invalid, one may question whether the asymmetry in deference regimes will give rise to any distortions in the development of substantive patent law. Importantly, however, not every patent decision is likely to result in a shift or further the development of patent law.

From a highly stylized perspective, there are two different types of validity decisions that occur during the agency's adjudication of an already-issued patent. The first type involves validity decisions of patents that are completely determined by existing law. If a patent examiner erroneously grants a patent that unquestionably should have been denied under existing law, the PTO's decision to invalidate the patent during post-grant review will have no effect on the development of substantive law. The law was already determined; a decision to invalidate this type of patent will have no effect on the contours of substantive patent law.[124] The second type involves the validity of patents that are indeterminate under existing law. In these cases,

124. Note, this decision should not be entitled to *Chevron* deference if the reason for determinacy is that the Patent Act is not ambiguous. *See Mead*, 533 U.S. at 226–27 (holding that the administrative implementation of statutory provisions is entitled to *Chevron* deference only when agencies have exercised interpretative authority).

there exists substantial discretion in determining whether the patent should issue because either substantive law or the application of the law to the particular facts at hand is underspecified. The PTO's decision on whether to grant these types of patents during post-grant review will likely have an effect on the shape of substantive patent law. To the extent that the PTO makes an *ex ante* determination regarding these unsettled areas of the law,[125] it is much more likely that pro-regulated-entity viewpoints will be challenged in post-grant review and that the agency's restrictive viewpoints will be challenged in patent-denial proceedings.[126] As a result, the PTO's expansionary views of patent policy and substantive patent law are still more likely to be afforded *Chevron* deference than its restrictive views, which are more likely to be reviewed de novo. Thus, even considering the fact that the PTO's decision to invalidate an already-issued patent can be appealed, the asymmetry in deference regimes applied to the PTO's adjudicatory proceedings could still

125. Although there are good reasons to believe the PTO would announce its viewpoints of indeterminate areas of the law *ex ante*—that is, in guidance documents—the PTO may, at times, announce its views on indeterminate areas of the law for the first time or change its views on indeterminate areas of law in the adjudication of a patent denial or an already-issued patent. If this occurs, it is possible that the Agency's restrictive or anti-regulated-entity views of substantive law may be entitled to *Chevron* deference. Suppose, for instance, the PTO has long held the position that software patents are patentable. Then the agency changes its viewpoint because it believes that patentability standards have become overly broad. The agency's new position, if announced for the first time during post-grant review, should be entitled to *Chevron* deference.

126. This depends somewhat on the rate of challenges to patent denials and patent grants and the rate at which the PTO's decision in the adjudication is appealed to the Federal Circuit. I am assuming that there are a sufficient number of challenges to both patent denials and patent grants that the PTO's views on indeterminate areas of the law will be subject to Federal Circuit review. There is some concern that the adjudication of already-issued patents may not be robustly utilized because of the fees associated with post-grant review. It is not clear, however, if these concerns are overblown, as post-grant review was designed to be substantially less expensive than patent litigation in federal courts. Bronwyn H. Hall & Dietmar Harhoff, *Post-Grant Reviews in the U.S. Patent System—Design Choices and Expected Impact*, 19 BERKELEY TECH. L.J. 989, 1009 (2004). Moreover, preliminary empirical evidence suggests that third parties are routinely utilizing these new proceedings (at least in comparison to their predecessors) to challenge the validity of already-granted patents. Gregory J. Gonsalves et al., *Trends in* Inter Partes *Review and Covered Business Method Review*, INTELL. ASSET MGMT., Mar.–Apr. 2014, at 20, 20 (noting that 486 *inter partes* review petitions were filed in the first year since the procedure has been available while only 5 petitions were filed within the first three years that the predecessor proceeding, *inter partes* reexamination, was available). Consider for instance the situation in which no one challenges the validity of an already-issued patent at the PTO or that a third-party challenger to already-issued patents routinely lacked standing to appeal the PTO's decision to uphold the validity of a granted patent in court. *See, e.g.*, Consumer Watchdog v. Wis. Alumni Research Found., 753 F.3d 1258, 1260 (Fed. Cir. 2014) (holding that a third party challenger to an already-issued patent lacked standing to appeal the PTO's decision affirming the patentability of the invention in question). If this occurred, then the Federal Circuit would not necessarily announce a pro-patent bias in the evolution of substantive patent law, as the court would never be given the opportunity to endorse the agency's standards that overly favor its regulated entities. However, this scenario would mimic that of asymmetric review discussed *infra* section III(B)(1). Thus, the PTO would still likely be applying substantive patent law that was tilted in the direction of patentees even if the Federal Circuit would not be announcing legal standards that tilted in the pro-regulated-entity direction.

potentially function as a one-way ratchet, pushing the development of substantive patent law in a patent-protective or pro-regulated-entity direction.

3. Asymmetric Challenges.—Beyond the above-discussed formal structures, a systematic bias in the application of deference regimes can arise informally. Even when two constituencies can both appeal an agency decision and the *same* standard of review applies, a (potentially less pronounced) shift in the development of law can occur simply through systematically different rates of appeal. If one set of entities is more likely to appeal agency decisions than the other, the reviewing court's ability to correct the full range of legal error may be compromised. As a result, a distortion in the evolution of legal standards may arise.

Consider, for example, the EPA, which, among other things, sets standards for hazardous waste.[127] If the EPA promulgates regulations setting standards for hazardous waste, the regulations may be challenged either by industry groups, arguing that the standard is too strict, or environmental groups, arguing that the regulation is too weak.[128] Yet empirical evidence suggests that industry groups are more likely to challenge EPA rules than environmental groups.[129] For instance, one study found that 91% of the plaintiffs filing petitions to challenge air pollutant regulations were industry groups, and only 8% were environmental groups.[130] As a result, the reviewing court may have a greater opportunity to correct the EPA's legal interpretations that are too restrictive or that overly disfavor industry. Because environmental groups are less likely to challenge EPA decisions, the erroneous adoption of a standard that is too weak or that unreasonably favors industry may never be challenged and, hence, will go uncorrected. The result may be a pro-regulated-entity bias in the development of environmental law at the agency level.

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127. *See* JAMES E. MCCARTHY & CLAUDIA COPELAND, CONG. RESEARCH SERV., R41561, EPA REGULATIONS: TOO MUCH, TOO LITTLE, OR ON TRACK? 1 (2014).

128. Industry tends to argue that agencies' positions are too restrictive rather than too lenient. *See, e.g.*, Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1783 (2012) (noting that "[i]ndustry rarely, if ever, advocated for greater health protection" with respect to EPA air toxin rules).

129. *See* Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 LAW & SOC'Y REV. 735, 741 (1996) (finding that industry groups are far more likely to appeal EPA rules on hazardous waste than environmental groups); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 135 tbl.2 (2011) (finding that industry is more likely than public interest groups to appeal EPA final rules on air toxin emission standards); Lettie McSpadden Wenner, *The Reagan Era in Environmental Regulation*, *in* CONFLICT RESOLUTION AND PUBLIC POLICY 41, 48 (Miriam K. Mills ed., 1990) (finding that between 1970 and 1985, "[i]ndustry exceeded environmental groups' complaints against government actions at the appellate level as early as 1976, and this was reversed only once, in 1983, when industry's inputs fell off").

130. Coglianese, *supra* note 129, at 743.

There is a growing body of empirical evidence that suggests systematic differences in appeal rates are increasingly commonplace within the administrative state.[131] There are a host of reasons why an agency's regulated entities may be more active participants in agency litigation than groups whose interests diverge from that of the regulated entities, the latter of which likely include groups that represent the public interest. Although defining the public interest is difficult, especially in a pluralistic society, inherent in the concept of public interest activity is the notion that the action benefits a larger group than the entity responsible for the activity.[132] While it is possible that an agency's legal interpretation could both overly favor the regulated entities and at the same time further the regulated beneficiaries—often the public—this Article is primarily concerned with the circumstance in which an agency's legal interpretation that overly favors the regulated entities also unreasonably undermines the regulated beneficiaries.

Perhaps the most salient reason for why industry is more likely to challenge agency action than groups that represent the public interest is that the former is better financed than the latter. The resource imbalance between these two entities may also handicap a public interest group's ability to keep abreast of the technical intricacies and issues that inform agency rules or major adjudicatory decisions.[133] These information costs thus also tend to limit public interest group participation in agency litigation. Additionally, differences in incentives between groups representing the two constituencies may skew participation in agency litigation.[134] While virtually every rule will directly affect some regulated entity, the repercussions of a rule to the public are more diffuse. As a result, no one organization may have a sufficient incentive to challenge agency action that is welfare reducing to society as a whole. Relatedly, the growing use of the remedy remand without vacatur may diminish the incentive of protection-oriented groups to challenge erroneous agency decisions. A public interest group that wins its case may be worse off (at least temporarily), as a legal construction that is vacated for overly favoring the agency's regulated entities may result in the absence of any regulatory framework (at least until the agency construes the statute

131. For instance, industry groups are far more likely to litigate FDA rules regarding food safety than are groups representing the consuming public. *See, e.g.*, Diana R.H. Winters, *Not Sick Yet: Food-Safety-Impact Litigation and Barriers to Justiciability*, 77 BROOK. L. REV. 905, 917 (2012) (noting the "paucity of citizen suits" challenging FDA food-safety regulations).

132. Thus a plaintiff who sues to vindicate the public interest would align with what Abram Chayes first called "public law litigation" and what Louis Jaffe dubbed the "non-Hohfeldian plaintiff." *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1037 (1968).

133. Wagner, *supra* note 21, at 1378–79.

134. *E.g.*, Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1315–17 (1999).

again).[135] Finally, there are also legal barriers to more robust participation of groups representing the public interest in the litigation of agency decisions, as the justiciability requirements such as standing, ripeness, and mootness often serve as barriers to litigation only in a one-sided manner.[136] These doctrines are more likely to limit the access of courts when the injury or harm is more diffuse, such as with the public, rather than when injury or harm is more concentrated, such as with the regulated entities.[137]

To be sure, administrative law scholars have recognized that power imbalances between industry and public interest groups may distort agency decision making.[138] For instance, Richard Pierce, Rachel Barkow, and Heather Elliot, among others, have noted that skewed access to the courts between regulated entities and those groups representing the public interest

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135. RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST–BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 160 (2008); Kristina Daugirdas, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278, 290 (2005); *see also* Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. CHI. L. REV. 1763, 1821–22 (2002) ("[T]he proregulation challenger's incentive to bring suit to effect a long-term increase in the new regulation's stringency is undercut by the worry that a legal 'victory' might create an even less stringent standard . . . .").

136. *See, e.g.*, Consumer Watchdog v. Wis. Alumni Research Found., 753 F.3d 1258, 1260 (Fed. Cir. 2014) (holding that a public interest group lacked standing to appeal the PTO's decision affirming the patentability of an invention).

137. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992) (holding that an injury cannot be a generalized grievance but must be concrete); Sunstein, *After* Lujan, *supra* note 42, at 223–35 (describing how *Lujan* forecloses "pure" citizen suits that are brought to protect the public welfare).

138. Scholars have demonstrated that industry participation and influence during both an agency's agenda-setting stage as well as the comment process associated with rule making outweigh that of public interest groups. *See, e.g.*, Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rule Making: A Decade of Change*, 15 J. PUB. ADMIN. RES. & THEORY 353, 361 tbl.3 (2005) (finding that businesses are participating in rule making twice as often as public interest groups); Wagner et al., *supra* note 129, at 125, 128–29 (finding that both the pre-notice period and the notice-and-comment process were "almost completely monopolized by regulated parties"); William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J. PUB. ADMIN. RES. & THEORY 495, 508 (2013) (finding that business groups exerted significant influence over agency rule-making agendas); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006) (finding that of the 1,693 public comments reviewed in the study, business interests submitted over 57% of comments, whereas nongovernmental organizations submitted 22% and public interest groups submitted 6%).

Others have argued that industry has an undue influence on the Office of Information and Regulatory Affairs (OIRA)—which among other things reviews agencies' draft regulations—noting that industry is more likely to meet with OIRA officials and, hence, influence OIRA decision making. *See, e.g.*, RENA STEINZOR ET AL., CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT 49 fig.15 (2011), *available at* http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf, *archived at* http://perma.cc/DFL5-H8DQ (finding that the OIRA process is dominated by industry participation); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1342–44 (2013) (discussing capture concerns with respect to OIRA).

could bias agency outcomes.[139] More specifically, they contend that agencies who wish to minimize judicial exposure might favor their regulated entities over the public interest, as the former are more likely than the latter to challenge agency decisions that negatively affect them.[140] This Article seeks to contribute to the literature by offering a sustained analysis of how a skewed participation of interested parties in litigation can affect the error correction function of courts reviewing agency decision making based on the model of court–agency interaction devised in Part II.

Notably, the lack of robust pluralistic litigation may not necessarily result in a breakdown in the error correction function of courts. It is possible that although public interest groups challenge fewer agency decisions in court, they may file enough lawsuits and pick the right cases to litigate to maintain an unbiased development of substantive law. This is an important caveat to the above analysis, which, unfortunately, has not yet been subject to empirical inquiry.

IV. Relaxing the Model's Assumptions Regarding Agency Behavior

This Part now relaxes several of the assumptions underlying the model of court–agency interaction and explores the consequences of deference asymmetries. It begins by examining how a strategic agency may respond to a systematic application of deference regimes and then considers the extent to which asymmetric agency error—that is, error in which an agency is more likely to adopt legal constructions that fall to the right or left of the court's preferred construction—influences the legal standards announced by the court or applied by the agency.

A. Reducing the Risk of Agency Reversal

Up to this point, the Article has assumed that the agency's decision to adopt a legal interpretation is not influenced by the possibility that its determination may be subject to judicial reexamination. This subpart relaxes this assumption and posits that agencies, like many other decision makers, are concerned with the possibility of appeal and reversal of their legal

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139. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEXAS L. REV. 15, 22 (2010); Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 173 (2011) [hereinafter Elliott, *Congress's Inability*]; Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 561 (2012); Richard J. Pierce, Jr., Comment, Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1194–95 (1993) [hereinafter Pierce, *Judicially Imposed Limit*]; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 87–88 (1995); Carolyn Sissoko, Note, *Is Financial Regulation Structurally Biased to Favor Deregulation?*, 86 S. CAL. L. REV. 365, 366–67 (2013); Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369, 370–71 (2009).

140. Barkow, *supra* note 139, at 22; Elliott, *Congress's Inability*, *supra* note 139, at 173; Pierce, *Judicially Imposed Limit*, *supra* note 139, at 1194–95; Staszewski, *supra* note 139, at 370–71.

interpretations of statutes.[141] To the extent that agencies are incentivized to minimize court scrutiny and reversal of their decision making, it is reasonable to ask how this inducement will affect the decisions of agencies that are faced with a systematic bias in the application of deference regimes. Importantly, such agencies face a highly skewed risk of appeal and reversal of their determinations.

Consider, first, agencies like the SSA, whose determinations are only asymmetrically reviewed. The SSA's decision to finally deny disability benefits is immediately appealable, whereas its decision to grant benefits is not subject to judicial reexamination.[142] Thus, agencies similar to the SSA can avoid judicial scrutiny, and possible reversal, by construing the statutes they administer in a way that always results in granting benefits. Of course, the SSA is unlikely to adopt this extreme practice, as its sole objective is not to minimize its risk of reversal. Nevertheless, the SSA's desire to avoid scrutiny of its decision making and risk of reversal can have profound effects on the development of federal disability law. When the SSA is faced with a close legal issue, the SSA will adopt legal interpretations of the Social Security Act that allow for granting of benefits. In other words, the SSA will interpret and develop substantive federal disability law so that it grants benefits in situations in which it believes the applicant would either just meet or just fail to meet the disability requirements.

Biased decision making is also a natural consequence of agencies that attempt to minimize the risk of reversal of their legal constructions that, depending on their alignment with the entities they regulate, will be applied in different adjudicatory settings. The PTO, for instance, has the ability to adjudicate both patent denials and patent grants—although the processes associated with these determinations are dramatically different. The agency adjudicates patent denials in an informal proceeding, whereas the adjudication of already-issued patents resembles a formal, court-like proceeding.[143] As a result, the agency's legal interpretations that overly favor its regulated entities (i.e., that result in the erroneous grant of a patent) are

141. It is, of course, expensive for the agency to defend its actions in court. To the extent that an agency operates on a fixed budget, resources that it devotes to litigation are resources that it necessarily cannot devote to other agency activity. Beyond these monetary concerns, reversal by the courts might also cause reputational harms. An agency may believe that routine reversal by its reviewing court will diminish its credibility before the court. These reputational concerns are especially significant because repeat players, such as agencies, believe their reputation is "largely their stock in trade." Fred I. Parker, *Foreword: Appellate Advocacy and Practice in the Second Circuit*, 64 BROOK. L. REV. 457, 462 (1998); *see also* Galanter, *supra* note 17, at 98–99 (analyzing repeat players in litigation and acknowledging that one of the advantages that repeat players have is their "opportunities to develop facilitative informal relations with institutional incumbents"). Additionally, an agency's clout with Congress, and concomitantly its budget, may diminish if its reputation as a fair arbitrator is called into question.

142. *See supra* note 98 and accompanying text.

143. *See supra* notes 108–09 and accompanying text.

likely to be subject to a more deferential standard of review than its legal constructions that unreasonably disfavor its regulated entities (i.e., result in the erroneous denial of a patent). Since the agency's legal constructions that are more expansive (i.e., that result in the issuance of patents) are more likely to be upheld than its legal constructions that are restrictive (i.e., that result in denying a patent), when the agency is faced with a close legal issue, the PTO will develop rules that allow for the patentability of inventions. Fear of judicial reversal, that is, will lead the PTO to develop rules allowing for patents so that it can take advantage of the greater deference afforded to its legal constructions announced during decisions to grant patents. Thus, just like the SSA, the PTO will announce legal interpretations that overly favor its regulated entities in an effort to minimize its risk of reversal.

Finally, a pro-regulated-entity bias in regulatory law is also an unavoidable consequence of the asymmetric rates of challenges of agency decision making. Because agency decisions are more likely to be challenged by regulated entities than groups representing the public interest,[144] agencies seeking to minimize scrutiny and reversal of their decisions will also adopt legal interpretations that overly favor the entities they regulate. By doing so, agencies will decrease the chances that their decisions will be subject to judicial review and concomitantly decrease the chances that their decisions will be reversed.

Under all three scenarios, the agency's incentive to adopt a legal construction of a statute that overly favors its regulated entities stems directly from the systematic bias in the application of deference regimes to the agency's legal constructions of a statute. As a result, strategic behavior on the part of an agency reinforces the pro-regulated-entity bias in the development of regulatory law, resulting from deference asymmetries.

B. Do Agencies Symmetrically Err in Their Legal Interpretations?

The model presented in this Article also assumes that agencies are as likely to adopt a legal interpretation that overly favors the entities they regulate as they are to adopt a standard that unreasonably disfavors the entities they regulate. What happens if the assumption is relaxed? It is possible that agencies either lean heavily in favor of their regulated entities or against them. What does the model predict if an agency's initial adoption of legal constructions is biased? This subpart turns to answering these questions.

It is possible that agency bureaucrats unreasonably disfavor the entities they regulate. This could occur for a number of reasons, including that the agency staff would anticipate a court's imbalanced ability to correct its decision making and construe statutes that attempt to ensure that the public

144. *See supra* notes 129–31 and accompanying text.

health is adequately protected.[145] That is, an agency would adopt substantive constructions of a statute that overly disfavor the entities it regulates because it knows that if it errs by adopting a legal interpretation that excessively favors the entities it regulates there is a smaller chance that its reviewing court can correct the agency. Thus, the court's skewed capacity to effectuate its preferred reading of the statute would actually result in the unbiased development of regulatory law.

The extent to which agency staff leans heavily against the agency's regulated entities is an important but currently untested hypothesis. Nevertheless, there are several reasons why it seems unlikely that agencies regularly or reliably act in a fashion that anticipates and counteracts imbalance in a court's ability to review and correct the agencies' decision making. First, for this anticipation to occur, agencies must be self-aware that the deference asymmetries they face are causing a drift in regulatory law. The fact that this point is not fully appreciated in the literature likely decreases the chances that agencies are cognizant of the bias. Second, for this anticipation to successfully counteract any bias, an agency would need to accurately forecast the magnitude of imbalance in the court's correction of its decision making. For instance, an agency whose decisions are asymmetrically reviewed would need to determine how many of its legal constructions and exactly what areas of substantive law will be litigated.[146] An agency that utilizes rule making to announce its legal interpretations of statutes would need to account for the differences in rates of challenges from industry versus groups representing the public interest that may be sensitive to the policy at issue.[147] Further complicating the agency's capacity to accurately calibrate just how much it must lean against the entities it regulates to counteract the court's skewed ability to correct its decision making is the

145. For instance, agency staff may have a natural inclination to overly favor the interest of the public. *See, e.g.*, STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 159 (2008) ("It is plausible that agency regulators are motivated to [serve broader interests] as a result of their own commitments to the common good, which might after all account for why they became regulators in the first place."); *id.* at 282 (concluding from his case studies that the APA processes helped agencies "inoculate" rules from interest group pressures and allowed "public-interested administrators . . . to pursue regulatory goals they believed advanced social welfare in the face of substantial opposition"); Sally Katzen, Correspondence, *A Reality Check on an Empirical Study: Comments on "Inside the Administrative State,"* 105 MICH. L. REV. 1497, 1505 (2007) (observing how the EPA "focus[es] like a laser" on protecting the environment).

146. In patent law, for example, the doctrines of novelty and nonobviousness are much more likely to be litigated than other substantive patent law standards, such as patentable subject matter or utility. *See* John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 208 tbl.1 (1998) (finding that the most routinely asserted grounds for invalidating a patent are obviousness (42.0%) and novelty (31.1%), whereas the least asserted grounds are patentable subject matter (0.7%) and utility (0.7%)).

147. *Cf.* STEINZOR ET AL., *supra* note 138, at 23 (noting that although public interest groups often desire to engage in a wide set of agency policy making, "their participation is often limited to those [policies] that are newsworthy or capable of mobilizing widespread interest").

fact that litigation rates vary in response to changes in economic conditions[148] and procedural systems that allow access to courts.[149] Although it is possible that an agency will have sufficient foresight and political will to anticipate and develop legal constructions that, once subject to skewed judicial correction, will result in a legal construction that meets halfway between the public interest and industry concerns, it seems unlikely.

It is, of course, also possible that agencies systematically adopt legal interpretations that overly favor the entities they regulate. If an agency is unreasonably advancing the special concerns of interest groups that dominate the industry or sector the agency is charged with regulating, then the resultant legal standards will likely overly favor the regulated entities. Importantly, this model posits that judicial checks on agency accountability are severely compromised in such a situation.

As noted above, the leanings of agencies' staffs have not yet been subject to empirical scrutiny. The extent to which agencies are actually captured is subject to much debate. Empirical evidence suggests that industry groups' contacts with agencies are far more extensive than those of groups representing the public interest.[150] More concerning is the evidence suggesting that as industry interaction with an agency increases, so do the changes of the agency's position in industry's favor.[151] Notably, procedural capture does not necessarily result in biased substantive decisions. Some scholars have argued that industry dominance has at times been harnessed to improve agency decision making.[152] If, however, it is true that agency bureaucrats routinely lean towards the views of their regulated entities, then the skewed ability of courts to police agency decision making will almost completely inhibit the error-correcting function of courts.

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148. *See* Lance Bachmeier et al., *The Volume of Federal Litigation and the Macroeconomy*, 24 INT'L REV. L. & ECON. 191, 198–206 (2004) (finding that consumption, output, and inflation are each statistically significant, countercyclical predictors of total federal civil and bankruptcy litigation filing rates from the years 1961 to 2000); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 988 (1991) (finding a negative relationship between economic health and the number of employment-related lawsuits filed).

149. *See* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 15–16 (2010) (noting that various consumer- and environmental-protection groups have argued the heightened pleading requirement of *Twombly* and *Iqbal* "is a blunt instrument that will keep out or terminate meritorious claims before discovery" and "may imperil the credibility and effectiveness of the rulemaking process"); Stewart, *supra* note 10, at 1670 (documenting the liberalization of standing rules and the resulting greater judicial oversight of agency decision making).

150. *See supra* note 138.

151. Wagner et al., *supra* note 129, at 129–32.

152. *See, e.g.*, David Thaw, *Enlightened Regulatory Capture*, 89 WASH. L. REV. 329, 348 (2014) (arguing that at times "regulatory capture may be used to harness private expertise for public goals").

Regardless of whether agencies lean in favor of their regulated entities or against them, this Article identifies how certain features of the current administrative state may push the development of regulatory law in a pro-regulated-entity direction even when the dominant interest groups do not intend to distort the system and agencies are not biased in any way. While it is impossible to determine whether other incentives within agency decision making may counteract the bias identified in this Article, it is important to understand how various structures of the administrative state may influence agency decision making if we hope to design a system in which legal constructions reflect the aims embedded in the statute in question.

V. Implications of Deference Asymmetries for the Administrative State

If regulatory law continues to be pushed in a pro-regulated-entity direction, institutional actors other than the agency and its reviewing court may attempt to adjust it. As in other types of law, an unwarranted evolution of regulatory law may be corrected by statutory clarification or the Supreme Court. The extent to which Congress and the highest court will be able to perform this function may depend on the specific regulatory context at issue.[153] Of course, the most direct way to correct a bias in the evolution of a legal doctrine is to eliminate its source.

This Article leaves to further research the normative question of whether the structures that give rise to the skewed application of deference regimes should be remedied. This answer will depend intimately upon the context of each individual agency and law at issue and hence must be left for another time. Nevertheless, for completeness this Part very briefly examines how the pro-regulated-entity bias in the development of law identified in this Article could be curtailed by eliminating the source of deference asymmetries.

For agencies that face formal asymmetric review of their legal interpretations, such as the SSA, only a subset of their decisions is subjected to immediate judicial review. Under the current system, SSA determinations that deny benefits are subject to judicial reexamination. In contrast, if the

153. For example, it may be more difficult for the Supreme Court to recognize when patent law standards are in need of re-adjustment than when other legal standards have gone astray. This is because the exclusive jurisdiction of the Federal Circuit over patent law claims limits the ability of the Court to rely on recent circuit splits as a signal of which legal issues require review. *See* Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619, 1644 (2007) (noting that Supreme Court intervention in patent law is "difficult to obtain" because of the lack of recent circuit splits). While the Court appears in part to make up for this deficiency by inviting the Department of Justice, through the Solicitor General of the United States, to file a brief analyzing the petition, this process is hardly a substitute for intercircuit conflict. *See* David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 295 (2009) (noting that the Supreme Court is more likely to call for the views of the Solicitor General in "complex statutory regimes," such as intellectual property).

SSA grants benefits, its actions will be uncontested.[154] As a result, to the extent the SSA utilizes guidance documents or adjudication to announce its legal constructions of the Social Security Act, a court may only be given the opportunity to correct the SSA's legal interpretations that overly disfavor applicants—i.e., that result in the erroneous denial of benefits. In contrast, legal interpretations that result in the erroneous granting of benefits may never be challenged in court. Congress could bring balanced judicial review to the SSA's decisions by enabling third parties to appeal the agency's decision to grant benefits to the federal courts. In this way, aggrieved parties could immediately appeal an agency's decision to either grant or deny benefits and the courts would be able to correct the full range of agency error.

To begin, the underlying goals of the regulatory regime in question may counsel against allowing such third-party challenges. That is, the designers of the agency in question may believe that false positives (i.e., erroneous granting of benefits) are more desirable than false negatives (i.e., erroneous denying of benefits), even if the result includes distortions in the evolution of regulatory law. Even assuming that there is agreement that a pro-regulated-entity bias in the law should be rectified by bringing balanced judicial review to agency determinations, it is important to note that the creation of a third-party right of appeal may not fully extinguish the bias. As discussed above, asymmetric rates of appeal of agency action may also skew the development of regulatory law.[155] As a result, at least in certain regulatory settings, balanced judicial review may have the potential to significantly diminish a pro-regulated-entity tilt in agency-applied law, though it may not fully eliminate it. In contrast, in other regulatory settings enabling third parties to challenge an agency's decision to grant benefits may result in litigation abuses in which an overwhelming number of entitlement decisions would be challenged in court. Without some sort of protection, well-funded groups could continually challenge the granting of benefits, subjecting individuals to protracted litigation. As a result, the context of each individual agency must be carefully considered when determining whether such a right should be created.

For agencies like the PTO, which have different adjudicatory settings for different agency decisions, the standards of review afforded the PTO's legal determinations announced during its adjudicatory proceedings could be unified. Presently, the PTO's legal interpretations announced during patent denials are afforded no deference.[156] In contrast, the PTO's legislative

154. *See supra* note 98 and accompanying text.

155. In particular, justiciability doctrines may significantly diminish the ability of third parties to appeal agency decisions to grant benefits to the federal courts. *See supra* section III(B)(1).

156. *In re* Kulling, 897 F.2d 1147, 1149 (Fed. Cir. 1990) (stating, without any analysis, that it would review the PTO's decision to deny a patent de novo). Several commentators have argued that patent denials should be entitled to *Chevron* deference. *See, e.g.*, Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*,

interpretations announced during adjudication of already-issued patents should be entitled to *Chevron* deference.[157] The most straightforward way to unify the deference regimes associated with the PTO's adjudications is for Congress to amend the Patent Act to afford either strong judicial deference to the PTO's legal decisions—including patent validity as a whole—announced during patent denials or to afford no deference to the PTO's legal interpretations announced during the adjudication of patent grants. However, even choosing between these options implicates a larger normative discussion about whether the PTO or its reviewing court, the Federal Circuit, should be the primary interpreter of the Patent Act. Those who believe the Federal Circuit should continue to be the most important expositor of the patentability standards would prefer that the PTO's legal interpretations announced during the adjudication of a patent grant be afforded no deference.[158] In contrast, those who contend that the PTO has, or at least has the potential to have, the comparative advantage in announcing legal standards that promote the underlying goals of the patent system would prefer that the agency's constructions of the Patent Act announced during patent denials be afforded strong judicial deference.[159]

Finally, the skewed application of deference asymmetries that arise from asymmetric rates of challenges to agency's decision making could be ameliorated by enfranchising groups whose interests diverge from the regulated entities' interests. There is substantial empirical evidence that an agency's regulated entities are more likely to challenge agency action than groups who represent the regulatory beneficiaries.[160] As a result, it is possible that a court's ability to correct erroneous legal interpretations is highly skewed. That is, courts are more likely to revisit an agency's legal interpretations that overly disfavor the agency's regulated entities than those that excessively favor the agency's regulated entities. By empowering groups who represent the public interest, public interest litigation may increase, and thus agency decisions that unreasonably favor the regulated entities may be more frequently challenged.

There are a number of reforms that could encourage public interest litigation. These reforms include a wide range of possibilities and it is beyond the scope of this Article to determine which one is normatively the

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95 GEO. L.J. 269, 297–99 (2007) (observing the difficulty in determining the amount of deference that should be awarded and arguing that more deference should be granted in the case of patent denials); Nard, *supra* note 108, at 1422–23 (advocating for the courts to grant greater deference).

157. *See supra* note 114 and accompanying text.

158. *See, e.g.*, DAN L. BURK & MARK A. LEMLEY, THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT 107 (2009) (arguing that courts provide the "dynamic interpretation of legal rules . . . which . . . the patent system needs").

159. *See, e.g.*, Wasserman, *supra* note 70, at 1966 (arguing the PTO should be the primary interpreter of the Patent Act).

160. *See supra* notes 129–31 and accompanying text.

most desirable. Instead, this Part attempts to broadly outline two such possibilities. One way to encourage more litigation challenging agency action that overly favors regulated entities is to relax the requirements for granting attorneys' fees.[161] Public interest litigation may be under-incentivized, as the benefits of such litigation are typically shared by broad segments of the public rather than concentrated with a few entities. As a result, benefits for such litigation may not be sufficient to make it worthwhile for entities to bear the costs of such litigation. Fee-shifting statutes may help solve this public good problem that arises when no one organization has sufficient incentive to challenge agency action that is welfare-reducing to society as a whole.[162] Moreover, because regulated entities are more likely to have deep pockets, such statutes may also help to mitigate power disparities between groups who represent the regulatory beneficiaries and the more sophisticated and resourceful regulated entities.[163] By overcoming these structural challenges, fee-shifting provisions help to bolster incentives to challenge agency actions that overly favor the entities the agency regulates. Fee-shifting statutes, however, may over- or under-incentivize such litigation. Those that believe the number and magnitude of attorneys' fee awards to public interest litigants are already grossly excessive would likely not support expansive fee-shifting provisions. Alternatively, those that posit public interest litigation is currently vastly under-incentivized are likely to contend that fee-shifting provisions, while a good start, may not be sufficient to enable the courts to correct the full range of agency error.[164]

Beyond relaxing the requirements for fee shifting, liberalizing the rules that govern standing is another conceivable way to increase public interest litigation.[165] Even if the regulated entities and groups that represent regulated

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161. *See* Barry R. Furrow, *Governing Science: Public Risks and Private Remedies*, 131 U. PA. L. REV. 1403, 1422 n.83 (1983) (noting that attorneys' fees can provide an incentive to bring public interest litigation). Congress has already enacted a number of fee-shifting statutes expressly to encourage public interest litigation. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000a–3(b) (2012).

162. Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 237–39 (1984).

163. *See* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1095 (2007) (explaining how fee-shifting statutes help mitigate disparities between individuals and "resourceful institutional defendants"); Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of Law in the Political System*, 77 AM. POL. SCI. REV. 690, 695 (1983) (noting that many statutes were intended to mobilize private citizens and avoid agency agenda setting).

164. For instance, historic data from public interest organizations indicate that attorneys' fee awards remain only a small percentage of the budget of most such groups. *See, e.g.*, COUNCIL FOR PUB. INTEREST LAW, BALANCING THE SCALES OF JUSTICE D-10 tbl.II–8 (1976) (listing fee awards as 1% of total sources of funds for various public interest groups between 1972 and 1975).

165. *See, e.g.*, Michael J. Burstein, *Rethinking Standing in Patent Challenges*, 83 GEO. WASH. L. REV. (forthcoming Feb. 2015) (manuscript at 52), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2359873, *archived at* http://perma.cc/BT26-F4EJ (advocating for expanded standing requirements to increase public interest litigation and thereby alleviate social costs within

beneficiaries have equal access to resources and the same financial incentives to bring suit, current justiciability doctrines may still privilege anti-regulatory challenges over pro-regulatory challenges. As a result, broadening standing doctrine may increase the former. However, just like the creation of a third-party right to challenge the granting of agency benefits, the expansion of standing doctrine may still leave such litigation below its optimal level or push it beyond what is necessary to substantially diminish a bias identified in this Article. Perhaps more importantly, like the other solutions to eliminating deference asymmetries discussed in this Part, broadening the justiciability doctrines implicates larger normative discussions beyond curtailing a source of bias in the development of regulatory law. The proper scope of standing doctrine is likely to be influenced by one's view of the proper functioning of the federal government. Those who believe that standing plays an important part in insuring that the courts do not impinge upon the Executive's duties to "take Care that the Laws be faithfully executed"[166] contend that a broad standing doctrine permits Congress to conscript the courts in its battle with the Executive.[167] In contrast, those who posit that current standing jurisprudence prevents suits in many situations where Congress has authorized them to argue that current justiciability doctrine interferes with Congress's legislative powers.[168] Because expanding the scope of the justiciability doctrines not only involves equalizing access to the courts but also larger debates regarding the balance of powers across branches of government, any broadening of these doctrines must also grapple with these additional concerns.

Conclusion

This Article presents a theoretical analysis of the relationship between an agency's adoption of a legal construction that overly favors its regulated entities or unreasonably disfavors its regulated beneficiaries and the deference regime the agency is afforded. Specifically, the Article explains

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patent litigation); Elliott, *Congress's Inability*, *supra* note 139, at 169 (acknowledging that an expanded concept of standing led to an "explosion of public interest litigation in the late 1960s" and that stricter standing requirements were instituted partly in response to this development); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 893 (1983) (arguing that alterations to standing requirements helped create the market for public interest litigation).

166. U.S. CONST. art. II, § 3, cl. 4.

167. *See* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1684 (2004) (observing that "judicial decisions restricting the citizen-suit provision" turn the courts against Congress "for the benefit of the President"); Scalia, *supra* note 165, at 881 (arguing that standing is "a crucial and inseparable element" of the separation of powers principle).

168. *See, e.g.*, Pierce, *Judicially Imposed Limit*, *supra* note 139, at 1181–82 (arguing that the Court's "broad grant of standing" to challenge the constitutionality of legislative actions has inappropriately disregarded the deference the Court generally gives to Congressional action that does not involve suspect categories or fundamental rights).

that an agency's construction that excessively favors its regulated entities is likely to be afforded a more deferential standard of review than an agency's legal construction that unreasonably undermines the public interest. Under a set of stylized but reasonable simplifying assumptions, this Article's analysis suggests that deference asymmetries in the modern administrative state may bias the evolution of regulatory law applied at an agency level and, at times announced by courts, in a pro-regulated-entity direction. Importantly, the bias identified in this Article does not hinge upon either the agency or the judiciary biasing or distorting its decision making in any way; instead, the bias is a direct consequence of certain features within the modern administrative state. Critically, this Article also identifies the origins of deference asymmetries in the administrative state, positing that a surprising number of agencies likely face a skewed application of deference regimes.

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Book Reviews

Family Law's Loose Canon

FAMILY LAW REIMAGINED. By Jill Elaine Hasday. Cambridge, Massachusetts: Harvard University Press, 2014. 307 Pages. $45.00.

Reviewed by Joanna L. Grossman*

I. Introduction

Family law has come a long way. Once occupying at best a marginal role in the law school curriculum—and an almost unmentionably low rank in the legal profession—family law has risen in every respect.[1] Now an undeniably complex, intellectual, and dynamic area for students, lawyers, and researchers alike, family law even has its own canon. The existence, content, scope and pitfalls of this canon—"the dominant narratives, stories, examples, and ideas that judges, lawmakers, and (to a less crucial extent) commentators repeatedly invoke to describe and explain family law and its governing principles"—are the centerpiece of Jill Hasday's thoughtful new book, *Family Law Reimagined.*[2]

The family law canon, Hasday argues, is not "limited to texts," and "does not take the form of a short and definitive reading list."[3] It is, rather, "a series of overriding stories that purport to make sense of how the law governs family members and family life," stories that are "so embedded in the field" and "reiterated, reinforced, and relied on" so often that "they are routinely assumed to be matters of common sense—so taken for granted as to supposedly require no explanation or defense."[4] But there's a cost to this level of comfort with the common narratives—the canon, Hasday suggests,

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1. *See* Nicholas Bala, *There Are Some Elephants in the Room: Being Realistic About Law Students, Law Schools, and the Legal Profession When Thinking About Family Law Education*, 44 FAM. CT. REV. 577, 580–81 (2006) (exploring why family law "has been low in the hierarchy" of legal education); Janet Halley, *What Is Family Law?: A Genealogy, Part I*, 23 YALE J.L. & HUMAN. 1, 1–6 (2011) (surveying the development of family law as a distinct area of study). On the historical role of family law in legal education and the legal profession, see SANFORD N. KATZ, FAMILY LAW IN AMERICA 2–9 (2003).

2. JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 2 (2014).

3. *Id.* at 2.

4. *Id.* at 2–3.

"helps structure and constrain family law's imaginative universe."[5] Moreover, the canon "misdescribes the reality of family law, misdirects attention away from the actual problems that family law confronts, and misshapes the policies that courts, legislatures, and advocates pursue."[6]

In this Review, I will explore the main themes of the book, which first depicts the components of the family law canon and then suggests what is missing from it. Then, I will consider Hasday's normative claim—that the canon is ultimately more harmful than beneficial. I focus in Part III on the fall of the federal Defense of Marriage Act and suggest that the existence of a family law canon, even a flawed one, made it easier to smoke out Congress's true, and malignant, intent. Even a loose "canon" sometimes hits its target. In Part IV, I examine the perils of an imperfect canon, agreeing with Hasday that there are many concrete instances in which, relying on canonical narratives, courts and legislators have missed the opportunity to freshly evaluate or construct laws and policies appropriate for the modern family. Parentage law, which determines which adults have legal rights to which children, is just such a victim. Hampered by the narrative of family law's break from its past, and the narrative about the child-centric nature of family law, courts and lawmakers have struggled mightily to apply rules designed for an entirely different modal family to the vast spectrum of families they confront today.

II. The Crux of the Canon and Its Limitations

Family Law Reimagined opens, powerfully, with two canonical stories that shape our understanding of family law. But first, it asks, what do we mean when we talk about "family law"? Hasday relies on the following definition: "[F]amily law regulates the creation and dissolution of legally recognized family relationships and determines legal rights and responsibilities that turn on family status."[7] Defining family law is important, Hasday argues, because the canon is shaped by the notion of what she terms "family law's exceptionalism"—that the field is "distinctly set off from other areas of the law, so that legal rules and presumptions in force elsewhere do not apply or are actually reversed within family law."[8] And when we do talk about family law, she suggests, we tend to offer two common observations: (1) family law is a matter of state, rather than federal, law and (2) the family is insulated from the principles of market exchange that otherwise pervade law.

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5. *Id.* at 3.
6. *Id.*
7. *Id.* at 18.
8. *Id.* at 15.

Chapter 1 is devoted to the localism narrative, which, Hasday claims, is used both descriptively and normatively: Family law is, and ought to remain, reserved to the states.[9] She has two main quarrels with the localism narrative. First, she argues, it is "employed selectively against specific federal initiatives and not others."[10] An unpopular proposal is likely to be met with the criticism that it is inappropriate merely because it is on the federal level rather than because it is misguided or harmful, or simply better handled on a state or more local level.[11] And the firm belief that family law *is* a matter of local concern makes courts and lawmakers more inclined to ensure that it remains that way. The development of a seemingly rootless "domestic relations" exception to federal jurisdiction, which allows federal courts to sidestep messy divorce cases even when the requirements for diversity jurisdiction are otherwise met, is a good example of the spillover from descriptive to normative principles.[12] Second, she explains, this narrative is simply not true. Although it may have once been more true that the federal government largely steered clear of family law, the United States Code is literally littered with enactments that directly provide benefits and impose obligations based on family status.[13] And in some areas, such as child support law, Congress has deliberately usurped the field in order to change it, dictating to states the method that must be used for determining child support awards (guidelines) and the means of enforcement that must be made available (everything from registries to assignment of rights for welfare cases to sanctions for nonpayment).[14] Indeed, Hasday spends many pages exhaustively detailing federal family law, comprising issues as disparate as spousal immigration benefits to evidentiary privileges in federal trials to the military's law of adultery.[15]

Chapter 2 exposes the myth of the impenetrable barrier between family and the market. The family is no place, the narrative goes, for crass talk of economic exchange, much less reliance on it to determine the outcome of

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9. *Id.* at 17.

10. *Id.*

11. *Id.* at 17–18.

12. *See generally id.* at 25–26 (criticizing the judicially created "domestic relations" exception to federal diversity jurisdiction as "without constitutional basis or statutory codification").

13. *Id.* at 45.

14. *See* Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified in scattered sections of 42 U.S.C.) (requiring states to establish guidelines for child support awards and standardize enforcement programs); JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 225–31 (2011) (discussing Congress' intervention in state child support enforcement).

15. HASDAY, *supra* note 2, at 44–59.

various conflicts.[16] Yet, Hasday argues, when courts invoke this narrative, they tend to "rely upon a few examples where family law loudly rejects market principles," ignoring the more typical cases in which those principles are routinely put to use.[17] This separation between family and market is, for example, the basis for the rule that "agreements between spouses for domestic labor are categorically unenforceable."[18] Domestic labor is supposed to be performed lovingly, without resentment, and for free. Likewise, most courts have categorically refused to treat human capital such as a professional degree as divisible marital property, even when the non-degree-holding spouse has contributed substantially to its acquisition.[19] However, Hasday argues, outside of these two contexts "legally permissible and enforceable economic exchanges run through family law and family relationships."[20] Thus we see the routine enforcement of prenuptial and postnuptial agreements, which operate to fix the economic cost of divorce or the first spouse's death; tolerance of economic agreements among any family members other than legal spouses (including long-term cohabitants); and compulsory economic exchange, such as spousal support following divorce or separation or the elective share at death.[21] The problem with insisting that family law is insulated from economic exchange—when that clearly isn't true—is that it obscures the nature and effects of the economic exchange that the law does or does not tolerate. The monied husband, for example, can protect his assets against division at divorce, but the impoverished wife cannot extract a promise of payment for doing his laundry. The canonical narrative's insistence that marriage is no place for enforceable economic exchange "obscures this disparate distribution of injury."[22]

In Chapters 3 and 4, Hasday considers "family law's relationship to its past."[23] By this, she means that canonical stories "prominently feature progress narratives recounting family law's evolution over time," which stress "sharp breaks from history, dramatic transformations in family law rules and policies, and the abandonment of historical practices grounded in subordination and injustice."[24] The chapters, respectively, describe and

16. *Id.* at 67.

17. *Id.* at 68.

18. *Id.* at 70.

19. *Id.* at 70–75. New York, which allows degrees and licenses to be valued and divided, is an outlier. *Id.* at 71 (citing O'Brien v. O'Brien, 489 N.E.2d 712, 713 (N.Y. 1985)).

20. *Id.* at 75.

21. *Id.* at 75–86.

22. *Id.* at 86.

23. *Id.* at 95.

24. *Id.*

critique what she terms "progress narratives for adults" and "progress narrative[s] for children."[25] For adults, she highlights two narratives that are oft repeated and yet less than accurate. The first "declares that family law has disentangled itself from a legal system that enforced the legal supremacy of husbands over wives. The other celebrates the rise of contract rules on the presumption that they are preferable to status rules."[26] The strength of the first narrative is more compelling than the second, as most scholars and judges understand that the move from status to contract is at best partial and certainly situational. But Hasday spins her own narrative, which convincingly demonstrates that gender equality in marriage is still an aspiration, not a *fait accompli*, and more importantly, that beliefs to the contrary have bred both complacency and some harsh results based on a reality that isn't.[27]

As just one small, but striking, example, she tells the story of James A. Hayes, who wrote a now-famous committee report for the California legislature explaining the recommendation to adopt the nation's first no-fault divorce law in 1970.[28] In the report, and in a bar journal article the following year, Hayes praised California for acknowledging that women's newfound equality justified more lenient divorce laws and a change to the rules regarding the economic incidents of marital dissolution.[29] He then turned to his own life and quoted his own report as justification for his request to stop paying alimony to his ex-wife, a woman who hadn't worked in twenty-nine years while raising the couple's four children.[30] If women have "full civil rights" and access "even" to the "professions," why should he have to continue supporting her?[31] But even with no personal interest, courts employed similar reasoning—all but ending permanent alimony on the theory that women could no longer be presumed or kept dependent after marriage.[32] But what "liberated" women also made them poor. Given the timing of many divorces in the life cycle, couples often have very little

25. *Id.* at 97, 133.

26. *Id.* at 97.

27. *See, e.g.*, *id.* at 128–30 (describing how no-fault divorce laws have made divorce "even more economically devastating for many women").

28. *Id.* at 104.

29. *Id.*

30. *Id.* at 104–05.

31. *Id.* at 104.

32. *See, e.g.*, Turner v. Turner, 385 A.2d 1280, 1281–82 (N.J. Super. Ct. Ch. Div. 1978) (observing that "women's liberation" had been transformed from "an elitist movement" to "profound and deep social change," the court queried: "If we are to encourage a woman to seek employment, what better way is there than to direct that alimony will be rehabilitative in nature and will cease on some predetermined date?").

accumulated property to divide.[33] Moreover, due to the burdens of child rearing and choices to prioritize one spouse's education or career, couples often have vastly disparate earning capacity.[34] The rejection of alimony as an equalizer, whether rooted in false claims of equality or not, means that the spoils and losses of marriage are often distributed unfairly. Most studies have shown that divorce imposes harsher economic consequences on women and children than on men.[35] In this, Hasday is right to see the harm of a canon that paints with too broad a brush and a narrative that "treats history as safely in the past" when traditional family law principles "still operate to undermine women's equal status."[36]

Chapter 4's "progress narrative for children" tells a slightly more complicated—and less persuasive—story. This narrative "celebrates the supposed rejection of common law principles that prioritized parental prerogatives and the asserted triumph of a legal regime privileging children's interests."[37] A shorthand version of this story is that questions involving children are resolved based on their "best interests." And while it is true that custody disputes between two fit parents are resolved by that formal standard,[38] the standard embodies tremendous judicial discretion that can be deeply infused with bias—in favor, for example, of women as primary custodians whether or not that is in the best interests of a particular child.[39] Moreover, given the complexities of the modern family resulting from the dramatic rise in unmarried childbearing, parenting by same-sex couples, and the use of reproductive technology, an increasing number of disputes involving children are subject to different legal standards—ones that explicitly turn on parental prerogatives rather than children's interests.[40] Involuntary termination of parental rights, corporal punishment,

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33. *See, e.g.*, Marsha Garrison, *The Economic Consequences of Divorce*, 32 FAM. & CONCILIATION CTS. REV. 10, 11 (1994) (reporting a study that found that the median net worth of marital assets at divorce is less than $25,000).

34. *See generally* CYNTHIA LEE STARNES, THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW 6 (2014) (arguing for a new conception of alimony as a compensatory payment that would "go far in ensuring that primary caregivers are not thrown under the bus when their marriages end").

35. On the economic effects of divorce, see generally GROSSMAN & FRIEDMAN, *supra* note 14, at 202–05; James B. McLindon, *Separate but Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 381 & tbl.21 (1987) (summarizing data on the division of net family assets by gender).

36. HASDAY, *supra* note 2, at 120.

37. *Id.* at 133.

38. *Id.* at 135.

39. *Id.* at 141.

40. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 63 (2000) (plurality opinion) (holding that disputes between a parent and non-parent cannot be resolved by resorting to a simple best-interests analysis).

child labor, and education are four other areas she cites for the proposition that we sometimes indulge parental prerogatives at the expense of children's interests rather than in service of them.[41] Thus, Hasday argues, "declarations that family law's regulation of the parent-child relation is now organized around children's best interests can . . . significantly overstate the changes in family law over time."[42] This overstatement forestalls debate about whether children's interests should predominate in any particular context, as well as discussion about the merits of embracing parental prerogatives.

The final section of *Family Law Reimagined*, composed of chapters 5 and 6, considers "what the canon excludes and ignores."[43] She focuses here on the neglect of family ties other than "marriage, parenthood, and (sometimes) their functional equivalents" and the neglect of the law's regulation of poor families, which differs in material and sometimes stunning ways from the regulation of higher-socioeconomic-status families.[44] Hasday focuses on sibling relationships to emphasize the cost of being locked into a certain conception of the family ties that bind—and that deserve to be protected.[45] The compulsive focus on spousal and parent–child relationships leads to policy choices by omission. Although research suggests that "the sibling relationship is potentially one of life's most important connections," it is often ignored by courts, legislatures, and social workers.[46] Siblings have few if any rights against being separated after divorce, death of a parent, or when adopted.[47]

Hasday begins the final chapter of *Family Law Reimagined* with the strong and undeniably true statement that the poor are "noticeably absent from the family law canon."[48] There simply are no canonical narratives about poor families—how "family law has conquered problems of poverty."[49] This is because family law, frankly, has made no such effort. Nor have there been noticeable attempts to meld family law principles with those of welfare law or child protection law. Instead, family law, and its authors and advocates, are simply content to leave *those* families out. Family law, in its most common iteration, is for the middle class and up.

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41. HASDAY, *supra* note 2, at 145–54.
42. *Id.* at 141.
43. *Id.* at 159.
44. *Id.*
45. *Id.* at 164–65.
46. *Id.* at 166.
47. *Id.* at 168, 176.
48. *Id.* at 195.
49. *Id.*

Perhaps nowhere is this walling off of family law more evident than in the Supreme Court's jurisprudence, which, in family law cases, emphasizes privacy, autonomy, and freedom from unwanted governmental intrusion.[50] But in welfare law, which strikes at the heart of families, the default is just the opposite.[51] Government assistance comes at a steep cost—a weakening of almost every aspect of family and self-determination, including things as personal and fundamental as the decision to have children or to live with an intimate partner.[52] On the legislative front, Hasday conducts an insightful comparison of the family law norms embedded in Social Security, the safety net for wage-earning families, which emphasizes "privacy and autonomy," and those embedded in Temporary Assistance for Needy Families, the safety net for the poor, which relies on "highly investigatory, instrumental, and interventionist premises."[53]

Through these six chapters, *Family Law Reimagined* clearly establishes that there is a family law canon; that it is at times under-inclusive, overinclusive, and downright misleading; and that the cost of a canon that takes such liberties with the reality of family law (not to mention the messy realities of family life) can be substantial. The power of the canon, Hasday concludes, "lies in its ability to operate at the level of common sense, so that canonical narratives and modes of understanding the field appear to require no explanation or reexamination."[54] The canon not only misleads, it also takes on normative force and obscures the questions that really need to be asked and answered in order for families to flourish in a variety of contexts.

III. The Power of the Canon

Even if overbroad, underinclusive, and, in some instances, clearly inaccurate, might the existence of canonical principles of family law be helpful? This Part takes just one aspect of the canon uncovered by *Family Law Reimagined*, the localism narrative, and asks whether the generalizations about the level of government at which family law is made and enforced might be more complicated—and more useful—than Hasday lets on. It also asks, more importantly, whether the canon, even if inaccurate, might sometimes advance legitimate principles.

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50. *Id.* at 197.

51. *Id.* at 198.

52. *See id.* at 198–208 (surveying Supreme Court decisions upholding state regulations tying eligibility for aid to family size, willingness to allow welfare officials to make warrantless home visits, and other family-status factors).

53. *Id.* at 208.

54. *Id.* at 221.

Hasday is certainly right that the common tropes about family law's localism belie the numerous and significant aspects of federal constitutional, statutory, and administrative law that regulate the family. But not all aspects of federal family law are created equal. Nor is it all obviously inconsistent with the platitudes about the reservation of family law to the states. In some key respects, federal law is circumscribed to avoid conflicts with state family law. For example, most federal benefit programs rely on state law determinations of family status when allocating spousal or dependent- or surviving-child benefits. The Social Security Act is a case in point. Although a legal parent–child relationship is the basis for a dependent child to collect benefits when an insured parent dies, whether that relationship exists is a function of state law.[55] Thus, the Supreme Court confirmed in a 2012 case, *Astrue v. Capato*,[56] that a posthumously conceived child might inherit from a deceased biological father in one state but not another, based solely on whether the laws of the child's home state recognize that man as a legal parent for purposes of intestate succession.[57]

In other contexts, federal law supersedes family law, but in a manner that's central to the federal–state balance of power and not unique to this area of law. Constitutional guarantees of equal protection and due process, for example, by design, supersede state law enactments. This has become more relevant in family law, as the Supreme Court has recognized more and broader protections for intimate and family relationships—a constitutional right to marry that brings heightened scrutiny upon state laws that directly and substantially interfere with marriage;[58] constitutionally protected parental rights, relevant in conflicts with third parties, the state, and would-be coparents;[59] constitutional protection for living with even distant

55. *See* 42 U.S.C. §§ 402(d), 416(e), (h)(2)(A) (2012) (using state intestacy laws to determine whether a Social Security applicant is the child or parent of an insured individual); 20 C.F.R. §§ 404.354–.355 (2014) (same).

56. 132 S. Ct. 2021 (2012).

57. *Id.* at 2026, 2032.

58. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing the freedom to marry as a vital right); Zablocki v. Redhail, 434 U.S. 374, 386–87 (1978) (invalidating a marriage restriction that "directly and substantially" interfered with the right to marry); Turner v. Safley, 482 U.S. 78, 96 (1987) (finding constitutional protection for the right to marry even in the prison context).

59. The trilogy establishing constitutional protection for parental rights vis-à-vis the state includes *Meyer v. Nebraska*, 262 U.S. 390, 397, 401–03 (1923) (invalidating a Nebraska law banning instruction in a foreign language before ninth grade); *Pierce v. Society of Sisters*, 268 U.S. 510, 530, 534–35 (1925) (invalidating an Oregon law requiring children between the ages of eight and sixteen to attend public school); and *Prince v. Massachusetts*, 321 U.S. 158, 169–71 (1944) (upholding the conviction of a child's aunt for allowing the child to sell religious pamphlets in violation of state labor law). That parental rights are also protected vis-à-vis challenges by third parties was reinforced in *Troxel v. Granville*, 530 U.S. 57 (2000), in which a plurality ruled that a third-party visitation statute was unconstitutional as applied to a particular

relatives;[60] and constitutional protection for intimate relationships.[61] The federal–state balance that ensues is no different than the balance in criminal procedure, voting rights, or any number of other areas that touch on individual constitutional rights. In still other contexts, the federal government regulates family only incidentally to administer a decidedly federal area of law—immigration, tax, or copyright, to take the most obvious examples.

The simple fact that there are federal law enactments that affect the family does not tell us much. Despite these various forms of federal family law, it is still by and large true that family law and family status are controlled by the states. The recent controversy over the federal Defense of Marriage Act (DOMA)[62] reveals how that generalization, blunt edged as it might be, can be important. DOMA, which passed through both houses of Congress by a wide margin with little by way of debate,[63] took steps to stop the potential spread of marriages by same-sex couples in the event any state legalized them. Section 2 amended the Full Faith and Credit Act to provide that states did not have to give effect to same-sex marriages from other states (a misguided and redundant provision to overcome a compulsion that didn't exist in the first place),[64] and Section 3 defined marriage as a union

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mother because it did not give special weight to her decision to deny more expansive visitation with her children's grandparents. *Id.* at 72.

60. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 495–96, 506 (1977) (invalidating, on constitutional grounds, an Ohio housing ordinance limiting occupancy of a dwelling to single nuclear families).

61. *See* Lawrence v. Texas, 539 U.S. 558, 562, 567 (2003) (invalidating law criminalizing same-sex sodomy on constitutional grounds).

62. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012) and 28 U.S.C. § 1738C (2012)).

63. *See* 142 CONG. REC. 17,094 (1996) (noting a 342–67 House vote); 142 CONG. REC. 22,467 (1996) (noting a 85–14 Senate vote); Peter Baker, *President Quietly Signs Law Aimed at Gay Marriages*, WASH. POST, Sept. 22, 1996, at A21 (noting that President Clinton "waited until the dead of night" to sign DOMA, "timing his action to minimize public attention and contain any political damage"). For a more detailed history of DOMA's enactment, see generally Joanna L. Grossman, *Defense of Marriage Act, Will You Please Go Now!*, 2012 CARDOZO L. REV. DE•NOVO 155, 156–59.

64. The Act states:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Defense of Marriage Act § 2(a), 28 U.S.C. § 1738C. On the inapplicability of full faith and credit principles to marriage recognition and the resulting redundancy of § 2, see generally Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L.J. 87, 105–06 (2004) [hereinafter

between a man and a woman for all federal law purposes.[65] In a 2013 decision, a 5–4 majority of the Supreme Court ruled that Section 3 of DOMA was a violation of the equal protection principles embodied in the Fifth Amendment.[66] Congress enacted DOMA in 1996, as the controversy over marriages by same-sex couples was reaching fever pitch.[67] The catalyst was Hawaii, which was poised to legalize same-sex marriage because of a ruling from the state's highest court in 1993 that the ban merited strict scrutiny and was likely to be struck down after a trial on remand.[68] DOMA was followed by the enactment of statutes and constitutional amendments across the country designed to preclude the celebration of same-sex marriages and bar recognition of those validly celebrated elsewhere.[69] But at some point, the tilt of the country shifted, and states began to embrace marriage equality in droves.[70] While there are still many states that have remained steadfast in their opposition, the *Windsor*[71] decision marked the winding down of the wars marked by its enactment.

What does *Windsor* tell us about the relevance of the family law canon? To strike down Section 3 of DOMA, the Court could have taken a variety of different tacks. The broadest one would have rejected the federal government's attempt to deny recognition to marriages by same-sex couples because *all* laws restricting marriage to heterosexual couples are a violation of due process, equal protection, or both. In a companion case, *Holllingsworth v. Perry*,[72] the Court was asked to rule just so in a case

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Grossman, *Fear and Loathing*]; Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriages Laws*, 84 OR. L. REV. 433, 452 (2005) [hereinafter *Resurrecting Comity*].

65. The Act states:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

Defense of Marriage Act § 3(a), 1 U.S.C. § 7.

66. United States v. Windsor, 133 S. Ct. 2675, 2683, 2696 (2013).

67. *See* Grossman, *Fear and Loathing*, *supra* note 64, at 105–07 (discussing the legislative history of DOMA).

68. *Id.* at 105–06 (citing Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993)).

69. On these developments, see GROSSMAN & FRIEDMAN, *supra* note 14, at 146–49.

70. The current count is thirty-five states and the District of Columbia, but this continues to be an era of rapid change. For up-to-date information, see *Marriage Equality and Other Relationship Recognition Laws*, HUM. RTS. CAMPAIGN, http://www.hrc.org/campaigns/marriage-center, *archived at* http://perma.cc/5WAW-XWBR.

71. *Windsor*, 133 S. Ct. 2675.

72. 133 S. Ct. 2652 (2013).

challenging the constitutionality of California's Proposition 8, a voter referendum making marriages by same-sex couples unconstitutional.[73] In that case, however, the Court did not reach the merits question—whether a state can ban same-sex marriage without running afoul of the U.S. Constitution—but instead dismissed the case on standing grounds.[74] Although this led indirectly to the legalization of same-sex marriage in California, because of a ruling that denied Prop 8's defenders standing to appeal an adverse judgment in the trial court, it left in place other similar bans, including DOMA.

The *Windsor* majority could also have ruled that Section 3 of DOMA was invalid because the federal government does not have the power to define marriage because marriage has traditionally been defined by the states. This tack would have been all but the grossest example of the misuse Hasday warns about—giving normative power not only to a description, but a misdescription. But there were briefs urging this approach, relying on the exact narratives Hasday relies on in *Family Law Reimagined*,[75] and the justices at oral argument seemed inclined to strike down DOMA because it represented an inappropriate federal incursion into family law.[76] Yet, there are many other instances in which the federal government utilizes its own definition of marriage—to judge entitlement to spousal citizenship, to give just one example—and thus it cannot be the case that the federal government is simply forbidden to define marriage.[77]

In the end, though, the *Windsor* opinion took a more nuanced approach that did rely on the localism narrative but stopped short of turning a description into a prescription or limitation. In fact, it made good use of the localism narrative to understand the Congressional purpose behind DOMA.

When first enacted, Section 3 of DOMA had no import because there were no states that allowed the celebration of marriages by same-sex couples—and thus no marriages for the federal government to refuse to

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73. *Id.* at 2659.

74. *Id.*

75. *See, e.g.*, Brief on the Merits for Amicus Curiae The Partnership for New York City in Support of Respondent Windsor and Affirmance of the Second Circuit at 10–16, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307).

76. *See* Transcript of Oral Argument at 56, 59, 67–68, *Windsor*, 133 S. Ct. 2675 (No. 12-307) (recording questions focusing on the traditional role of the state by Justices Ginsburg, Kennedy, and Sotomayor). *But see Windsor*, 133 S. Ct. at 2692 (deeming it "unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance").

77. *See, e.g.*, 8 U.S.C. § 1186a(b)(1)(A)(i) (2012) (providing that marriages "entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant" will not entitle the immigrant to that status even if the marriage is otherwise valid under state law).

recognize. But when first Massachusetts,[78] and then a cascade of other states, embraced marriage equality, this provision of DOMA wreaked havoc by refusing to acknowledge that same-sex marriages existed. As a practical matter, this meant that couples who were legally married in their home state or another state were nevertheless treated as single by the federal government for purposes ranging from immigration to taxes to Social Security. Marital status, it turns out, is relevant to over 1,000 federal laws.[79]

Windsor involved a typical federal–state law conflict under DOMA. A woman's female widow—the couple had legally married in Canada and had their marriage given effect in New York—was charged over $300,000 in estate taxes.[80] Transfers to a legal surviving spouse are tax free under the federal estate tax,[81] but because the federal law provision of DOMA prevented the Internal Revenue Service (IRS) from recognizing the couple's marriage, this widow was taxed.[82] The widow, Edith Windsor, filed suit challenging the constitutionality of DOMA and requesting a tax refund as a "surviving spouse."[83]

A federal district court sided with Windsor, holding that this provision of DOMA was indeed unconstitutional.[84] Congress, the court reasoned, had no legitimate reason to refuse recognition to some marriages based solely on the sexual orientation of the parties.[85] Refusing to stay the judgment pending appeal, the court ordered the IRS to immediately refund over

78. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003) (invalidating state ban on marriages by same-sex couples and authorizing the issuance of licenses in May 2004). Until 2008, Massachusetts was the only state to allow the celebration of same-sex marriages. GROSSMAN & FRIEDMAN, *supra* note 14, at 152–53.

79. *Windsor*, 133 S. Ct. at 2683; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004) (noting that there are 1,138 federal laws to which marital status is relevant).

80. *Windsor*, 133 S. Ct. at 2683.

81. *See* 26 U.S.C. § 2056(a) (2012) (excluding from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse").

82. *Windsor*, 133 S. Ct. at 2682.

83. *Id.* at 2682. At the time, New York did not allow for the celebration of valid same-sex marriages, but it did give effect to those that were validly celebrated elsewhere. *See, e.g.*, Godfrey v. Spano, 920 N.E.2d 328, 336–37 (N.Y. 2009) (upholding validity of Executive Order recognizing out-of-state marriages by same-sex couples). Subsequently, the New York legislature passed a law to legalize same-sex marriage. Marriage Equality Act, ch. 95, 2011 N.Y. Laws 749 (codified at N.Y. DOM. REL. LAW §§ 10-a, 10-b, 13 (McKinney 2014)); Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 24, 2011, http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html?pagewanted=all&_r=1&, *archived at* http://perma.cc/7VEH-YPSL.

84. Windsor v. United States, 833 F. Supp. 2d 394, 406 (S.D.N.Y. 2012)

85. *Id.* at 402–06.

$350,000 to the decedent's estate.[86] Although the ruling was appealed, both parties asked the Supreme Court to hear the case while that appeal was still pending.[87] The Second Circuit Court of Appeals did rule—affirming the trial court's conclusion that sexual orientation classifications are entitled to heightened scrutiny and that the federal government had an insufficiently compelling reason for refusing to give effect to marriages by same-sex couples.[88]

The Supreme Court considered whether "Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State."[89] The majority said yes.[90]

Like his majority opinion in *Lawrence v. Texas*,[91] in which the Court ruled 6–3 that state criminal bans on same-sex sexual behavior violate the right to privacy protected in the Due Process Clause of the Fourteenth Amendment,[92] Justice Kennedy's opinion in *Windsor* showed sensitivity to emerging social norms about gay rights and relationships and performed a nuanced analysis of relevant constitutional principles

Justice Kennedy's constitutional analysis in *Windsor* began by noting the novelty of the arrangement the Court was being asked to consider: "[U]ntil recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage."[93] The novelty pushed both defenders and challengers into stauncher positions. For opponents of marriage by same-sex couples, the belief that a man and woman are "essential to the very definition" of marriage "became even more urgent, more cherished when challenged."[94] But others reacted to the suggestion of same-sex marriage with "the beginnings of a new perspective, a new insight."[95] Quickly, the "limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary

86. *Id.* at 406.

87. Petition for a Writ of Certiorari Before Judgment at 1, *Windsor*, 133 S. Ct. 2675 (No. 12-307) [hereinafter Solicitor's Petition] (petitioning the Court on behalf of the United States); Petition for Writ of Certiorari Before Judgment at 1, *Windsor*, 133 S. Ct. 2675 (No. 12-307) (petitioning the Court on behalf of Edith Windsor).

88. Windsor v. United States, 699 F.3d 169, 185, 188 (2d Cir. 2012).

89. Solicitor's Petition, *supra* note 87, at 1.

90. *Windsor*, 133 S. Ct. at 2695.

91. 538 U.S. 558 (2003).

92. *Id.* at 578–79.

93. *Windsor*, 133 S. Ct. at 2689.

94. *Id.*

95. *Id.*

and fundamental, came to be seen in New York and certain other States as an unjust exclusion."[96]

But the Supreme Court's role was not to mediate a political dispute. It was to determine whether Congress could constitutionally pick a side by refusing to acknowledge the marriages between same-sex couples validly authorized by certain states. Justice Kennedy began the constitutional analysis with a discussion of the traditional regulation of marriage—cue the localism narrative. "By history and tradition," marriage has been "treated as being within the authority and realm of the separate States."[97] Subject to constitutional limitations, "'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'"[98] Regulation of marriage is "the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'"[99] Consistent with this tradition, "the Federal Government, through our history, has deferred to state law policy decisions with respect to domestic relations."[100] This "allocation of authority," the Court observed, "dates to the Nation's beginning."[101] It is thus a "long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next."[102]

Yet, the Court noted in *Windsor*, Congress does *have* the authority to "make determinations that bear on marital rights and privileges" when acting "in the exercise of its own proper authority."[103] Congress thus can, for example, refuse to grant citizenship rights to the noncitizen spouse in a sham marriage (one entered into solely for purposes of procuring immigration rights) even if the marriage would be valid for state law purposes.[104] Congress can also make its own determinations about what counts as marriage, if it chooses to, to avoid overpayment of Social Security benefits[105] or impose special protections on spouses under pension plans

96. *Id.*
97. *Id.* at 2689–90.
98. *Id.* at 2691 (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)).
99. *Id.* (quoting Williams v. North Carolina, 317 U.S. 287, 298 (1942)).
100. *Id.*
101. *Id.*
102. *Id.* at 2692.
103. *Id.* at 2690.
104. *Id.* (citing 8 U.S.C. § 1186a(b)(1) (2012)).
105. *Id.* (citing 42 U.S.C. § 1382c(d)(2) (2012)).

regulated by ERISA in furtherance of the statute's intent to protect retirement security.[106]

What makes DOMA different from these examples—and unconstitutional? In the three examples cited in *Windsor*, and noted above, Congress is regulating marriage "in order to further federal policy."[107] Justice Kennedy writes of DOMA's "far greater reach" a "directive applicable to over 1,000 federal statutes and the whole realm of federal regulations."[108] Moreover, DOMA is targeted at a single class of persons, a class that some states have sought specifically to protect. But its reach alone does not dictate its validity. Rather, the majority opinion relies directly on the localism narrative—and DOMA's stark departure from it—to find an independent basis for deeming the law unconstitutional. Yes, the Court agreed, marriage has traditionally been the province of the states. Yes, states must conform to constitutional standards, but they have otherwise been left to determine the rules regarding entry into, conduct of, and exit from marriage. Whether or not the federal government has the *power* to define[109] marriage (or other aspects of family status) on a broad basis, it has largely chosen not to. The vast majority of federal laws that turn on marital status rely on state definitions rather than supplying their own.

Justice Kennedy does not suggest that the federal government cannot regulate marriage because it has traditionally not done so. Rather, he examines the tradition of deference to state definitions of marriage and concludes that DOMA is, at a minimum, *unusual*. And, according to the Court's ruling in *Romer v. Evans*:[110] "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."[111] This is so because they raise an inference of "improper animus or purpose,"[112] which is insufficient to sustain a law against an equal protection attack even under the lowest standard of review.[113] The "Constitution's guarantee of equality," Justice

106. *See* 29 U.S.C. § 1055(c) (2012) (requiring that a spouse approve applicable pension-plan-beneficiary changes or loans secured by the pension); Egelhoff v. Egelhoff, 532 U.S. 141, 143, 150 (2001) (holding that ERISA preempts a Washington statute that placed an undue burden on divorced spouses).

107. *Windsor*, 133 S. Ct. at 2690.

108. *Id.*

109. *Id.* at 2693.

110. 517 U.S. 620 (1996).

111. *Windsor*, 133 S. Ct. at 2692 (quoting *Romer*, 517 U.S. at 633) (internal quotation marks omitted).

112. *Id.* at 2693.

113. *Id.* at 2695–96.

Kennedy wrote, "'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."[114] DOMA could not survive this analysis. As Justice Kennedy concluded:

> DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.[115]

When combined with the direct evidence of Congress's moral disapproval of marriages by same-sex couples,[116] the inference drawn from DOMA's unusual character was enough to sink it.[117]

Justice Kennedy makes clear that his disdain for DOMA is strong. The opinion concludes with a long and pointed critique of DOMA and its impact on same-sex married couples. The law diminishes "the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect."[118] It "undermines both the public and private significance of state-sanctioned marriages" by telling couples, "and all the world," that "their otherwise valid marriages are unworthy of federal recognition."[119] It imposes upon them a "second-tier marriage."[120] It "humiliates tens of thousands of children now being raised by same-sex couples" and "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[121] Same-sex couples "have their lives burdened . . . in visible and public ways."[122] The law touches "many aspects of married and family life, from the mundane to the

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114. *Id.* at 2693 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

115. *Id.*

116. *Id.*

117. *See id.* at 2696 (concluding that DOMA "is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity").

118. *Id.* at 2694.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

profound."[123] And it does all this under the guise of a law whose "principal purpose and necessary effect" are to "demean those persons who are in a lawful same-sex marriage."[124]

It may be that the Court would have invalidated DOMA even if it hadn't starkly departed from the family-law localism tradition, but that narrative—with all its flaws—was the basis for the ruling in *Windsor*. Moreover, the departure-from-tradition argument has fueled litigation challenging the validity of state bans on recognition of marriages by same-sex couples.[125] The crux of the argument is that just as Congress departed from tradition in singling out a type of marriage for denial of recognition, states have departed from a long history of recognizing out-of-state marriages in order to deny recognition of marriages by same-sex couples. The tradition, embodied in the place of celebration rule followed by most states, is to exercise comity and give effect, in most instances, to marriages validly celebrated out of state.[126] Perhaps this is not a significant enough tradition to have canonical stature, but it is one of the mostly accurate truisms of family law that marriage is portable across state lines. Refusing to exercise comity for one particular type of marriage, when the tradition has been to give effect to marriages as long as they were valid where celebrated, is, the argument goes, also a "discrimination of an unusual character" that raises constitutional suspicion. Several federal district courts have embraced this argument in post-*Windsor* cases,[127] as has one federal appellate court (the first to reach the recognition issue). In *Baskin v. Bogan*,[128] Judge Posner invalidated the bans on celebration of same-sex marriages in three states, but also their separate bans on recognition of out-

123. *Id.*

124. *Id.* at 2695.

125. *See, e.g.*, Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 993, 995 (S.D. Ohio 2013) (finding constitutional violation on Ohio's refusal to recognize out-of-state marriages by same-sex couples despite long history of recognizing other prohibited marriages), *rev'd*, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

126. On the history of interstate marriage recognition, see generally Grossman, *Resurrecting Comity*, *supra* note 64.

127. *See, e.g.*, Whitewood v. Wolf, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014); Henry v. Himes, 14 F. Supp. 3d 1036, 1061–62 (S.D. Ohio 2014), *rev'd*, *DeBoer*, 772 F.3d 388; Tanco v. Haslam, 7 F. Supp. 3d 759, 772 (M.D. Tenn. 2014), *rev'd*, *DeBoer*, 772 F.3d 388; DeLeon v. Perry, 975 F. Supp. 2d 632, 662 (W.D. Tex. 2014); Bourke v. Beshear, 996 F. Supp. 2d 542, 543, 550–52 (W.D. Ky. 2014) (invalidating statutory and constitutional bans on recognition of marriages by same-sex couples from other states and noting that the reasoning in *Windsor* "establishes certain principles that strongly suggest the result here"); *Obergefell*, 962 F. Supp. 2d at 995 (invalidating Ohio's refusal "for the first time in its history" to recognize a particular type of out-of-state marriage, one between parties of the same sex), *rev'd*, *DeBoer*, 772 F.3d 388.

128. 766 F.3d 648 (7th Cir. 2014).

of-state marriages.[129] With respect to Indiana, he noted "the kicker" that the state "will as a matter of comity recognize any marriage lawful where contracted" but will not grant the same comity to marriages by same-sex couples; this "suggests animus."[130]

In *Windsor*, Justice Kennedy both avoids the trap Hasday warns about—turning a descriptive observation into a normative principle—*and* uses the localism narrative to smoke out Congress's true purpose. And in the post-*Windsor* cases—some of which the Supreme Court has agreed to review during the October 2014 term[131]—we see an extension of the same analytical approach, but with a smaller, less established narrative. We might draw two conclusions from these examples: (1) that the canon is more nuanced than Hasday describes or (2) that the canon, by definition a set of generalizations, can advance legal analysis whether or not it is exactly right in all the particulars. Either way, *Windsor* represents the power, rather than the peril of a loose canon.

IV. The Perils of the Canon

As I argued in Part III, a set of generalizations or narratives about an area of law can be analytically useful, even essential. One might shudder to think what family law cases and statutes would look like if each were truly *tabula rasa*—handed down by some sort of alien invader who was in the dark about the history, traditions, and structure of this area of law. But Hasday is right that overreliance on common narratives can obscure as much or more as it enlightens. Family law's very success and growth as a field has, in this sense, endangered its content. This is, one might say, the peril of the canon.

Although *Family Law Reimagined* offers innumerable examples where proper policy or legal analysis is subverted by misuse of common narratives or platitudes, parentage law offers yet another. As discussed above, Chapters 3 and 4 tell family law's progress narratives—featuring the ways in which family law is alleged to have broken ties with its past and been reshaped around modern norms and ideals, including a strong preference for serving children's interests. One need only look cursorily (which is all the length of this Review permits) at the tenets of parentage law to see the strong, and yet often illogical, ties to the past, as well as a consistent prioritizing of adults' over children's interests.

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129. *Id.* at 657, 672.

130. *Id.* at 666.

131. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3607, 3608 (U.S. Jan. 16, 2015) (No. 14-574).

Parentage law traditionally revolved around relatively simple questions of marital status and legitimacy.[132] Children born to married women had two parents—the woman who gave birth and her husband, who was conclusively presumed to be the child's father unless he was absent or impotent.[133] Although children born out of wedlock were considered *filius nullius*—the child of nobody—under English law,[134] by the end of the nineteenth century, most states considered a child born to an unmarried woman to have a legal mother but no legal father.[135] Legitimate children thus had two parents; illegitimate children had one. This system made a certain amount of sense in a world in which all children were conceived through sex, sex outside of marriage was socially taboo and legally forbidden, and science was not advanced enough to definitively tie any particular man to a child. The traditional rules thus operated within these parameters. The husband was presumed to be the father of a married woman's child both as a proxy for biology—he was the most likely candidate given social norms and practices[136]—and because allowing proof of a competing claim would invade the couple's privacy and likely unravel the marriage, all in pursuit of a "truth" that would be little more than conjecture based on rumor, innuendo, and suspicion. Better for a child to have the wrong father in a norm-compliant family than the converse—or no father at all. The child of an unmarried woman, on the other hand, might be deprived of a legal father under the conventional rules, but this was largely confirming the most likely social outcome given the societal sanctions for nonmarital sexual relationships, the unlikelihood of financial support from an unwed father, and the marginality of the relationships that might lead to an illegitimate child in those days.

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132. For more on the entwining of parentage and legitimacy, see generally Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POL'Y & L. 671 (2012).

133. *See* Michael H. v. Gerald D., 491 U.S. 110, 117 (1989) (upholding California's law providing that the "issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate" (quoting CAL. EVID. CODE § 621(a) (West Supp. 1989) (repealed 1992) (internal quotation marks omitted)).

134. MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 24 (1994).

135. On this history, see generally HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 28–36 (1971); John Witte, Jr., *Ishmael's Bane: The Sin and Crime of Illegitimacy Reconsidered*, 5 PUNISHMENT & SOC'Y 327 (2003).

136. *See* Chris W. Altenbernd, *Quasi-Marital Children: The Common Law's Failure in* Privette *and* Daniel *Calls for Statutory Reform*, 26 FLA. ST. U. L. REV. 219, 227–28 (1999) (citing a 1940s study finding 10% of children born to married women were conceived in adultery). On the powerful legal and social norms confining legitimate sex to marriage, see generally GROSSMAN & FRIEDMAN, *supra* note 14, at ch. 2.

It's not a stretch to say that everything has changed. Babies are conceived in test tubes with gametes from strangers; women have babies for people who can't; same-sex couples intentionally become parents together (using some of those test tubes and gametes); over forty percent of children are born to unmarried parents;[137] and DNA testing can tell us with almost 100% accuracy the identity of a child's genetic father. The legal changes have been almost as dramatic. Unwed fathers cannot, as a constitutional matter, be categorically disregarded.[138] The biological tie gives a man the unique opportunity to "develop a relationship" with his child; he has constitutionally protected parental rights if he "grasps that opportunity" and accepts some "responsibility for the child's future."[139] Meanwhile, illegitimate children have their own constitutional rights against discrimination,[140] and the constitutionally protected rights of an established legal parent (say, a mother who acquires legal parent status by the act of giving birth) cannot be diluted by the recognition of a second legal parent without her consent.[141]

Yet, despite these oceanic social and legal changes—which led Justice O'Connor to declare in a 2000 opinion that the "demographic changes of the past century make it difficult to speak of an average American family"[142]—there is no effort in parentage *law* to break sharply from its past, even as families themselves have made such a break. Nor any to ensure that children's interests are protected in the increasingly complicated scenarios—involving, in some cases, as many as five different adults—that lead to their conception.[143] Rather, parentage law has developed primarily through analogy, seriously hampered by the fact that it is hard to construct a

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137. *See* Brady E. Hamilton et al., *Births: Preliminary Data for 2011*, NAT'L VITAL STAT. REP., Oct. 3, 2012, at 1, 7 tbl.1 (reporting that 40.7% of births in 2011 and 40.8% of births in 2010 were to unmarried women).

138. *See* Stanley v. Illinois, 405 U.S. 645, 649 (1972) (invalidating Illinois's law that conclusively denied legal parent status to unwed father regardless of his ties to the children).

139. Lehr v. Robertson, 463 U.S. 242, 262 (1983).

140. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68, 69, 71–72 (1968) (striking down law that precluded a deceased mother's five children from collecting damages for her wrongful death because they had been born out of wedlock).

141. *See, e.g.*, Boseman v. Jarrell, 704 S.E.2d 494, 504–05 (N.C. 2010) (enforcing agreement to share parental rights with lesbian coparent because she acted inconsistently with her paramount legal status by "intentionally and voluntarily creat[ing] a family unit in which [the coparent] was intended to act—and acted—as a parent" to a child they "jointly decided to bring . . . into their relationship"); Janice M. v. Margaret K., 948 A.2d 73, 87 (Md. 2008) (refusing to recognize de facto parent status for fear of overriding a legal parent's parental rights without a showing of unfitness or exceptional circumstances).

142. Troxel v. Granville, 530 U.S. 57, 63 (2000).

143. Consider a case in which a child is conceived with donor egg and donor sperm, carried by a gestational surrogate, and raised by two intended parents with no genetic tie to the child.

bridge between such different worlds. Even the Uniform Parentage Act, adopted in 1973 and substantially revised in 2000 and 2002, continues the traditional framework for determining parentage, simply expanding categories where necessary.[144] A married man who consents to the insemination of his wife with donor sperm is the child's legal father because his consent substitutes for his biological contribution.[145]

Consider the law of lesbian coparents' rights as just one example of the consequences of stumbling forward without, as Hasday urges, doing some reimagining and recasting. Most of the states that have embraced marriage equality have indicated through statute or case law that the traditional marital presumption of paternity applies with equal force to married lesbian couples.[146] In other words, a woman is presumed to be the "father" of her wife's child if they married before the birth of the child. But why? If marriage is a proxy for biology, it makes no sense to apply the presumption to a partner of the same sex, whom we know did not contribute sperm to conceive the child. If the presumption is a means to protect a marriage that might be destroyed by proof of adultery, it would also make no sense to apply the presumption to a lesbian spouse because it is already apparent that she is not genetically tied to the child—and that fact does *not* give rise to an inference that the woman who gives birth has cheated. It is obvious to all but the completely uninformed that the conception involved a third party.

Yet, there might be very good reasons to assign parentage to a lesbian coparent. Perhaps the biological mother's decision to marry before or during a pregnancy signifies her intent to share parental rights. Perhaps the partner's decision to marry reflects her intent to function as a coparent of any child born to either of them. Or perhaps a child born into a married couple's home should be presumed to benefit from continuing the relationship with both spouses. But courts often ignore these questions, focusing instead on bright-line rules and concepts that are familiar and accepted in family law. Depending on the jurisdiction, a lesbian coparent's rights can turn on whether she was married to the biological mother before

144. UNIF. PARENTAGE ACT, 9B U.L.A. 295 (2001).

145. *Id.* § 703.

146. *See, e.g.*, WASH. REV. CODE. ANN. § 26.04.010(3) (West Supp. 2013) ("Where necessary to implement the rights and responsibilities of spouses under the law, gender specific terms such as husband and wife used in any statute, rule, or other law must be construed to be gender neutral and applicable to spouses of the same sex."); Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 971 (Vt. 2006) (noting that civil union partner was entitled to presumption of parentage with respect to her partner's biological child born during the civil union).

the birth of a child;[147] whether she qualifies as a de facto parent, who has earned rights through actual parenting;[148] whether she has entered into an enforceable coparenting agreement with the biological mother;[149] or whether she has legally adopted the child.[150] The relative importance of biology, intent, contract, and parental function varies tremendously by jurisdiction and even by individual case, adding confusion and unpredictability to a determination of critical importance. Moreover, nowhere in the determination of a lesbian coparent's rights, under any of these approaches, is there express consideration of a child's best interests. The battle is over parental rights, plain and simple. A better approach, as I have argued elsewhere, would be to start with a clean slate and articulate the basis on which parental status should be assigned, one that could be adapted across the increasingly complicated spectrum of scenarios in which children are brought into this world. This approach would honor Hasday's call for more focus on the actual questions facing courts and policy makers today—and potentially deliver more sensible results than the current approaches.

V. Conclusion

Hasday proposes in her introduction not to eliminate the family law canon, but to recast it "to more accurately describe family law and its guiding principles" so that judges, lawyers, legislators, and families themselves can "assess family law as it is" and "debate the actual choices facing the field."[151] In this regard, she has certainly succeeded. Canonical crutches, like stereotypes or "conventional wisdom," often overgeneralize and oversimplify, sometimes with harmful results. Hasday's book is full of such cautionary, and expertly told, tales. The question she leaves for others is what family will look like if we shed the loose canon of family law and take the fresh look she invites.

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147. *See, e.g.*, Debra H. v. Janice R., 930 N.E.2d 184, 195–96 (N.Y. 2010) (refusing to recognize de facto parentage status but granting parental rights to lesbian coparent because she entered a civil union with the biological mother prior to the child's birth); Grossman, *supra* note 132, at 692 (explaining the trend "towards recognition that marital status creates . . . a presumption of joint parentage for same-sex couples").

148. *See, e.g.*, *In re* H.S.H.–K, 533 N.W.2d 419, 421 (Wis. 1995) (establishing a four-part test for recognition of de facto parentage status).

149. *See, e.g.*, Frazier v. Goudschaal, 295 P.3d 542, 558 (Kan. 2013) (finding a coparenting agreement between a lesbian couple to be enforceable); *In re* Mullen, 953 N.E.2d 302, 305–06 (Ohio 2011) (ruling that a coparenting agreement could create binding rights for a lesbian coparent).

150. *See, e.g.*, Boseman v. Jarrell, 704 S.E.2d 494, 505 (N.C. 2010) (finding that a lesbian coparent is not a legal parent if the adoption decree was not authorized by statute).

151. HASDAY, *supra* note 2, at 6.

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Is There a Way Forward in the "War over the Family"?

FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS. By Clare Huntington. New York, New York: Oxford University Press, 2014. 352 pages. $45.00.

Linda C. McClain*

I. Introduction

A. Bringing Together Two Conversations About Marriage

In a recent oral argument before the Seventh Circuit about the constitutionality of Indiana's and Wisconsin's laws barring marriage by same-sex couples and recognition of such marriages, Wisconsin's assistant attorney general defended Wisconsin's marriage laws as part of a "concerted Wisconsin policy to reduce numbers of children born out of wedlock."[1] In response, one judge on the panel quipped: "I assume you know how that has been working out in practice?"[2] In a subsequent acerbic and witty opinion unanimously affirming the federal district court rulings invalidating Indiana's and Wisconsin's restrictive laws, Judge Posner also expressed incredulity at the argument that excluding same-sex couples from marriage cohered with the states' interest in "channeling procreative sex into (necessarily heterosexual) marriage" to address "the problem of 'accidental births'" and "unintended" and "unwanted children."[3] If that channeling policy were succeeding, he reasoned, "we would expect a drop in the percentage of children born to an unmarried woman, or at least not an

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1. Associated Press, *Judges Take Tough Tone at Gay Marriage Hearing*, N.Y. TIMES, Aug. 26, 2014, http://www.nytimes.com/2014/08/27/us/judges-take-tough-tone-at-gay-marriage-hearing.html?_r=1, *archived at* http://perma.cc/9QXR-2RKZ. The oral argument is available at: http://media.ca7.uscourts.gov/sound/2014/rt.2.14-2526_08_26_2014.mp3, *archived at* http://perma.cc/QT7H-REQG.

2. Associated Press, *supra* note 1.

3. Baskin v. Bogan, 766 F.3d 648, 655, 662–63 (7th Cir. 2014).

increase" since Indiana and Wisconsin adopted their restrictive laws.[4] Instead, each state—similar to "the nation as a whole"—has experienced about a 10% increase from 1997 to 2012, with over 40% of births to unmarried women.[5] Thus, "there is no indication" that the states' marriage laws have had any "channeling" effect.[6]

One effect those laws *have* had, Posner observed, in seeming conflict with the states' "concern" with accidental or unplanned births and "unwanted children," is to bar from marriage the "homosexual couples" who are far more likely than heterosexual couples to adopt those children.[7] Indeed, ignoring adoption was an "extraordinary oversight" in the states' argument.[8] If marriage between a child's parents "enhances the child's prospects for a happy and successful life,"[9] such that "marriage is better for children who are being brought up by their biological parents, [then] it must be better for children who are being brought up by their adoptive parents."[10] "The state should *want* homosexual couples who adopt children," as state law permits them to do, "to be married."[11] Children, "natural conformists" and "upset" by being out of step "with their peers," would thereby experience "emotional comfort" and security.[12] *United States v. Windsor*'s[13] child-focused "criticisms" of the Defense of Marriage Act (DOMA), Posner argued, apply even more forcefully to the complete denial of marriage to same-sex couples: "The differentiation . . . humiliates tens of thousands of children now being raised by same-sex couples . . . [and] makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[14] Challenges to restrictive marriage laws, Posner concludes, while "[f]ormally" about discrimination, are, "at a deeper level, . . . about the welfare of American children."[15]

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4. *Id.* at 664.
5. *Id.*
6. *Id.*
7. *Id.* at 654, 662–63.
8. *Id.* at 662.
9. *Id.* at 663.
10. *Id.* at 664.
11. *Id.* Judge Posner's emphasis on adoption of "unwanted" children, while strategically effective, does not acknowledge other pathways to parenthood pursued by same-sex couples, such as the use of assisted reproductive technology and second parent adoption of one partner's biological child. Stu Marvel, The Surprising Resilience of the Traditional Family 7–9 (Dec. 10, 2014) (unpublished manuscript) (on file with author).
12. *Baskin*, 766 F.3d at 663–64.
13. 133 S. Ct. 2675 (2013).
14. *Baskin*, 766 F.3d at 659 (quoting *Windsor*, 133 S. Ct. at 2694) (internal quotation marks omitted).
15. *Id.* at 654.

The Seventh Circuit oral argument and opinion bring together and illuminate two conversations about marriage, family law, and equality that too often proceed independently. In the first, in the numerous post-*Windsor* challenges to restrictive marriage laws taking place in courtrooms across the country, same-sex couples and the courts who rule in their favor emphasize the high stakes of exclusion by characterizing marriage as a highly esteemed, incomparable institution and a status that signals one's intimate commitment is worthy of equal respect and dignity.[16] Defenders of restrictive marriage laws narrow marriage's role to channeling otherwise irresponsible heterosexuals into a stable family form for the sake of the children their unions may produce.[17] That rationale puts same-sex couples—who cannot become parents by accident—beyond the concerns of the state, which "has no interest in 'licensing adults' love."[18] Even this channeling argument, however, gives marriage an unrivaled role as *the* social institution designed to address a fundamental social problem and to anchor parental investment in children.[19] Judge Posner's opinion illustrates the twofold rejoinder to that argument: (1) this reductive view of marriage ignores the actual content of state marriage laws, which indicate that "[t]he state must think marriage valuable for something other than just procreation," and (2) if the state regards marriage as the optimal family form for child rearing, then allowing same-sex couples to marry advances marriage's child-protective functions and spares children humiliation and tangible deprivations.[20] To be left out of marriage is to experience a second class form of family life and (as another federal appellate court put it) to be "prohibit[ed] . . . from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance."[21]

Parallel to this exaltation of marriage in rulings that bring more families under marriage's protective umbrella is a second discourse about the

16. *Windsor* provides a template for this. *See Windsor*, 133 S. Ct. at 2693 (stating that DOMA interferes with "the equal dignity of same-sex marriages" conferred by New York's law); *id.* at 2692 (describing how marriage by a same-sex couple is a "relationship deemed by the State worthy of dignity in the community equal with all other marriages").

17. *See* Bostic v. Schaefer, 760 F.3d 352, 381 (4th Cir. 2014) (discussing and rejecting "Proponents' attempts to differentiate same-sex couples from other couples who cannot procreate accidentally"); *supra* note 3 and accompanying text.

18. *Bostic*, 760 F.3d at 394 (Niemeyer, J., dissenting) (quoting Virginia's argument).

19. In his influential account, Carl Schneider proposed: "[I]n the channelling function the law creates or (more often) supports social institutions [such as marriage and parenthood] which are thought to serve desirable ends." Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498 (1992); *see also* Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO L. REV. 2133, 2135–37 (2007) (considering the continuing relevance of the channeling function in litigation over same-sex marriage and in challenges to "the conventional sequences of love, marriage, and the baby carriage").

20. *Baskin*, 766 F.3d at 659, 662.

21. *Bostic*, 760 F.3d at 384.

disappearance of marriage from the lives of a growing number of people and communities in the United States.[22] "[T]he share of American adults who have never been married is at an historic high," while the "shares of adults cohabiting and raising children outside of marriage have increased significantly."[23] Too many young adults, policy analysts warn, are "drifting" into sex and parenthood unintentionally and outside of marriage.[24] Reports of a growing class-, race-, and gender-based marriage divide stress the urgency of this "other marriage equality problem."[25] This discourse also warns of the "diverging destinies" of children born into or reared in marital versus nonmarital families[26] and of the "reproduction of inequalities" as these patterns continue across generations.[27] Policy analysts debate whether it is possible to close the marriage gap or whether changes in economic conditions, values (or social norms), and gender patterns are such that a more realistic policy is to move "beyond marriage" and to aim instead at cultivating a "new ethic of responsible parenthood."[28]

The Seventh Circuit opinion brings together these two pieces of the marriage puzzle by examining the incentive effects, or influence, of state laws on patterns of family life. It also invites holistic consideration of whether a state's family laws cohere as a whole and achieve the aims of securing "the welfare of American children."[29] That the state laws at issue were those of Indiana and Wisconsin serendipitously introduces the

22. *See generally* NAT'L MARRIAGE PROJECT & CTR. FOR MARRIAGE & FAMILIES, THE STATE OF OUR UNIONS: MARRIAGE IN AMERICA 2010: WHEN MARRIAGE DISAPPEARS: THE NEW MIDDLE AMERICA (2010); PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES (2010).

23. WENDY WANG & KIM PARKER, PEW RESEARCH CTR., RECORD SHARE OF AMERICANS HAVE NEVER MARRIED: AS VALUES, ECONOMICS AND GENDER PATTERNS CHANGE 4 (2014), *available at* http://www.pewsocialtrends.org/files/2014/09/2014-09-24_Never-Married-Americans.pdf, *archived at* http://perma.cc/H4SD-U2GT.

24. Isabel V. Sawhill, Opinion, *Beyond Marriage*, N.Y. TIMES, Sept. 13, 2014, http://nytimes.com/2014/09/14/opinion/sunday/beyond-marriage.html?_r=0, *archived at* http://perma.cc/RF8B-FJY7 [hereinafter Sawhill, *Beyond Marriage*]. *See generally* ISABEL V. SAWHILL, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE (2014) [hereinafter SAWHILL, GENERATION UNBOUND].

25. For this coinage, see Linda C. McClain, *The Other Marriage Equality Problem*, 93 B.U. L. REV. 921, 924 (2013).

26. *See* Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607, 611, 614 (2004) (arguing that differences in the childbirth trajectories of the least- and most-educated women are leading to children of single mothers losing resources, while children born to more affluent (usually married) women are gaining resources).

27. *See* Sara McLanahan & Christine Percheski, *Family Structure and the Reproduction of Inequalities*, 34 ANN. REV. SOC. 257, 271 (2008) ("[T]he evidence suggests that recent changes in the family are contributing to the intergenerational persistence of inequality.").

28. Sawhill, *Beyond Marriage*, *supra* note 24; *see also* WANG & PARKER, *supra* note 23, at 4–5 (attributing the rising share of never married to changes in values, economics, and gender patterns).

29. Baskin v. Bogan, 766 F.3d 648, 654 (7th Cir. 2014).

relevance of "welfare" to child welfare and family law: *Zablocki v. Redhail*,[30] in which the Supreme Court declared unconstitutional Wisconsin's efforts to encourage responsible fatherhood by linking access to marriage to paying child support and keeping one's children off welfare,[31] is a cornerstone in arguments in marriage equality litigation that the "fundamental" right to marry is "expansive" and "broad" rather than narrow.[32] In the 1990s, Tommy Thompson, Governor of Wisconsin, was a poster child for experimenting with welfare reform to encourage "individual responsibility."[33] Indiana is the home state of former Vice President Dan Quayle, an iconic figure in the 1990s welfare debates who linked intergenerational poverty to a "poverty of values"[34] and invited endless commentary on whether he was "right" or "wrong" for criticizing television character Murphy Brown's decision to have a nonmarital child as setting a bad example for young women to create fatherless families.[35]

In *Failure to Flourish: How Law Undermines Family Relationships*, family law scholar Clare Huntington issues a similar invitation to assess holistically the impact of family law on families and, particularly, on children. That inventory, she argues, yields dismal conclusions about the law's failure to foster "family well-being" and "strengthen family relationships."[36] Huntington indicts both "dispute-resolution family law"—that is, the "legal rules governing divorce, paternity, child abuse, and other

30. 434 U.S. 374 (1978).

31. *Id.* at 388–91.

32. Latta v. Otter, Nos. 14-35420, 14-35421, 12-17668, 2014 WL 4977682, at *12 (9th Cir. Oct. 7, 2014) (Reinhardt, J., concurring) (citing *Zablocki* as rejecting a "narrow" right to marry, such as "the right of fathers with unpaid child support obligations to marry"); Bostic v. Schaefer, 760 F.3d 352, 376 (4th Cir. 2014) (citing *Zablocki* to support a "broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right").

33. *See States' Perspective on Welfare Reform: Hearing Before the S. Comm. on Fin.*, 104th Cong. 18 (1995) (statement of Hon. Tommy G. Thompson, Governor of the State of Wisconsin) (characterizing welfare reform in Wisconsin as "demand[ing] individual responsibility from welfare recipients"). President George W. Bush subsequently appointed Thompson Secretary of the Department of Health and Human Services. Press Release, U.S. Dep't of Health & Human Servs., Former Wisconsin Governor Tommy G. Thompson Becomes New Secretary of Health and Human Services (Feb. 2, 2001), *available at* http://archive.hhs.gov/news/press/2001pres/20010202.html, *archived at* http://perma.cc/JF6A-9HJV.

34. Vice President Dan Quayle, Speech on Cities and Poverty at the Commonwealth Club of California (May 19, 1992), *in* N.Y. TIMES, May 20, 1992, at A20, *available at* http://www.nytimes.com/1992/05/20/us/after-the-riots-excerpts-from-vice-president-s-speech-on-cities-and-poverty.html, *archived at* http://perma.cc/9ETU-TUCD.

35. Andrew Rosenthal, *Quayle Says Riots Sprang from Lack of Family Values*, N.Y. TIMES, May 20, 1992, at A1, A20, *available at* http://www.nytimes.com/1992/05/20/us/after-the-riots-excerpts-from-vice-president-s-speech-on-cities-and-poverty.html, *archived at* http://perma.cc/M6HK-U4VG. For an example of commentary, see generally Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, April 1993, at 47, *available at* http://www.theatlantic.com/magazine/archive/1993/04/dan-quayle-was-right/307015/, *archived at* http://perma.cc/DR3X-5TT2.

36. CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS xiii (2014).

kinds of family conflicts"[37]—and "structural family law,"[38] within which she includes not only the conventional subject matter of family law—such as rules about marriage and parenthood—but also the many forms of legal regulation that "influence[] the context for relationships"—such as zoning laws, employment discrimination laws, and criminal laws.[39] "[C]ontext matters," Huntington argues, because "relationships do not exist in a vacuum."[40] Huntington challenges readers to think holistically and broadly about the role of law in shaping family life.

Huntington enlists positive psychology to explain why relationships matter to individuals and society and under what circumstances such relationships develop.[41] Thus, the normative vision that should guide family law is "that family law in all of its aspects should nurture strong, stable, positive relationships."[42] She contends that, while a "few narrow reforms" are moving family toward that vision, they will remain "haphazard, unconnected, and sometimes actively challenged" without the "overarching theory of family law" that she proposes to unite them "and encourage more complete change."[43]

B. A Propitious Juncture in the "War over the Family"?

Failure to Flourish arrives at a peculiar, and perhaps propitious, juncture in long-running public conversations about the relationship among family life, family values, and family law when it is possible to ask about a way forward to end the "war over the family."[44] For decades, a disturbing contradiction or paradox in state and federal family law and policy was that, even as government sought to shore up marriage and "responsible fatherhood" to address the "failure of families to form" (single-parent families) and the rise in "broken families" (due to divorce), it excluded same-sex couples from marriage to "defend" marriage and often hindered lesbians and gay men and their children from forming legally protected families.[45] That legal landscape is rapidly, although not uniformly, changing to welcome same-sex couples into the marriage fold. Yet, as the Seventh Circuit opinion's appeal to demographic trends made clear, governments have not

37. *Id.* at xi.
38. *Id.* at xii.
39. *Id.*
40. *Id.* at xi.
41. *Id.* at 6–11.
42. *Id.* at xvii.
43. *Id.* at xvi–xvii.
44. For more on this formulation, see generally BRIGETTE BERGER & PETER L. BERGER, THE WAR OVER THE FAMILY (1983); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 121–30 (1991); DAVID POPENOE, WAR OVER THE FAMILY (2005).
45. On this paradox, see Linda C. McClain, *Federal Family Policy and Family Values from Clinton to Obama, 1992–2012 and Beyond*, 2013 MICH. ST. L. REV. 1621, 1624–25.

managed to halt or reverse those trends and bring everyone into the big marriage tent.

Sawhill proposes the terms "traditionalists" and "village builders" to capture a basic divide about how best to respond to the separation of marriage and parenthood and whether to try to bring everyone into that tent.[46] "Traditionalists" generally "share a deep concern about the fragmentation of the family and its implications for adults and especially for children" and, thus, view strengthening marriage and restoring a norm of childbearing and parenting within marriage as the best way forward.[47] They include many conservatives who believe that "government does more harm than good" and that its programs often undermine marriage and parental responsibility.[48] "Village builders" focus less on family form than on the basic proposition that "families exist within a larger society that must take some responsibility for helping parents to raise their children;" they insist that "[w]ithout the right supports from the larger community, . . . families"—particularly single-parent families—"will not flourish."[49]

Where does *Failure to Flourish* position itself in this shifting landscape? Is Huntington more of a traditionalist or village builder? Like Judge Posner, Huntington invokes child well-being to condemn legal barriers to marriage for same-sex couples who *wish* to marry.[50] Like the attorneys defending Indiana's and Wisconsin's marriage laws, and like the traditionalists Sawhill describes, she also insists that family form matters for children, observing: "There is overwhelming evidence that children raised by single or cohabiting parents have worse outcomes than children raised by married, biological parents."[51] Unlike them, she pulls back from championing marriage as the necessary or sole solution to the problem of anchoring parental commitment and cooperation in childrearing.[52] Instead, a "flourishing family law" should support a broad range of families and aim not at *marriage*, as such, but at stable and committed *relationships* between coparents, so that they "can meet the needs of their children."[53] Huntington, thus, is emphatically a "village builder" as she details the many ways that the state should support families.[54]

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46. SAWHILL, GENERATION UNBOUND, *supra* note 24, at 7, 83–84.

47. *Id.* at 84–85.

48. *Id.* at 84.

49. *Id.* at 87. As an example of a village builder, Sawhill cites to Hillary Clinton's *It Takes a Village*, discussed *infra* at note 67.

50. HUNTINGTON, *supra* note 36, at 171–73.

51. *Id.* at 31.

52. *See, e.g.*, *id.* at 176 ("[T]he goal is not necessarily to increase the number of marriages but rather to increase the long-term commitment between parents, whatever the form.").

53. *Id.* at 179–80.

54. For an informative exchange between Huntington and the author relating *Failure to Flourish* to Sawhill's categories, compare Linda C. McClain, *On "Traditionalists," "Village Builders," and the Future of Children*, BALKINIZATION (Nov. 1, 2014, 5:36 PM), http://balkin.blogspot.com/2014/11/on-traditionalists-village-builders-and.html, *archived at*

In this Review, I will explore whether *Failure to Flourish* offers a viable way forward beyond the "war over the family" by offering a new baseline for conversation. I will also argue that, while *Failure to Flourish* persuasively insists that "context matters," it is surprisingly acontexual in ways that limit its ambitious effort to guide family law. *Failure to Flourish* is, at times, admirably fine grained, using portraits of particular families to illustrate how family law shapes their lives and describing specific initiatives as harbingers of a flourishing family law.[55] On the other hand, the book articulates a normative vision of the "pervasive state" fostering "strong, stable and positive relationships" without considering the context of decades of calls by various social movements to "strengthen families" and state and federal policies aimed at doing so. It gestures toward an ecological approach to families and family law, even calling for a relationship impact statement by analogy to an environmental impact statement when considering law and policy, without situating that call in the context of decades of calls for a shift from family policy to family ecology.[56] The book cautions that government cannot do it all, gesturing toward the vital role of neighborhoods, religious organizations, and other nongovernmental actors but does not engage with the significant turn in recent decades to enlist civil society and public–private partnerships to help families and address problems government alone can't solve. Readers could better appreciate and evaluate Huntington's vision of a pervasive state properly directed in aid of human flourishing if they had a better sense of how she situates her own project in the context of these numerous other ones. At this point in the family law–family values conversation, there is no clean slate on which to write. Context, indeed, matters.

This Review will also argue that *Failure to Flourish*'s critique of dispute-resolution family law as negative, adversarial, and destructive of family relationships is acontexual. With respect to divorce and family dissolution, for example, prominent trends—or even revolutions—in family law in the direction Huntington favors date back twenty years or more. Huntington does not explain why she regards as "islands in a sea of dysfunction"[57] reforms in this area that other family law scholars identify as institutionalized enough to represent a paradigm shift from an adversary model of warring attorneys and parents to a problem-solving model aimed at

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http://perma.cc/9RZP-DY5L, with Clare Huntington, *Tempered Support for a Cultural Change Agenda*, BALKINIZATION (Nov. 3, 2014, 10:12 PM), http://balkin.blogspot.com/2014/11/tempered-support-for-cultural-change.html, *archived at* http://perma.cc/C5FF-SEA8.

55. *See* HUNTINGTON, *supra* note 36, at 55–58 (sketching portraits of three families to illustrate how "the state is present in the lives of all families"); *id.* at 165–85 (offering examples of how to implement a "flourishing family law").

56. For discussion, see *infra* Part III.

57. HUNTINGTON, *supra* note 36, at 108.

facilitating coparenting and reducing parental conflict.[58] As it were, this shift aims at a way forward not in the war *over* the family, but in handling acrimony and conflict *between* family members in a way more conducive to peaceful coparenting and child well-being.[59] The impulse to call for sweeping away a harmful paradigm to make way for a better one is understandable but somewhat misdirected and unnecessary. If family law, in significant ways, has shifted in the direction Huntington advocates, then it might be more fruitful to focus on how better to instantiate that positive vision and what obstacles may hinder its realization. Indeed, whether or not *Failure to Flourish* presents an accurate diagnosis, many of its prescriptions are appealing and could be pushed even further. The book is more useful, I will suggest, in describing the foundation of a new system, already in place, that should be extended than in its description of the current system as mired in the past.

In Part II, I explicate some features of Huntington's argument and highlight valuable contributions the book makes. In Part III, I will attempt to situate Huntington's diagnosis of the state of the family and her call to action in the context of certain developments in the "war over the family." I will ask whether her prescriptive vision goes far enough. In Part IV, I will argue that her critique of dispute-resolution family law is too negative and will try to situate her call for flourishing family law in the context of well-established trends in family law.

II. From Negative to Flourishing Family Law

Families matter—or, as Huntington puts it, "relationships matter"—to the individuals in them as well as to society.[60] The prominent rhetorical place given to families in every presidential campaign amply demonstrates the common premise that (as I have written elsewhere) "a significant link exists between the state of families and the state of the nation, and that strong, healthy families undergird a strong nation," while "the weakening of families both reflects and leads to moral and civic decline and imposes significant

58. *See infra* Part IV. To be clear: in this Review I am focusing primarily on dispute-resolution law concerning family dissolution, that is, divorce and post-dissolution rules concerning coparenting. I am not evaluating Huntington's diagnosis of dispute-resolution family law in the context of child welfare or adoption and surrogacy proceedings. For a review focused on the child welfare context, see generally Wendy A. Bach, *Flourishing Rights*, 113 MICH. L. REV. (forthcoming Apr. 2015), *available at* http://ssrn.com/abstract=2519722, *archived at* http://perma.cc/EM2U-5A8F.

59. My inspiration for this imagery is Andrew Schepard, *War and P.E.A.C.E.: A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents*, 27 U. MICH. J.L. REFORM 131 (1993).

60. *See* HUNTINGTON, *supra* note 36, at 6–7 (describing the correlation between close interpersonal relationships and individual well-being).

costs on society."[61] Thus, when Huntington, after inventorying the challenges facing different types of American families, concludes "[t]he state of the American family is not good,"[62] she joins a sizeable roster of observers from across the political spectrum and across the decades who have sounded the alarm about American families in crisis and the implications of that crisis for the social and political order.[63] Huntington justifies her primary focus on "the family relationships that affect and involve children" because it is for children (particularly young children) that family relationships are so influential.[64] When she contends that "[t]he problem facing society . . . is that too often families are unable to provide children with the kinds of relationships that are essential for healthy development and in turn create engaged, productive citizens,"[65] she echoes arguments made by family law scholars and social movements that stress the formative role played by families in fostering the capacity of children for "responsible democratic and personal self-government."[66] Reminiscent of Hillary Rodham Clinton, Huntington invokes the proverb "[i]t takes a village to raise a child," arguing that families depend upon neighborhoods, communities, workplaces, and the state in order to flourish.[67]

A distinctive feature of Huntington's call to action on behalf of families is her enlisting of the insights of positive psychology. Children need "strong and stable relationships," as the literature on human attachment teaches.[68] They also need "positive" relationships that are not abusive and in which the parent is "responsive" to the child's needs "much of the time."[69] Adults, too, she argues, need strong, stable, and positive relationships, and a critical element of child well-being is that coparents have such a relationship.[70]

To support "strong" relationships, family law should grant legal recognition to a "broader range of families" than the traditional nuclear family, such as same-sex couples who seek to marry and families formed through assisted reproductive technology.[71] Huntington continues:

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61. LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 1 (2006).

62. HUNTINGTON, *supra* note 36, at 54.

63. *See generally* MCCLAIN, *supra* note 61 (surveying the concerns regarding the weakening of families in the civil society revival movement, the marriage movement, and the welfare reform debates).

64. HUNTINGTON, *supra* note 36, at xvi.

65. *Id.* at 1.

66. MCCLAIN, *supra* note 61, at 15–17.

67. HUNTINGTON, *supra* note 36, at 158; *see also* HILLARY RODHAM CLINTON, IT TAKES A VILLAGE (10th anniversary ed. 2006).

68. HUNTINGTON, *supra* note 36, at 18.

69. *Id.* at 20.

70. *Id.* at 20–21.

71. *Id.* at xv.

> To foster *stable* relationships, structural family law should encourage long-term commitment between parents—commitment to each other or at least commitment to the shared work of raising children. To foster *positive* relationships, structural family law should make subtle but crucial changes to the context in which families live . . . [to] increase family interaction and build social ties between families and the larger community.[72]

Huntington proposes that family law be informed by appreciation of psychoanalyst Melanie Klein's idea of the "cycle of intimacy," which people experience "repeatedly" in their lifetimes:[73]

> A widespread human experience is that individuals experience love, inevitably transgress against those they love, feel guilt about the transgression, and then seek to repair the damage. Individuals experience this cycle repeatedly throughout their lifetimes, with transgressions ranging from the minor, such as parents raising their voices to their children, to the more egregious, such as an individual undermining a marriage. In healthy parent-child and adult relationships, a person is able to acknowledge the transgression and then seeks to repair the damage.[74]

Measured by that framework, family law, "[w]ith a few exceptions, . . . is fundamentally negative."[75] Instead of helping with the work of repair, dispute-resolution family law focuses on "rupture without repair."[76] Custody battles are zero sum and fail to help parents repair their relationship so they can successfully coparent after the legal divorce.[77]

Structural family law, the numerous ways in which law structures family life, takes a "largely reactive stance toward family well-being, expecting families to build [strong, stable, positive] relationships on their own" and then "wait[ing] for a crisis and then interven[ing] in a heavy-handed manner."[78]

Huntington acknowledges "narrow reforms" to structural and dispute-resolution family law in the direction she recommends.[79] She contends, however, that these "are best understood as islands in a sea of dysfunction."[80] A "basic reorientation" and new vision are in order: a "flourishing" family

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72. *Id.*
73. *Id.* at 21, 235 n.138.
74. *Id.* at 21.
75. *Id.* at 108.
76. *Id.* at 83.
77. *Id.* at 88–91.
78. *Id.* at 92–93. As noted above, I will focus on Huntington's critique of the family dissolution aspect of dispute-resolution family law rather than the child welfare, abuse and neglect, and other aspects.
79. *Id.* at 106.
80. *Id.* at 108.

law "should strive to foster strong, stable, positive relationships from the beginning."[81] This entails "changing . . . the way the state resolves the inevitable conflicts that mark family life"—dispute-resolution family law—and changing "the broader structural relationship between families and the state"—structural family law.[82]

Failure to Flourish deserves praise for urging a broader conception of family law that includes the numerous ways the state influences families and family life. That broader definition, Huntington argues, is "essential if we want to think more creatively about how the state can nurture strong, stable, positive relationships."[83] A related valuable feature of *Failure to Flourish:* the idea of the pervasive state, which reaches the family not only through "direct regulation," but also "influences families indirectly through incentives and subsidies, 'choice architecture,' myriad laws and policies seemingly unrelated to the family, and by shaping social norms."[84] Perceiving that "state regulation of family life is deep and broad,"[85] Huntington argues, is "essential for rethinking how the state *should* influence families."[86] Thus, the fruitful debate is not *whether* or not the state is pervasive or that it is acting; instead, "[t]he goal is to figure out how best to redirect this pervasive state so that it encourages strong, stable, positive relationships within the family."[87] These insights about the pervasive state are a useful addition to a significant body of theoretical work by family law scholars on the state, including, for example, Maxine Eichner's argument for a "supportive state" and Martha Fineman's theory of the "responsive state."[88]

III. Enlisting the State to Encourage Strong Family Relationships: Some Context

If the public policy debates and initiatives of the last several decades yield any lessons, one might be to ponder whether and how the pervasive state can nurture or encourage strong, stable, and positive relationships.

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81. *Id.* at 109.
82. *Id.*
83. *Id.* at 58.
84. *Id.* at 63.
85. *Id.* at 58.
86. *Id.* at 68.
87. *Id.* at 80.
88. *See* MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS 4–9 (2010) (developing a liberal democratic "normative account of the family-state relationship" that amends liberalism to "recognize the dependency of the human condition" and the role of the state in "supporting caretaking and human developments . . . so that citizens can lead full, dignified lives, both individually and collectively"); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 262–63, 273–75 (2010) (critiquing the universal and autonomous "liberal subject" and liberal conceptions of autonomy and arguing for grounding conception of a "responsive" state and of how societal institutions allocate resources around the "vulnerable subject").

Given the pervasive theme of "strengthening families" in several social movements and developments in law and policy, it would be instructive to know what Huntington thinks these efforts got right or wrong, and what lessons, if any, we might glean from these earlier and ongoing initatives about family flourishing. Is the failure to promote flourishing families a failure of vision or of implementing the vision?

A. Is It Finally Time for a Shift from "Family Policy" to "Family Ecology"?

An attractive feature of Huntington's normative vision is its interest in the social environments that allow children to flourish and also, in the face of adversity, to be resilient. She uses imagery of a "web of care" that "provides critical support for parents in their caregiving responsibilities" and cautions that "too often the web is frayed by environments that do not help neighbors build social connections."[89] Another attractive feature is her recognition that government can't do it all and that institutions of civil society play an important part.[90] "The saying '[i]t takes a village to raise a child' is shopworn," she concedes, "but the basic idea is sound."[91]

Readers may have a sharp sense of déjà vu with respect to this appeal to an ecological model and the need to enlist civil society and "the village" to help families. For example, in 1991, family law scholar Mary Ann Glendon proposed "a shift from family policy to family ecology."[92] She asked whether it was possible to move from "the war over the family"—between the "cultural right" and "cultural left"[93]—toward a "sensible American family policy" that would put "children at the center" in recognition of "the high public interest in the nurture and education of citizens."[94] Glendon frequently used imagery of "fraying" social networks and environment to highlight the urgent need to take an ecological perspective.[95]

Enlisting Urie Bronfenbrenner's work on the ecology of human development, she urged that public deliberation about families should focus on "interconnected environments" and how "[j]ust as individual identity and well-being are influenced by conditions within families, families themselves

89. HUNTINGTON, *supra* note 36, at 158.

90. *See id.* at 146–49 (examining the mutual dependency of the state and families in successfully achieving the essential work of raising children).

91. *Id.* at 158.

92. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 130 (1991) (emphasis omitted).

93. *See id.* at 121 (exploring the political battle over family policy between the "cultural right," which defends and imagines, as the "basic social unit," the "traditional" family based on marriage between a husband–breadwinner and wife–homemaker, and the "cultural left," which rejects the traditional family as patriarchal and oppressive and instead views the individual as the basic social unit and speaks more of "families" as including nontraditional forms of family).

94. *Id.* at 126.

95. *E.g.*, *id.* at 135.

are sensitive to conditions within surrounding networks of groups—neighborhoods, workplaces, churches, schools, and other associations."[96] Glendon urged that taking this "more comprehensive view" would be a helpful way to move beyond a "verbal war over the family to . . . reasoning together about conditions of family life."[97] As does Huntington, Glendon stresses the important implications for an ecological approach of the famous thirty-year study of nearly 700 infants born in the Hawaiian state of Kauai,[98] one-third of which were "classified as high-risk because of exposure to perinatal stress and other factors such as poverty, low parental education, an alcoholic or mentally ill parent, or divorce."[99] As Huntington reports, "[d]espite these life circumstances, a third of the children in the high-risk category developed into competent, caring adults" and the "distinguishing factor" for those better outcomes was that the children "had emotional support from extended family, neighbors, teachers, or church groups, and they had at least one close friend."[100] For Glendon:

> [T]he Kauai study challenges us to reflect on the relative absence of public deliberation concerning the state of the social structures within which we learn the liberal virtues and practice the skills of government; . . . [and] the diverse groups that share with families the task of nurturing, educating and inspiring the next generation.[101]

Other family law scholars, notably Barbara Bennett Woodhouse, have developed a child-centered ecological approach to family and child welfare law.[102] I focus on Glendon because her environmental or ecological approach subsequently shaped two social movements in which she participated: the

96. *Id.* at 130.

97. *Id.*

98. *See id.* at 130–33 (emphasizing that the study's conclusions about what helped children overcome adversity show "the importance of keeping . . . interacting social subsystems in view" in public deliberations about the family).

99. HUNTINGTON, *supra* note 36, at 12.

100. *Id.* Thus, Huntington praises the efforts of a reformer deeply influenced by Urie Bronfenbrenner's idea of "human ecology and the networks that form among parents and others who care for children." *Id.* at 166 (internal quotation marks omitted).

101. GLENDON, *supra* note 92, at 134.

102. *See* Barbara Bennett Woodhouse, *A World Fit for Children Is a World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability*, 46 HOUS. L. REV. 817, 818–19 (2009) (linking the well-being of children with other vulnerable groups and arguing that by providing for the needs of children and their caregivers, all will benefit).

"responsive communitarian" movement, launched in 1991,[103] and the civil society revival movement of the late 1990s.[104]

Like Huntington, these movements worried about the well-being of children and argued that family form matters for parents engaging in, as Huntington puts it, their "critical child-development work."[105] Although the civil society movement did not speak precisely of strong, stable, and positive relationships, it stressed the formative role of families in teaching basic qualities important for relationships and for citizenship.[106] Noting the risks of a weakened social ecology, civil society movement leaders urged: "As a nation, we must commit ourselves to the proposition that every child should be raised in an intact two-parent family, whenever possible, and by one caring and competent adult at the very least."[107] The marriage movement emphasized better (on average) child outcomes as well as the better social health of married adults as reasons why all levels of government should "[m]ake supporting and promoting marriage an explicit goal of domestic policy."[108]

To be sure, Huntington would quickly distance her own position from at least some aspects of these family- and child-focused social movements, noting that flourishing family law's goal of fostering stable, strong, and positive relationships between coparents and parents and children does not equate simply to promoting marriage.[109] Fair enough. My point is that Huntington's implicit embrace of an ecological approach to family

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103. *See generally* AMITAI ETZIONI, *The Responsive Communitarian Platform: Rights and Responsibilities*, *in* THE SPIRIT OF COMMUNITY 251 (1993) [hereinafter *Communitarian Platform*] (outlining the Communitarian perspective on the family, education, communities, and the polity and identifying Mary Ann Glendon as a coauthor of the platform issued on November 18, 1991).

104. *See generally* COUNCIL ON CIVIL SOC'Y, A CALL TO CIVIL SOCIETY: WHY DEMOCRACY NEEDS MORAL TRUTHS 6 (1998) [hereinafter A CALL TO CIVIL SOCIETY] (describing "civil society" as the best "conceptual framework" for "the moral renewal" of democracy).

105. HUNTINGTON, *supra* note 36, at 159–63; *see also Communitarian Platform*, *supra* note 103, at 257 ("[T]he weight of the historical, sociological, and psychological evidence suggests that on average *two-parent families are better able to discharge their child-raising duties* if only because there are more hands—and voices—available for the task.").

106. A CALL TO CIVIL SOCIETY, *supra* note 104, at 7.

107. NAT'L COMM'N ON CIVIC RENEWAL, A NATION OF SPECTATORS: HOW CIVIC DISENGAGEMENT WEAKENS AMERICA AND WHAT WE CAN DO ABOUT IT 13 (1998).

108. INST. FOR AM. VALUES, THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES 10, 22 (2000) [hereinafter THE MARRIAGE MOVEMENT], *available at* http://americanvalues.org/catalog/pdfs/marriagemovement.pdf, *archived at* http://perma.cc/5KQ8-NMRV.

109. HUNTINGTON, *supra* note 36, at 176–80. I have engaged critically elsewhere with all three of these movements. *See* JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 20–48 (2013) (challenging dichotomous treatment of rights and responsibilities in the responsive communitarian movement); *id.* at 93–106 (posing questions about several core tenets of the civil society revival movement); MCCLAIN, *supra* note 61, at 62, 75 (critiquing the civil society movement for its inattention to inequality within the family and its ambivalence about sex equality); *id.* at 118–54 (critiquing the marriage movement and governmental marriage promotion for inattention to the relationship between marriage quality and sex equality and failing to embrace sex equality as a component of "healthy marriage").

flourishing has some striking antecedents. Does she see any connection between her vision and these prior prescriptions? Further, to the extent that those earlier proposals influenced concrete family policy—for example, calls for marriage education and promotion, responsible fatherhood initiatives, and divorce reform—what, if anything, might we learn about successes or failures of a "pervasive state" at fostering relationships?

B. "Putting the Brakes on" Divorce: Why Not Do More to Encourage Reconciliation?

If family law, as Huntington urges, should do more to repair relationships, then the tantalizing question arises: do earlier proposals to do more to save marriages warrant reconsideration? Over two decades ago, political philosopher and presidential advisor William Galston (prominent in the communitarian, civil society, and marriage movements) argued that given the effects of divorce on children, "it would be reasonable to introduce 'braking' mechanisms that require parents contemplating divorce to pause for reflection."[110] Even if that "pause for reflection" did not "succeed in warding off divorce," it afforded time for the couple to "resolv[e] crucial details of the divorce,"[111] with their "first obligation to decide the future of their children before settling questions of property and maintenance."[112] Further, "[b]y encouraging parents to look at the consequences of a family breakup rather than at the alleged cause or excuse for it," the hope is that "couples will improve their prospects of saving the marriage."[113]

Perhaps a family law focused on repair *should* do more to save marriages for the sake of the children. On the one hand, Huntington resists this, characterizing the requirement in some states that courts "attempt to reconcile a couple filing for divorce" as a "superficial attempt to 'repair' the relationship."[114] She reasons that "[b]y the time one person in the couple has initiated divorce proceedings, the time for reconciliation is typically over," so that "[t]he real focus for the repair should be on the future relationship of the couple as coparents."[115] On the other hand, in the following passage she ponders what the state might do when "[i]t may be in a child's interests for

110. WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 286 (1991).

111. *Id.* at 286–87 (quoting Marilyn Gardner, *Putting Children First—The New English Precedent*, CHRISTIAN SCI. MONITOR, Mar. 30, 1990, at 14, *available at* http://www.csmonitor.com/1990/0330/pgar30.html, *archived at* http://perma.cc/JWC8-EHFY) (internal quotation marks omitted).

112. *Id.* at 286.

113. *Id.* (quoting Gardner, *supra* note 111) (internal quotation marks omitted).

114. HUNTINGTON, *supra* note 36, at 117–18.

115. *Id.* at 118.

the mother and father to stay together . . . but not necessarily in the parents' interests":[116]

> Setting aside a case of domestic violence, where separation makes good sense, commitment between adults is one of the situations where family law should first try to align the interests of the family by encouraging the parents to develop a stronger relationship with each other. But in the absence of that, family law should still prioritize the child's needs. "Staying together for the sake of the children" may seem outdated, but given the alternatives for the child, there is something to this intuition. This is not to say that the state should require couples to stay together or make it particularly difficult for them to exit a relationship, but there are more indirect ways for the state to encourage long-term commitment . . . .[117]

Family law students, in my experience, typically react with disbelief to the argument that, from the perspective of child outcomes, it is better in a low-conflict marriage that parents do not divorce and that it may even be better, eventually, for adults.[118] Surely, they argue, children will sense if their parents are unhappy! What kind of an example will such parents set for forming healthy adult relationships? Nonetheless, if family law should encourage long-term adult commitment, including postdissolution, so that children benefit from a strong coparenting relationship, why not do more to discourage divorce and heal marriages? Why not try, given the "marriage-go-round"—that those who divorce often remarry or repartner, leading to children experiencing one or more family transitions with new adults in the household and attendant instability?[119]

What might Huntington say about the more extensive vision of family repair offered in the recent Institute for American Values report, *Second Chances: A Proposal to Reduce Unnecessary Divorce*, coauthored by William J. Doherty, a family studies scholar and experienced family therapist, and Leah Ward Sears, former chief justice of the Georgia Supreme Court?[120] The authors counter the premise that divorce "happens only after

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116. *Id.* at 156–57.

117. *Id.* at 157.

118. *See generally* LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY 148 (2000) ("[R]esearch suggests that marriage is a dynamic relationship; even the unhappiest of couples who grimly stick it out for the sake of the children can find happiness together a few years down the road.").

119. *See* ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND 10–11 (2009) (arguing that conflicting American cultural ideals about marriage lead to a cycle of marriage, divorce, and remarriage that results in a less stable home environment and worse outcomes for children).

120. WILLIAM J. DOHERTY & LEAH WARD SEARS, INST. FOR AM. VALUES, SECOND CHANCES: A PROPOSAL TO REDUCE UNNECESSARY DIVORCE (2011), *available at* http://americanvalues.org/catalog/pdfs/second-chances.pdf, *archived at* http://perma.cc/5L54-LHA4.

a long process of misery and conflict."[121] Instead, research finds that "[m]ost divorced couples report average happiness and low levels of conflict in their marriages,"[122] such that "divorces with the greatest potential to harm children occur in marriages that have the greatest potential for reconciliation."[123] Filling a gap in research, Doherty and his colleagues asked nearly 2,500 divorcing parents, after they had taken their required parenting classes, "if they would be interested in exploring marital reconciliation with professional help."[124] The study found that "[a]bout one in four individual parents indicated some belief . . . that their marriage could still be saved, and in about one in nine couples both partners did."[125] If a "significant minority" of individuals and couples "expressed interest in learning more about reconciliation" that far into the divorce process, Doherty and Sears suggest, then "the proportion of couples open to reconciliation might be even higher at the outset of the divorce process—before the process itself has caused additional strife."[126] For example, another study by Doherty and colleagues found that "about one-third of married people who had ever reported low marital happiness later on experienced a turnaround."[127]

Doherty and Sears propose that states adopt a one-year waiting period for divorce, and, if the couple has children, they must complete a marriage-dissolution program before filing for divorce.[128] That program must include, along with "information on constructive parenting in the dissolution process" and skills to "increase cooperation and diminish conflict" and information on alternatives to litigation, "information on the option of reconciliation" and resources to assist interested couples with reconciliation.[129] With such measures, family law could return to an earlier (but short-lived) focus by family court professionals on reconciliation.[130] This type of education seems consistent with Huntington's emphasis on repair. After all, as Huntington mentions, the original vision of no-fault divorce was therapeutic:[131] people in

121. *Id.* at 10.

122. *Id.* at 11 (emphasis omitted) (citing Paul R. Amato & Bryndl Holmann-Marriott, *A Comparison of High- and Low-Distress Marriages that End in Divorce*, 69 J. MARRIAGE & FAM. 621 (2007)).

123. *Id.* at 11 (emphasis omitted) (quoting Alan Booth & Paul R. Amato, *Parental Predivorce Relations and Offspring Postdivorce Well-Being*, 63 J. MARRIAGE & FAM. 197, 211 (2001)) (internal quotation marks omitted).

124. *Id.* at 15–16 (emphasis omitted) (citing William J. Doherty et al., *Interest in Marital Reconciliation Among Divorcing Parents*, 49 FAM. CT. REV. 313, 313–14 (2011)).

125. *Id.* at 16.

126. *Id.*

127. *Id.* at 17, 19 (discussing Jared R. Anderson, Mark J. Van Ryzin & William J. Doherty, *Developmental Trajectories of Marital Happiness in Continuously Married Individuals: A Group-Based Modeling Approach*, 24 J. FAM. PSYCHOL. 587 (2010)).

128. *Id.* at 20, 33–34.

129. *Id.* at 46–47.

130. *Id.* at 15.

131. HUNTINGTON, *supra* note 36, at 274 n.119.

"dead" marriages should be able to end them without having to allege fault, and courts and helping professions should focus their energies on saving marriages that could be saved.[132] Isn't Huntington's advocacy of a cycle of intimacy all the more reason to prevent divorce, when possible, by helping people save—repair—their marriages, particularly when they have children? What might Huntington think of another measure proposed by Doherty and Sears, an Early Notification and Divorce Prevention Letter, which would start the clock running on the one-year waiting period, while informing the other spouse that the marriage "has serious problems" that may lead to separation and divorce; stating that the sender wants the marriage "to survive and *flourish*"; and asking whether the other spouse is willing to work on the problems in the marriage with appropriate professional help, "save" the marriage, and make it healthy?[133]

Of course, there is an important gender dimension to this prescription: women initiate the majority of unilateral divorces.[134] One reason is that women's happiness, health, and other benefits from marriage are more sensitive to marriage quality.[135] There is also a class dimension, since, as one marriage movement document reports, "more educated and affluent Americans are now markedly more likely to succeed in marriage than their less privileged fellow citizens."[136]

C. *Limits to What Government Can Do: Enlisting Civil Society and Public–Private Partnerships*

Familiar slogans in family-values rhetoric, particularly in presidential speeches of recent decades, are that government doesn't raise children, parents do, *and should*; government can't love and nurture.[137] Another slogan—that there are problems that government alone can't solve[138]—has

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132. J. HERBIE DIFONZO, BENEATH THE FAULT LINE: POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA 118 (1997).

133. DOHERTY & SEARS, *supra* note 120, at 29 (emphasis added).

134. *Id.* at 22–23.

135. MARGARET F. BRINIG, FAMILY, LAW, AND COMMUNITY: SUPPORTING THE COVENANT 60, 69 (2010); FLEMING & MCCLAIN, *supra* note 109, at 100; INST. FOR AM. VALUES & NAT'L MARRIAGE PROJECT, WHY MARRIAGE MATTERS: THIRTY CONCLUSIONS FROM THE SOCIAL SCIENCES 31–32 (3d ed. 2011) [hereinafter WHY MARRIAGE MATTERS]; MCCLAIN, *supra* note 61, at 134–35.

136. WHY MARRIAGE MATTERS, *supra* note 135, at 16.

137. *See, e.g.*, Proclamation No. 7456, 3 C.F.R. 255 (July 21, 2001) ("Government cannot replace the love and nurturing of committed parents that are essential for a child's well-being."); President George H.W. Bush, Remarks Accepting the Presidential Nomination at the Republican National Convention (Aug. 20, 1992) (transcript available at http://www.presidency.ucsb.edu/ws/?pid=21352), *archived at* http://perma.cc/75FJ-VFQC ("[W]hen it comes to raising children, Government doesn't know best; parents know best.").

138. *See* Governor William J. Clinton, Address Accepting the Presidential Nomination at the Democratic National Convention (July 16, 1992) (transcript available at http://www.presidency

translated into intense interest in public–private partnerships in recent decades. It is a puzzle why Huntington does not situate her vision of family flourishing in the context of these trends, explaining points of continuity and discontinuity. For example, she clarifies that she is not arguing that "the state can and should do everything."[139] Rather: "Other entities and institutions play a significant role in helping families flourish. For example, faith communities, informal support networks, and community groups play essential roles in nurturing strong, stable, positive relationships."[140] She offers a positive example of the nonprofit organization KaBOOM! becoming a partner with communities to build playgrounds.[141] Noting that the United States has a long history of "this kind of community effort," she argues that "[t]he most important role for the state in this context is to support, not supplant, this civic engagement."[142]

Huntington's brief statement that government should "support, not supplant" echoes a prominent theme in numerous calls to enlist civil society and public–private partnerships to build social capital, strengthen families and communities, and deliver goods and services.[143] For example, the responsive community and civil society movements called for the use of public–private partnerships to empower vulnerable communities and cautioned that government should *support* rather than *replace* social subsystems.[144] Huntington's vision also resonates with the idea of subsidiarity—"that the smallest possible unit should . . . address a problem and a larger unit should step in to provide aid only if that smaller unit otherwise would fail"[145]—an inspiration for President George W. Bush's faith-based initiative.[146] President Bill Clinton insisted that there are certain tasks that government simply cannot do, or certainly cannot do as well as nongovernmental actors.[147] Drawing on Bronfenbrenner, Hillary Clinton—

.ucsb.edu/ws/?pid=25958), *archived at* http://perma.cc/7ZV3-ZCTR ("There is not a program in government for every problem . . . .").

139. HUNTINGTON, *supra* note 36, at 220.

140. *Id.*

141. *Id.* at 220–21.

142. *Id.* at 221.

143. *See* FLEMING & MCCLAIN, *supra* note 109, at 104–06 (arguing that "[c]ivil society should support democratic self-government, not supplant it"); Linda C. McClain, *Unleashing or Harnessing "Armies of Compassion"?: Reflections on the Faith-Based Initiative*, 39 LOY. U. CHI. L.J. 361, 368–69 (2008) (describing President George W. Bush's "faith-based initiative" as calling for a more coordinated national effort to enlist public–private partnerships to meet social needs in America's communities).

144. FLEMING & MCCLAIN, *supra* note 109, at 104–06.

145. *Id.* at 105. Some family law and child welfare scholars also appeal to this principle. *See generally* Jessica Dixon Weaver, *The Principle of Subsidiarity Applied: Reframing the Legal Framework to Capture the Psychological Abuse of Children*, 18 VA. J. SOC. POL'Y & L. 247 (2011).

146. *See* McClain, *supra* note 143, at 366–67 (describing how proponents of faith-based initatives appeal to subsidiarity).

147. Clinton, *supra* note 138.

Sawhill's prime example of a "village builder"[148]—called for an "ecological or environmental approach" or "child in the village model" that looked at all the different ways civil society and government could support the well-being of children.[149]

By now, the call for enlisting civil society in public–private partnerships has transformed the federal government itself, which has an Office of Faith-Based and Neighborhood Partnerships that coordinates with related "centers" in a number of federal agencies.[150] If the pervasive state should "support" civic engagement in ways that contribute to families' positive relationships and "foster pluralism . . . by supporting a variety of different nonprofit institutions,"[151] then some evaluation of government's actual deployment to date of these partnerships and funding of various nongovernmental organizations would be instructive.

D. A New Baseline for Argument About Family Forms?

Back in the 1990s, at the height of the "family values" wars, many feminist and left/liberal family scholars and commentators warned about appeals to a social science "consensus" about either family form or family values and the risks of generalizations.[152] They wrote books in defense of single-parent families and against constructing single mothers as pathological or deviant.[153] Sociologists and journalists offered fine-grained empirical accounts of the lives of single mothers in America and why they

148. SAWHILL, GENERATION UNBOUND, *supra* note 24, at 87.

149. CLINTON, *supra* note 67, at 314–15 (internal quotation marks omitted).

150. *About the Office of Faith-Based and Neighborhood Partnerships*, OFF. FAITH-BASED & NEIGHBORHOOD P'SHIPS, http://www.whitehouse.gov/administration/eop/ofbnp/about, *archived at* http://perma.cc/NTK8-YXMG.

151. HUNTINGTON, *supra* note 36, at 221.

152. *See, e.g.*, Judith Stacey, *The Father Fixation*, UTNE READER, Sept.–Oct. 1996, at 72, 72 [hereinafter Stacey, *Father Fixation*], *available at* http://www.utne.com/politics/fretting-about-fatherlessness-american-nuclear-family.aspx#axzz3MHP4DG5e, *archived at* http://perma.cc/RJ32-TFJJ ("As a sociologist, I can attest that there is absolutely no consensus among social scientists on family values, on the superiority of the heterosexual nuclear family, or on the supposed evil effects of fatherlessness."); Judith Stacey, *The New Family Values Crusaders*, NATION, July 25–Aug. 1, 1994, at 119, 119–22 (criticizing arguments on family values claimed to be based on social science consensus).

153. *See, e.g.*, NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES xi–xix (1997) (recounting her own decision to become a single parent and calling for a shift from stigmatizing to supporting single-parent families); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 21–24, 101–06 (1995) (arguing that the dominant patriarchal ideology constructs "family" around heterosexual monogamous marriage, rendering as "deviant" mothers outside of that family form); DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 217–25 (1997) (challenging the "conservative vision" of single mothers, particularly of black, single mothers, as immoral and harmful and critiquing "myths about welfare and reproduction" that drove punitive welfare reform in the 1990s).

separated motherhood from marriage.[154] Family historians and social scientists countered the rhetoric of the crisis of "fatherless America" as harming children and driving America's most urgent social problems[155] with positive accounts of family diversity and calls for more inclusive social values reflecting support and respect for diverse families.[156]

Failure to Flourish signals a new baseline for and tenor of conversation about family form. To be sure, Huntington embraces values of diversity and pluralism and an "ecumenical" approach to family form, which does not insist on the marital family as the normative model.[157] Nonetheless, her book contains many passages about the advantages and better outcomes for children of a stable, marital, biological, two-parent family and the disadvantages and worse outcomes experienced by children in single parent and "complex family structures" that could readily be found in position papers and calls to action by many traditionalists groups concerned with shoring up marriage and intact, two-parent families for the sake of child well-being[158]—statements to which feminist and left-of-center scholars and advocates reacted.[159] For example, she asserts: "As much as liberals might

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154. *See, e.g.*, KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 16–19 (1997) (exploring the issues faced by unskilled single mothers earning wages below the poverty line); MELISSA LUDTKE, ON OUR OWN: UNMARRIED MOTHERHOOD IN AMERICA xi–xii (1997) (using the author's personal experiences as a single mother as an entry into examining the experiences of unmarried teen mothers and older, unwed mothers). Although the book was not published until 2005, the findings of Kathryn Edin's coauthored book with Maria Kefalas, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE (2005), influenced later welfare-reauthorization debates. *See* MCCLAIN, *supra* note 61, at 143–44 (noting Edin's congressional testimony).

155. DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 1 (1995).

156. *See* STEPHANIE COONTZ, THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES 3, 9 (1997) (breaking down negative misconceptions about family diversity); Stacey, *Father Fixation*, *supra* note 152, at 73 (arguing that "family diversity is here to stay" and pointing to evidence of positive outcomes for children reared by gay and lesbian parents).

157. *See* HUNTINGTON, *supra* note 36, at xix ("Accordingly, this book addresses relationships that go beyond the traditional nuclear family of a married mother and father living with their biological or adopted children.").

158. *Compare id.* at 31–34 (canvassing the "overwhelming evidence that children raised by single or cohabiting parents have worse outcomes than children raised by married, biological parents"), *with* THE MARRIAGE MOVEMENT, *supra* note 108, at 10–11 (summarizing social science research that "children do better, on average, when they are raised by their own two married parents" and that children raised in single-parent households are more likely to have a range of negative outcomes).

159. *See supra* text accompanying notes 152–56. Among those reactions, I include my own earlier criticism of the marriage movement and governmental marriage promotion:

> The marriage movement's repeated references to a "consensus" on the benefits of marriage and the harms of nonmarital family forms may illustrate a "feedback loop": a group of social scientists cite repeatedly to each other's work so that a certain set of claims is presented as an "uncontested" consensus, even if there is credible social science to the contrary.

MCCLAIN, *supra* note 61, at 128.

wish otherwise, there is mounting evidence that family structure is a causal factor, among others, affecting child outcomes."[160] Another striking parallel to earlier discourse about strengthening families is her frequent warnings that society will either "pay now or pay later" to help families and that "we are already paying for the costs associated with poorly functioning families."[161]

Once again, the intersection of the two sides of the marriage equality issue (highlighted by the Seventh Circuit oral argument) is notable. Huntington concludes: "[T]here is ample evidence that, *with the exception of families headed by same-sex couples*, children raised by two married, biological parents have better outcomes than children raised in other family structures."[162] Thus, as same-sex couples challenging state restrictions on marriage argue, and as judges conclude, there is a robust consensus that quality of parenting, not gender, is what matters for child outcomes.[163] And those couples do not attempt to dethrone marriage as the primary social institution for rearing children. To the contrary, taking a cue from Justice Anthony Kennedy, they argue that their children suffer harm, humiliation, and stigma where their parents' relationship is not dignified as a marriage.[164]

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160. HUNTINGTON, *supra* note 36, at 204.

161. *Id.* at xvii. On the appeal to "costs" in this earlier discourse, see Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339, 360 (1996) ("In the rhetoric of irresponsible reproduction, one charge common to all three targets described above—single mothers, welfare mothers, and teen mothers—is that such family forms are costly for children, for society, and for men's roles as fathers.").

162. HUNTINGTON, *supra* note 36, at 35 (emphasis added).

163. DeBoer v. Snyder, 973 F. Supp. 2d 757, 761 (E.D. Mich. 2014) (favorably quoting testimony that "quality of parenting" rather than "gender" is the key), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3608 (Jan. 16, 2015) (No. 14-574); *id.* at 771 ("[T]he overwhelming weight of the scientific evidence supports the 'no differences' viewpoint."). In reversing the federal district court, the Sixth Circuit majority opinion accepted the responsible procreation rationale as satisfying rational basis review for constitutionality, while observing that evidence (such as that presented at trial) about the capacity of "gay couples" to raise children supported the "policy argument" for extending marriage laws to such couples. DeBoer v. Snyder, 772 F.3d 388, 404–08 (6th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3608 (Jan. 16, 2015) (No. 14-574). By contrast, the dissent quoted *Baskin*'s sharp critique of the responsible procreation rationale as "so full of holes that it cannot be taken seriously." *Id.* at 430 (Daughtrey, J., dissenting) (quoting Baskin v. Bogan, 766 F.3d 648, 656 (7th Cir. 2014)) (internal quotation marks omitted). The dissent also concluded that the extensive trial record about child outcomes supported the district court's determination that "the amendment [barring marriage by same-sex couples and marriage recognition] is in no way related to the asserted state interest in ensuring an optimal environment for child-rearing." *Id.* at 424–27.

164. Specifically, Justice Kennedy's *Windsor* majority opinion. United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) ("[The Defense of Marriage Act] humiliates tens of thousands of children now being raised by same-sex couples."); *see also* Hamby v. Parnell, No. 3:14-CV-00089-TMB, 2014 WL 5089399, at *2 (D. Alaska Oct. 12, 2014) ("The Plaintiffs argue that the laws' effect stigmatizes same-sex couples and their children by relegating them to a 'second class status' . . . ."). Illustrative is a complaint filed shortly after *Windsor*, which cited the crucial language from Justice Kennedy's opinion. First Amended Complaint for Declaratory and Injunctive Relief at para. 10, Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014) (No. 1:13-CV-1861). As the Complaint alleges:

And a nearly unbroken stream of federal courts agree, including Judge Posner, as discussed above.

Will this exaltation of marriage for same-sex couples who are parents create a "new illegitimacy" for other pathways to parenthood and forms of family life?[165] Will the availability of marriage for same-sex couples lead to even more emphasis on the importance of two-parent families?

What is the new consensus about family form that should guide a flourishing family law? Might it end the "war over the family"? What is the place of marriage in that new consensus? Huntington emphasizes encouraging "long-term commitment" between parents in coparenting relationships, not encouraging marriage per se.[166] Marriage equality discourse emphasizes the wrongful exclusion of same-sex couples from "the common vocabulary of family life and belonging that other[s] [] may take for granted,"[167] a rhetoric that affirms rather than challenges the favored place of marriage as a setting for adult commitment and child rearing. As the Ninth Circuit recently put it, stressing the role of marriage not only in bringing, but in keeping, a couple together: "Raising children is hard; marriage supports same-sex couples in parenting their children, just as it does opposite-sex couples."[168]

In a significant turning point in the war over the family, David Blankenhorn, president of the Institute of American Values and a prominent leader of the marriage movement who publicly announced he now supported same-sex marriage, has joined with journalist and same-sex marriage proponent Jonathan Rauch to call for a "new conversation" about strengthening marriage that supports marriage for same-sex couples and a marriage opportunity agenda to address the growing marriage divide.[169] Is this a sound way to help foster strong, stable, and positive relationships that Huntington could support? Or is policy analyst Isabel Sawhill, a veteran of

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> [Plaintiffs] and their children are stigmatized and relegated to a second class status by being barred from marriage. The exclusion 'tells [same-sex] couples and all the world that their relationships are unworthy' of recognition. [*Windsor*] at 2694. And it 'humiliates the . . . children now being raised by same-sex couples' . . . . *Id.*

Id.

165. Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 389 (2012).

166. HUNTINGTON, *supra* note 36, at 177 ("Deciding that the state should encourage a long-term commitment between parents does not necessarily mean that the state should focus only on marriage.").

167. Latta v. Otter, No. 14-35420, 14-35421, 12-17668, 2014 WL 4977682, at *3 (9th Cir. Oct. 7, 2014) (quoting Plaintiffs' Memorandum in Opposition to Defendant Governor Otter's Motion for Summary Judgment at 1, Latta v. Otter, 19 F. Supp. 3d 1054 (D. Idaho 2014) (No. 1:13-cv-00482-CWD)) (internal quotation marks omitted).

168. *Id.* at *6.

169. Inst. for Am. Values, *A Call for a New Conversation on Marriage*, PROPOSITIONS, Winter 2013, at 1, 2–5, *available at* http://americanvalues.org/catalog/pdfs/2013-01.pdf, *archived at* http://perma.cc/6EZF-BH5E.

the 1990s welfare and "family values" debates and a leader in efforts to end teen and unplanned pregnancy, correct that the "genie is out of the bottle" with respect to the separation of marriage and parenthood, so that, rather than seeking to restore marriage as "the standard way to raise children," the aim should be "a new ethic of responsible parenthood"?[170] Naomi Cahn and June Carbone have also called for a "responsible parenthood" model, although they have observed that when people follow that model of investing in education and avoiding early pregnancy and parenthood, they tend to have children within marriage.[171]

If it is a fool's errand to try to reconnect marriage and parenthood because both limited economic prospects and changed social norms are at work (which government programs have not done much to alter), then perhaps the focus should be on the front end, or prevention: facilitating greater access to the most effective and much better contraception and instilling an ethic that means "not having a child before you and your partner really want one and have thought about how you will care for that child."[172] Or, as Blankenhorn counters, perhaps it is too soon to give up on marriage—which, rather than "disappearing, [is] fracturing along class lines"—and it may be more realistic to try to promote a responsible parenthood ethic with the assistance of the social institution of marriage than as simply a matter of individual responsibility?[173] Why not pair, Rauch argues, Sawhill's emphasis on effective contraception with improving access to marriage and strengthening a marriage culture?[174]

A valuable role that *Failure to Flourish* may play in this new landscape is to invite a holistic look at family formation and parenthood and the aims of a flourishing family law. The argument, made in marriage equality litigation, that marriage channels all those casual heterosexual relationships that result in accidental pregnancy and childbearing into stable, marital families is a fantasy not, as Posner observed, borne out in reality.[175] Nonetheless, the underlying social problem of unstable family circumstances that impact child well-being is real and warrants attention.

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170. Sawhill, *Beyond Marriage*, *supra* note 24.

171. *See* NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 170–89 (2010) (discussing the benefits of improved sex education and contraception access).

172. Sawhill, *Beyond Marriage*, *supra* note 24.

173. David Blankenhorn, *Don't Give Up on Marriage Now*, DESERET NEWS, Oct. 10, 2014, http://www.deseretnews.com/article/print/865612822/Dont-give-up-on-marriage-now.html, *archived at* http://perma.cc/C2B5-S4A3.

174. Jonathan Rauch, *Don't Give Up on Marriage Yet*, SOC. MOBILITY MEMOS, BROOKINGS INST. (Oct. 16, 2014, 1:50 PM), http://www.brookings.edu/blogs/social-mobility-memos/posts/2014/10/16-dont-give-up-on-marriage-rauch, *archived at* http://perma.cc/8L8L-35PG. For Huntington's qualified support for Sawhill's approach, see Huntington, *supra* note 54.

175. *See supra* notes 3–6 and accompanying text.

Huntington, like some other family law and feminist scholars, seeks to attend more to the plight of unmarried fathers and to encourage stable and positive coparenting relationships without necessarily aiming at marriage.[176] The vivid ethnographic stories of the lives and worldviews of the low-income fathers profiled by Kathryn Edin and Timothy J. Nelson in *Doing the Best I Can: Fatherhood in the Inner City* are inspiring such work.[177]

Given this concern over low-income fathers, it would be useful to know what lessons, if any, Huntington thinks that a flourishing family law might glean from the intense focus since the 1990s on using welfare funds as a tool to strengthen families by promoting "responsible fatherhood" as "integral to successful child rearing and the well-being of children."[178]

Those efforts target father absence and articulate the premise that a healthy start for a child requires the nurture and support of both parents. Just as Huntington urges that fathers matter for more than economic contributions, one recent White House report by the Obama Administration defined responsible fatherhood as "actively contributing to a child's healthy development, sharing economic responsibilities, and cooperating with a child's mother in addressing the full range of a child's and family's needs."[179] The George W. Bush Administration similarly declared that fathers have "emotional" as well as "financial commitments" and that "[d]ads play indispensable roles that cannot be measured in dollars and cents: nurturer, mentor, disciplinarian, moral instructor, and skills coach, among other roles."[180] Huntington acknowledges (in a footnote) that funding for healthy marriage and responsible fatherhood traces back to the Deficit Reduction Act of 2005.[181] However, there is a much longer history of governmental and

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176. HUNTINGTON, *supra* note 36, at xiv–xv, 190–92; *see also* Laurie S. Kohn, *Engaging Men as Fathers: The Courts, the Law, and Father-Absence in Low-Income Families*, 35 CARDOZO L. REV. 511, 513 (2013) (offering an inventory of the "barriers to father-presence for nonresident low-income court-involved men" and proposing ways the legal system could address those barriers). An earlier work attending to low-income fathers and supporting a model of fatherhood focused more on active parenting than financial support is NANCY E. DOWD, REDEFINING FATHERHOOD (2000).

177. KATHRYN EDIN & TIMOTHY J. NELSON, DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY (2013). On the influence of this book, see, for example, HUNTINGTON, *supra* note 36, at 190–92 (discussing the dynamic in nonmarital relationships); Kohn, *supra* note 176, at 522–23 (discussing the "light" the book sheds on relationships between unmarried parents). Nancy Dowd, who has long championed redefining fatherhood around caretaking rather than breadwinning, also finds Edin and Nelson's book inspiring in terms of fathers' engagement with their children. Remarks at Workshop on Theorizing the State at Emory University School of Law (Dec. 6, 2014).

178. CARMEN SOLOMON-FEARS, CONG. RESEARCH SERV., RL31025, FATHERHOOD INITIATIVES: CONNECTING FATHERS TO THEIR CHILDREN 1 (2014) (quoting Personal Responsibility and Work Opportunity Reconciliation Act of 1996, H.R. 3734, 104th Cong. § 101 (1996) (enacted)) (internal quotation marks omitted).

179. OBAMA ADMINISTRATION, PROMOTING RESPONSIBLE FATHERHOOD 2 (2012).

180. SOLOMON-FEARS, *supra* note 178, at 2 (quoting EXEC. OFFICE OF THE PRESIDENT, A BLUEPRINT FOR NEW BEGINNINGS: A RESPONSIBLE BUDGET FOR AMERICA'S PRIORITIES 75 (2001)).

181. HUNTINGTON, *supra* note 36, at 292 n.32.

nongovernmental efforts, at various levels, to encourage responsible fatherhood, and it would be useful to consider whether any lessons or best practices emerge from that experience.[182] For example, her call to focus not on marriage but on stable coparenting relationships has important precedents in debates about how best to encourage responsible fatherhood: through promoting marriage as the proper site of such fatherhood or through "strengthening families as they exist," including addressing education and economic barriers to healthy relationships, which will benefit adults and children even if such efforts do not lead to marriage.[183] This latter approach, which focused more on capacity building, resonates with Huntington's and certainly makes sense given what she calls challenges facing the "complex family structures" of families formed by unmarried parents.[184]

Underlying this issue, however, are questions of class and power. In *Marriage Markets: How Inequality is Remaking the American Family*, June Carbone and Naomi Cahn observe that part of what has made marriages "healthier" at the top of the income spectrum is the fact that high-income men outnumber the high-income women the men view as desirable partners.[185] This creates a better relationship market for the most successful women while the men, who invest more time and money in their children than the fathers of a half century ago, also enjoy greater rights at divorce, including shared parenting.[186] The combination of the two encourages marriage, deters divorce, and promotes family stability.

Carbone and Cahn argue that, in contrast, women find men without jobs to be poor candidates for marriage; in communities in which the women greatly outnumber the men who make good partners, relationship quality, married or unmarried, suffers.[187] The women, who increasingly outearn the men and still do more for the children, gain greater relationship power the more that they control access to children.[188] Carbone and Cahn object that most of the efforts to promote paternal involvement come at the expense of

182. *See* McClain, *supra* note 161, at 389 & n.209 (observing the emergence of "a new 'social movement' . . . calling for 'responsible fatherhood' and diagnosing 'fatherlessness' as a central, if not the 'most urgent,' social problem driving an array of other social ills" and listing associated organizations, including the National Fatherhood Initiative, National Institute for Responsible Fatherhood, Family Revitalization, and Promise Keepers).

183. MCCLAIN, *supra* note 61, at 141 (quoting Ronald Mincy, *What About Black Fathers?*, AM. PROSPECT, Apr. 7, 2002, http://prospect.org/article/what-about-black-fathers, *archived at* http://perma.cc/5LQJ-YFGF) (internal quotation marks omitted).

184. HUNTINGTON, *supra* note 36, at xviii.

185. JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 62–63 (2014).

186. *Id.* at 118.

187. *See id.* at 72–73 (summarizing sociological research that shows a decline in relationship quality among unmarried couples when male-to-female ratios fall).

188. *See id.* at 130–31 (finding that an unmarried father's "continuing relationship with his children depends on how he manages the relationship with the mother" and the mother's "willingness to allow access" depends on economic and noneconomic factors).

women's hard fought autonomy.[189] "Repairing" relationships is unlikely to work in the face of a mismatch between men and women.

E. Marriage Education: Worth a Second Look?

Like Huntington and some other family law and feminist scholars, I have been skeptical about governmental promotion of marriage and responsible fatherhood, particularly given some of the gender role assumptions of marriage and fatherhood agendas and (until recently) the exclusion of same-sex couples.[190] When the federal government dedicated funds to marriage *promotion*, I argued that "[f]acilitating the relationship decisions of persons considering marriage, and teaching them skills that may contribute to a successful marriage, differs from trying to persuade persons not seeking to marry to do so."[191]

Nonetheless, if one takes to heart *Failure to Flourish*'s call for a more preventive family law that does more at the front end to promote strong, stable, and positive relationships, perhaps efforts at relationship education and marriage education deserve another look as a means of helping both adult–adult and parent–child relationships. In 2006, the Deficit Reduction Act of 2005 opened up dedicated streams of funding for such efforts.[192] By now, many states have marriage commissions and initiatives and produce educational materials, and the federal government funds a National Healthy Marriage Resource Center.[193] The marriage movement also championed such education, both through the efforts of faith communities and through government subsidies, as a way to improve marital quality and reduce divorce.[194]

A basic premise of such education is that the skills and knowledge necessary for a healthy relationship can be taught and that, as a Florida booklet for marrying couples puts it: "Once relationship skills are learned, they are generalized to parenting, the workplace, schools, neighborhoods, and civic relationships."[195] Pertinent to Huntington's proposed focus on the cycle of intimacy, which recognizes the inevitability of conflict, these materials typically stress that all relationships have conflicts; how people

189. *Id.* at 133.

190. MCCLAIN, *supra* note 61, at 117–19.

191. *Id.* at 130.

192. *See supra* note 181.

193. NAT'L HEALTHY MARRIAGE RESOURCE CENTER, http://www.healthymarriageinfo.org/index.aspx, *archived at* http://perma.cc/3CJJ-6PRP.

194. THE MARRIAGE MOVEMENT, *supra* note 108, at 20–23.

195. FAMILY LAW SECTION OF THE FLA. BAR, FAMILY LAW HANDBOOK 1, *available at* http://www.flclerks.com/PDF/2000_2001_pdfs/7-99_VERSION_Family_Law_Handbook.pdf, *archived at* http://perma.cc/G9ZW-S2MR; *see also* Diane Sollee, *Where Are We Going?*, *in* MARRIAGE: JUST A PIECE OF PAPER? 372, 376, 381 (Katherine Anderson et al. eds., 2002) (urging that we think of marriage as a "skill-based relationship" and that a "skills set" can help people to keep marriages together).

handle conflict in a relationship distinguishes healthy from unhealthy relationships.[196] At first, some of these materials were laughable (whether or not intentionally so),[197] but by now states are producing booklets written by respected experts in sociology, family studies, and family and marriage education and counseling.[198] Indeed, Carbone and Cahn conclude that "effective" marriage education that "encourage[s] students to look for the warning signs of domestic violence, learn how to keep the lines of communication open, and insist on mutual respect" might contribute to "relationship stability."[199] It would be instructive to see how Huntington might grade these materials measured against her vision for what the "pervasive" state should be doing. Are these materials overly intrusive on a couple's relationship, which is none of government's business? Or simply ineffectual? Or might they be, as one of my married Family Law students put it, "pure gold," when it comes to preparing young people for the challenges of married life?

IV. Dispute-Resolution Family Law: Islands in a Sea of Dysfunction or a Velvet Revolution?

Failure to Flourish views dispute-resolution family law as fundamentally negative. This is a baffling diagnosis at least with respect to the family dissolution process where divorcing parents have minor children. Huntington argues that dispute-resolution family law uses an inapt adversary model, does little to repair relationships to foster coparenting, and that lawyers practicing family law are particularly destructive of relationships.[200] Far more persuasive is Jana Singer's observation that "[o]ver the past two decades, there has been a paradigm shift in the way the legal system handles most family disputes—particularly disputes involving children"—from a "law-oriented and judge-focused adversary model" to a "more collaborative, interdisciplinary, and forward-looking family dispute resolution regime."[201]

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196. *See, e.g.*, Sollee, *supra* note 195, at 377 ("The most important skill set is how to handle disagreement, since all couples fight.").

197. My personal favorite is a video, *The Marriage News You Can Use*, in which the fictional news station C-Wed featured reporters giving marriage advice. Video tape: The Marriage News You Can Use (Utah Department of Workforce Services 2002) (on file with author).

198. *See, e.g.*, OFFICE OF FAMILY SUPPORT, LA. DEP'T OF SOC. SERVS., MARRIAGE MATTERS!: A GUIDE FOR LOUISIANA COUPLES, *available at* http://www.dss.state.la.us/assets/docs/searchable/OFS/GuideMarriageChild/MarriageMatters.pdf, *archived at* http://perma.cc/RU5F-3TKP. Theodora Ooms was the senior consultant on the project that produced MARRIAGE MATTERS!, and the coauthors were Ooms, Scott Stanley, Paul Amato, and Barbara Markey. *Id.* at 2.

199. CARBONE & CAHN, *supra* note 185, at 180.

200. HUNTINGTON, *supra* note 36, at 83–88.

201. Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 363 (2009).

Singer identifies several "related components" of this paradigm shift, or what she calls a "velvet revolution."[202] Some of those components feature in Huntington's book as exemplary of the direction in which Huntington would like dispute-resolution family law to move.[203] Family law scholars and practitioners are likely to view these components as far enough established as to be institutionalized rather than "a few narrow reforms."[204]

Huntington acknowledges (in a footnote) that Singer argues that these reforms "are more comprehensive"[205] but does not explain why she implicitly resists Singer's evaluation. Some of the changes that Singer details, such as the shift to alternative dispute resolution (ADR), reflect trends that began forty or fifty years ago.[206] Pertinent to Huntington's concerns about post-dissolution cooperative parenting, at the Pound Conference—a "defining event" in the ADR movement held in April 1976—participants stressed mediation as "better for litigants who had continuing relationships after the trial was over because it emphasized their common interests rather than those that divided them."[207] Other developments in this paradigm shift, such as court-affiliated parent education programs, date back to the 1990s and have taken hold more strongly since then.[208] Singer also makes the intriguing observation that changes in substantive family law toward this new paradigm have facilitated changes in that direction in dispute-resolution family law and vice versa.[209] Directly relevant to Huntington's focus on the negative impact of both types of family law on children, Singer argues that the shift from the sole-custody paradigm to an "unmediated best-interests" of the child standard has facilitated a shift "from adversarial to nonadversarial resolution of divorce-related parenting disputes," even as "the shift from adversarial to nonadversarial dispute resolution" has affected the legal norms governing custody cases, with a shift from custody judgments to parenting plans.[210]

It is illuminating—and illustrative of the perceived link between strong, healthy families and a strong nation—that nearly all of the elements Singer

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202. *Id.* For elaboration of these components, see *infra* notes 215–48 and accompanying text.

203. *See* HUNTINGTON, *supra* note 36, at xvi (listing several reforms that embody principles advocated by Huntington, including laws allowing joint custody, the "widespread use of mediation," and that "some lawyers already adopt a more conciliatory, cooperative approach to family conflicts").

204. *Contra id.* (arguing that these "few narrow reforms" are still "haphazard, unconnected, and sometimes actively challenged").

205. *Id.* at 276 n.135.

206. *See* ANDREW L. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 50 (2004).

207. *Id.*

208. *Id.* at 68–69.

209. Jana B. Singer, *Bargaining in the Shadow of the Best-Interests Standard: The Close Connection Between Substance and Process in Resolving Divorce-Related Parenting Disputes*, 77 LAW & CONTEMP. PROBS. 177, 177–78 (2014).

210. *Id.*

identifies as part of the paradigm shift featured in the recommendations for a "family-friendly court" made in a 1996 report by the U.S. Commission on Child and Family Welfare, *Parenting Our Children: In the Best Interests of the Nation*.[211] The report recommends, for example, changing the nomenclature away from custody and visitation to language of parenting time and responsibility, requiring parents to draft parenting plans, involving mediation in contested custody cases, requiring parent education, and improving access to the courts for unmarried parents.[212] Notably, similar to Huntington's call for an assessment of the impact of law on relationships, the Commission recommends: "Governments at all levels should evaluate laws and policies with respect to their effects on families."[213] The report also offers many recommendations about the vital role of communities in empowering families, both with respect to family formation, parenting, and mentoring, as well as to "support the development and public awareness of effective community-based, non-court, dispute resolution, and family support programs that can help family members resolve disputes and address the consequences of divorce."[214]

Many of the reforms recommended in *Parenting Our Children* are now part of the paradigm shift Singer detects in family law. First is "a profound skepticism about the value of traditional adversary procedures" as "ill suited for resolving disputes involving children."[215] Influenced by social science findings about the critical role parents' behavior during and after separation plays on children's adjustment, "academics and court reformers have argued that family courts should abandon the adversary paradigm in favor of approaches that help parents manage their conflict and encourage them to develop positive postdivorce coparenting relationships."[216] Moreover, family courts have "embraced this insight" by adopting "an array of nonadversary dispute resolution mechanisms designed to avoid adjudication of family cases."[217]

The paradigm shift is also evident in the practice of family lawyers, who, in increasing numbers, have "rejected the adversary paradigm, in favor of a collaborative law model."[218] In the early 1990s, for example, the American Academy of Matrimonial Lawyers (AAML) adopted standards of conduct for divorce lawyers, *Bounds of Advocacy*,[219] out of a conviction that there

211. U.S. COMM'N ON CHILD & FAMILY WELFARE, PARENTING OUR CHILDREN: IN THE BEST INTERESTS OF THE NATION 3–5 (1996) [hereinafter PARENTING OUR CHILDREN].

212. *Id.* at 29–43.

213. *Id.* at 62.

214. *Id.* at 52–56.

215. Singer, *supra* note 201, at 363.

216. *Id.*

217. *Id.* at 364.

218. *Id.*

219. AM. ACAD. OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY (1991).

was a tension between the zealous advocacy required by existing professional responsibility rules and the realities of divorce practice and that competent representation could include a problem-solving approach mindful of the client's children and family.[220] The aspirational guidelines the AAML adopted are very much in keeping with Huntington's vision. They recognize that divorce presents human and emotional problems as well as legal problems and recommend that attorneys advise their clients about the economic and emotional impact of divorce and explore "the possibility or advisability of reconciliation."[221]

Recognizing that a cooperative resolution of matrimonial disputes is "desirable," an attorney should consider ADR methods;[222] and, if representing a parent, "should consider the welfare of, and seek to minimize the adverse impact of the divorce, on minor children."[223] In *Divorce Lawyers at Work*, Lynn Mather and her colleagues found that divorce attorneys understand advocacy by reference to a model of the "reasonable lawyer," which, although it differs by community of practice, generally finds the zealous advocacy model inapt for family law disputes.[224] Their research confirms prior work finding that "divorce lawyers dampen legal conflict far more than they exacerbate it and generally try to avoid adversarial actions."[225] By contrast, Huntington relies on one study finding "that family-law practitioners are far more likely to engage in relationship-destroying, adversarial behavior than lawyers in any other type of practice."[226] That study, however, is problematic both for its small sample size and ambiguity about how it defined family lawyers.[227] Huntington's critique of family lawyers misses the significance of context. If a family lawyer in a high-stakes divorce, with lots of assets or contested custody and lots of resources with which to wage battle, faces an opponent with a winner-take-all or zero-sum mentality or is negotiating with a very aggressive opponent, then that lawyer

220. LYNN MATHER ET AL., DIVORCE LAWYERS AT WORK 113 (2001).

221. AM. ACAD. OF MATRIMONIAL LAWYERS, *supra* note 219, R. 2.12.

222. *Id.* R. 1.4 cmt.

223. AM. ACAD. OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY R. 6.1 (2000).

224. MATHER ET AL., *supra* note 220, at 111.

225. *Id.* at 114.

226. HUNTINGTON, *supra* note 36, at 88.

227. E-mail from Lynn Mather, Professor, SUNY Buffalo Law School, to author (Sept. 20, 2014, 12:28 EST) (on file with author). Lynn Mather reviewed the 2006 study on which Huntington relies, Andrea Kupfer Schneider and Nancy Mills, *What Family Lawyers Are Really Doing When They Negotiate*, 44 FAM. CT. REV. 612 (2006), and observed certain weaknesses in the study. First, the sample sizes are too small; out of 578 attorneys surveyed, only 10.6% (or 61) were "family lawyers," and only 14.8% (or 9) of those family lawyers were "unethically adverse." *Id.* at 616 tbl.4; *see also* E-mail from Lynn Mather, *supra*. Second, the study does not indicate clearly how it defines family lawyers, so that generalist lawyers handling family law cases, who are more likely to get caught up in the emotions of their client and behave adversarially, may be skewing the results. E-mail from Lynn Mather, *supra*.

will "play the game," but it may not be the game the lawyer prefers.[228] Apart from such high-stakes cases, family lawyers practice mindful of the fact that the parties will be dealing with each other on an ongoing basis concerning children.[229]

The second element, Singer observes, is "the belief that most family disputes are not discrete legal events, but ongoing social and emotional processes."[230] When family disputes are thus "recharacterized," they "call *not* for zealous legal approaches, but for interventions that are collaborative, holistic, and interdisciplinary because these are the types of interventions most likely to address the families [sic] underlying dysfunction and emotional needs."[231]

The third element in the paradigm shift is a "reformulation of the goal of legal intervention in the family" from a "backward-looking process, designed primarily to assign blame and allocate rights" to a paradigm in which a judge "assume[s] the forward-looking task of supervising a process of family reorganization."[232] Indeed, family law teachers readily will recognize that the goal of family "reorganization" is pervasive in discussions of the tasks that legal and nonlegal professionals face in helping "families in transition," including preparing divorcing or never-married parents for coparenting.[233] The slogan, "'parents are forever, even if marriages are not,'"[234] captures this idea and stands in sharp contrast to the "clean break" idea that informs other aspects of divorce.[235] This forward-looking, reorganizing approach applies not only to divorcing couples with children but also to never married parents. This development seems particularly resonant with Huntington's call for a flourishing state to help foster strong, stable, and positive relationships and to repair relationships so that they can help parents to coparent and children to flourish. Therapeutic jurisprudence (a movement praised by Huntington) "embodies this forward-looking

228. MATHER ET AL., *supra* note 220, at 128–30 (describing how family lawyers may prefer a cooperative negotiation style, but instead adopt an adversarial style in response to an adversarial opponent).

229. Lynn Mather & Craig A. McEwen, *Client Grievances and Lawyer Conduct: The Challenges of Divorce Practice*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 63, 79 (Leslie C. Levin & Lynn Mather eds., 2012) (finding that many family law specialists "held strong views, consistent with the AAML, that the interests of children should temper zealous advocacy on behalf of a client").

230. Singer, *supra* note 201, at 364.

231. *Id.*

232. *Id.*

233. *See, e.g.*, Rebecca Love Kourlis et al., *IAALS' Honoring Families Initiative: Courts and Communities Helping Families in Transition Arising from Separation or Divorce*, 51 FAM. CT. REV. 351, 353, 370 (2013) (explaining the risks involved during transitional times when families are reorganizing after separation or divorce).

234. SCHEPARD, *supra* note 206, at 45 & 193 n.149 (quoting a sign on a wall of a Los Angeles mediation program office).

235. Singer, *supra* note 201, at 366.

orientation" so that "legal intervention in the family strives not merely to resolve disputes, but to improve the material and psychological well-being of individuals and families in conflict."[236]

The fourth element follows from the third: "[T]o achieve these therapeutic goals, family courts have adopted systems that deemphasize third-party dispute resolution in favor of capacity-building processes that seek to empower families to resolve their own conflicts."[237] This focus on capacity building seems akin to Huntington's argument, in the child-welfare context, to focus on the strengths that families have and to empower them to solve their problems.[238]

Many developments in family law and family courts illustrate this emphasis on helping family members resolve their own conflicts in a way that will foster child well-being and reduce hostility between parents. These programs may not explicitly use the language of "repairing" relationships but seem in keeping with a flourishing family law's aim of facilitating cooperative coparenting relationships between people who are no longer intimate partners. It is puzzling that, although Huntington acknowledges that some of these programs exist, her book does not suggest the extent to which these programs are not simply islands of reform but institutionalized as a new approach to family conflict.

Consider parent education programs. A recent inventory of parent education in the family courts dated the "first documented parent education programs" to the late 1970s and early 1980s, with the first court-mandated program in 1986.[239] Parent education programs "proliferated rapidly in the 1990s"; by 1998, a national survey reported "that 44 states had state or local laws authorizing courts to require attendance at a program."[240] Today, with such programs "operating in 46 states" and popular with courts and users, parent education is institutionalized and part of the present-day landscape of dispute-resolution family law.[241]

A primary reason for requiring parent education plans is to ameliorate the effects of parental conflict on children.[242] *Parenting Our Children*, for example, quoted Judith Wallerstein: "Conflict can destroy . . . [.] What protects the child is a civil, rational, responsible relationship between [the]

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236. *Id.* at 364.

237. *Id.*

238. HUNTINGTON, *supra* note 36, at 131–37 (describing family group conferences as premised on the principle that "families have strengths and are capable of changing the problems in their lives").

239. Peter Salem et al., *Taking Stock of Parent Education in the Family Courts: Envisioning a Public Health Approach*, 51 FAM. CT. REV. 131, 132 (2013).

240. *Id.*

241. *Id.* at 133.

242. *Id.* at 135.

parents and realistic planning that is sensitive to the [needs of the] growing child."[243]

The pervasiveness of parent education programs does not, admittedly, guarantee that such programs actually are lessening parental conflict or fostering healthy relationships.[244] Some literature on parent education explicitly embraces a public health or ecological model, speaking of the role parent education can play in changing some of the most important risk and protective factors for children from divorce, since high levels of parental conflict and a "poor co-parenting relationship" are among those factors.[245] The focus on educating parents about risk and protective factors suggests an ecological approach.

Finally, the "fifth component of the paradigm shift is an increased emphasis on predispute planning and preventive law."[246] This component seems particularly in keeping with Huntington's critique of family law for being too focused on the back end, when a family is in crisis, rather than on preventative and facilitative measures.[247] Parenting plans, long proposed by the AAML and more recently by the American Law Institute, have this future-directed, dispute-prevention focus, including "a mechanism for periodic review or a process for resolving future disagreements" by means, ideally, that do not involve court intervention.[248]

Related developments in family law that Huntington views more as a hopeful sign than as a significant shift are the move away from the language of custody and visitation to the language of parenting responsibility and parenting time and the shift from the sole custody model to shared parenting.[249] Proponents of such changes argued that the changes would "have a positive impact on parental cooperation and the well-being of children."[250]

As Singer notes, this paradigm shift brings with it some concerns and challenges relevant to Huntington's reparative model. Consider shared parenting. Context and class matter in assessing the place and impact of this norm in family law. Carbone and Cahn argue that what they call the "upper third," married, college-educated parents, follow a new marital script in which "[m]en are expected to play a larger role in their children's lives, and while women are freer to leave unhappy relationships, they no longer control access to the child in the process of doing so," given the legal regime favoring

243. PARENTING OUR CHILDREN, *supra* note 211, at 32 (quoting Judith Wallerstein).
244. Salem et al., *supra* note 239, at 135–36.
245. *Id.* at 139–40.
246. Singer, *supra* note 201, at 365.
247. *See supra* notes 75–78 and accompanying text.
248. *Id.* at 364–65.
249. HUNTINGTON, *supra* note 36, at 124–26, 130–31.
250. PARENTING OUR CHILDREN, *supra* note 211, at 30.

shared parenting.[251] But what of unmarried parents or parents in an unstable marriage? Feminist readers of Huntington might fear that in a world of flourishing family law, a pervasive state encouraging coparenting will, in effect, force mothers who do not want to deal with the biological fathers of their children to deal with them as legal coparents and will not yield much by way of positive benefits to the children, while limiting such women's ability to choose a man who has taken responsibility for the child to be the legal father.[252]

Another concern is whether, in the case of children born to young people who "drift" into parenthood and lack a stable relationship, the goal of cementing a long-term, coparenting relationship is realistic. Huntington herself acknowledges that factors like "family instability and multipartner fertility make it harder for parents and children to maintain strong, stable, positive relationships."[253] Selectivity in picking "the right partner" contributes, Cahn and Carbone argue, to relationship stability; what can the "pervasive state" do to address the problem that "many intimate relationships today are characterized by 'quick entrees, partners gathering little evidence about trustworthiness, limited interdependence, and an emphasis on partners meeting specific immediate needs'"?[254] Is "parallel parenting," in which parents each rear a child in appropriate ways and do not undermine each other, rather than a model of parents actively communicating and sharing responsibility for major decisions, a better aim?[255] Certainly, parallel parenting may lead to cooperative parenting, but it may not.[256] But it is not clear "repair" is the operative concept.

In sum, Singer seems to have the more persuasive argument that a paradigm shift has occurred. Undeniably, there is a shortfall between the normative commitments to a new paradigm and practical realities on the ground. On the one hand, many innovative programs are in place in family courts, in communities, and in family law practice that have moved from an adversarial paradigm to a problem-solving or collaborative model. On the other hand, material constraints like budget cuts threaten such programs and overcrowded dockets also tax the court system. Moreover, the rise of pro se representation means more people will not have legal representation.[257] But that does not mean a new normative paradigm is needed. Huntington's

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251. CARBONE & CAHN, *supra* note 185, at 126–27.

252. *Id.* at 136–40 (discussing approaches to the marital presumption and pointing out how some approaches control women and impinge on their decision-making authority).

253. HUNTINGTON, *supra* note 36, at 156.

254. CARBONE & CAHN, *supra* note 185, at 180 (quoting Linda M. Burton et al., *The Role of Trust in Low-Income Mothers' Intimate Unions*, 71 J. MARRIAGE & FAM. 1107, 1122 (2009)).

255. SCHEPARD, *supra* note 206, at 35–36, 101–02.

256. *Id.*

257. For a sobering account of the potential causes and impact of the rise in pro se representation, see Kourlis et al., *supra* note 233, at 357.

positive vision for flourishing family law fits more or less comfortably into shifts already under way. As one scholar recently concluded, "the challenge fundamentally is one of translation" so that the benefits of the family law revolution are more widely available, particularly to the "high proportion" of participants in family court who lack an attorney or have "limited to modest resources."[258]

V. Conclusion

In this Review, I have argued that it is a propitious time to consider whether there is a way forward in the war over the family. I have situated *Failure to Flourish* within the context both of previous calls to strengthen families as well as two present-day conversations about marriage, family law, and equality that too often proceed parallel to, but independent of, each other. Through her invitation to focus on why family relationships matter and the conditions under which children in particular flourish, Huntington, a "village builder," nonetheless finds some common ground with "traditionalists." Her arguments about how to deploy the pervasive state—and family law—to foster flourishing *relationships* are a useful complement to other theories of the state, such as Fineman's vulnerability theory, focused on the role of societal *institutions* in providing resources and building resilience and of the state in bringing into being and maintaining those institutions.[259] Moving forward, both the relational and institutional focus are vital and, in a sense, are another way to think about the channeling function of law in creating and supporting social institutions that allow realization of important goods or ends.[260]

I have disagreed with parts of Huntington's critique of "negative" family law, countering that, at least with respect to dispute resolution family law in the context of family dissolution involving minor children, there is a concerted shift toward reducing "war" between family members to make peaceful legal proceedings and coparenting possible. Nonetheless, in my view, most of her positive agenda, from (as Sawhill proposes) encouraging young people to delay childbearing and parenting until they are ready and capable, to supporting parents in their "critical work" of child development, to attending to the environments in which families live, is sound and unobjectionable. It is similar to many progressive calls for a new family agenda. I support a marriage plus agenda that declines to move completely

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258. Deborah Cantrell, *The Role of Equipoise in Family Law*, 14 J.L. & FAM. STUD. 63, 64–65, 96 (2012).

259. Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, *in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 13, 20–26 (Martha Albertson Fineman & Anna Grear eds., 2013).

260. *See id.* at 25 ("The state is always at least a residual actor in the formation and functioning of society and should accept some responsibility in regard to the effects and operation of those institutions it brings into being and helps to maintain.").

"beyond marriage" but instead supports marriage while nurturing other family and relationship forms.[261] Perhaps *Failure to Flourish* will invite conversation about why, with so many decades of calls not just to talk about family values but to implement policies that "value families," there is still such a shortfall and how it may be possible to better realize those values.

261. *See* MCCLAIN, *supra* note 61, at 191–219 (arguing for a model that supports many different kinds of familial relationships).

Notes

At Sea, Anything Goes? Don't Let Your Copyrights Sail Away, Sail Away, Sail Away*

I. Introduction

The cruise ship industry is big business for America. In 2013, the cruise ship industry contributed approximately $44.1 billion in gross output to the U.S. economy.[1] More comprehensibly, that figure reflects $20.1 billion of direct spending by cruise lines, their crew members, and their passengers.[2] Much has already been written about the safety concerns of cruise ship passengers[3] and the largely unregulated toll these floating cities take on the environment.[4] One important harm, however, seems to be missing from the list of evils: copyright piracy on the high seas.

With nearly ten million passengers embarking on cruise ships from U.S. ports each year,[5] cruise ships work hard to keep passengers—and their wallets—engaged.[6] Onboard entertainment options usually include a

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* I am especially grateful to Professor Oren Bracha for his careful guidance in organizing this Note. I would also like to acknowledge Professor Linda Mullenix for her help navigating the treacherous waters of cruise ship litigation. Thank you also to the editors of the *Texas Law Review*—especially Katie Kinsey—for their suggestions and contributions. Above all, I would like to thank Joel Henderson for his boundless love and encouragement.

1. BUS. RESEARCH & ECON. ADVISORS, THE CONTRIBUTION OF THE NORTH AMERICAN CRUISE INDUSTRY TO THE U.S. ECONOMY IN 2013, at 10 (2014) [hereinafter 2013 CRUISE INDUSTRY CONTRIBUTIONS], *available at* http://www.cruising.org/sites/default/files/pressroom/US-Economic-Impact-Study-2013Final_20140909.pdf, *archived at* http://perma.cc/FQB9-F573.

2. *Id.* at 8. Direct spending by cruise lines includes "expenditures for headquarters operations, food and beverages provided onboard cruise ships and business services such as advertising and marketing." *Id.* Direct spending by crew members and passengers includes "a variety of goods and services including clothing, shore excursions and lodging as part of their cruise vacation or as part of a pre- or post-cruise stay." *Id.*

3. *See, e.g.*, Sarah J. Tomlinson, Comment, *Smooth Sailing? Navigating the Sea of Law Applicable to the Cruise Line Industry*, 14 VILL. SPORTS & ENT. L.J. 127, 131–32 (2007) (describing the body of law governing cruise ships on the high seas and suggesting measures the U.S. government could take to improve passenger safety).

4. *See, e.g.*, Asia N. Wright, Note, *Beyond the Sea and* Spector*: Reconciling Port and Flag State Control Over Cruise Ship Onboard Environmental Procedures and Policies*, 18 DUKE ENVTL. L. & POL'Y F. 215, 217 (2007) (reviewing the history of cruise ship pollution and sketching the environmental regulations that impact cruise ships).

5. 2013 CRUISE INDUSTRY CONTRIBUTIONS, *supra* note 1, at 7 tbl.ES-3.

6. One career cruise line executive estimated onboard revenue accounted for 30% of cruise line revenue. Fran Golden, *Why Do Cruise Lines Do the Things They Do?*, TRAVELMARKET REP.

casino, bars and lounges, restaurants, spa treatments, theme parties, and production shows.[7] Two common species of production shows are the Broadway-style revue and the pop music show.[8] In both formats, the ship's resident cast of hardworking dancers and singers[9] perform music with popular appeal, likely copyrighted works previously published within the United States. Familiar, popular music is arguably a vital factor in crafting these entertainment options. After all, it stands to reason that if passengers skip the show and retire to their staterooms, the ship's revenue stream retires for the night as well.

If these performances were taking place on land within the United States, U.S. copyright law would clearly require a license for any public performance of a copyrighted work.[10] Once the ship has sailed more than twelve nautical miles from the shore, however, the ship has crossed over into the high seas—the nautical equivalent of the proverbial no-man's land.[11] Presumably wishing to challenge such inequitable treatment of copyrighted works on land and at sea, the copyright holders of the musical *Grease* brought suit against several cruise lines for infringement of their work.[12] The cruise lines responded with a straightforward defense: the Copyright Act has no extraterritorial effect and thus could not reach alleged infringements on the high seas.[13]

Given the increasing globalization of world economies,[14] should this still be the case? Should cruise ships continue to be allowed to willfully infringe upon the copyrights of protected works simply because they transport their largely American audiences far enough away from U.S. shores? The current situation is, at least, troubling. This Note offers a

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(Feb. 2, 2012), http://www.travelmarketreport.com/tmrarticledisplay?aid=6861, *archived at* http://perma.cc/739X-2EH8.

7. *E.g.*, *Onboard Activities*, CARNIVAL, http://www.carnival.com/onboard.aspx, *archived at* http://perma.cc/MQS4-4WJD; *Onboard Experience*, NORWEGIAN CRUISE LINE, http://www.ncl.com/freestyle-cruise/whats-onboard, *archived at* http://perma.cc/7NY-H3SZ.

8. *See, e.g.*, *What's On Board?*, NORWEGIAN CRUISE LINE, http://www.ncl.com/cruise-ship/spirit/onboard/entertainment, *archived at* http://perma.cc/5UC8-FJK9 (listing *On Broadway*, a Broadway revue, and *Soul Rockin' Nights*, a rock-and-roll show, among a ship's entertainment options).

9. These resident performers are often recruited through auditions in New York City. *See, e.g.*, *Norwegian Cruise Line – 2015 Open Dance Call*, DARYL EISENBERG CASTING, http://www.decasting.com/cruise, *archived at* http://perma.cc/SXN4-TKH2 (seeking dancers for an open audition call in New York City).

10. *See infra* subpart II(B).

11. *See infra* notes 61–63 and accompanying text.

12. *See infra* Part III.

13. *See infra* note 96 and accompanying text.

14. *Cf.* Gregory Swank, Comment, *Extending the Copyright Act Abroad: The Need for Courts to Reevaluate the Predicate-Act Doctrine*, 23 DEPAUL J. ART TECH. & INTELL. PROP. L. 237, 244 (2012) ("As the marketplace becomes more international, the ability to exploit copyrighted material abroad becomes much easier.").

possible solution, one that stems from a little known exception to the extraterritorial limitations of U.S. copyright—the predicate-act doctrine.[15] In Part II, I begin with a brief explanation of relevant U.S. copyright and licensing provisions, highlighting the unique treatment of musical theater works. In Part III, I recount the only attempt at litigating the issue of copyrights on the high seas in U.S. courts, *Jacobs v. Carnival Corp.*[16] In Part IV, I apply the predicate-act doctrine to the facts of *Jacobs* in hopes of finding a remedy for the injured copyright holders. With this solution in mind, I urge similarly situated copyright holders to raise their objections and judges and legislators to respond with tighter regulation. The cruise ship industry seems to be a continuous series of inequitable loopholes where profits can be exploited with little to no oversight and without regard to injury. The time has come to draw the high-water mark for such unjust practices.

II. Copyright and Licensing of Musical Theater Works

A. The Copyright Act

U.S. copyright holders enjoy certain exclusive rights.[17] Article I of the U.S. Constitution charges Congress to regulate and protect these rights.[18] Two such rights relevant to this Note are the right of public performance[19] and the right to prepare derivative works.[20] Both of these rights must be understood as terms of art that have been defined within the Copyright Act. First, a public performance, contrary to intuition, is determined according to the audience gathered to view the performance rather than in reference to any particular locale: "To perform or display a work 'publicly' means [] to perform or display it in a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[21] Second, a derivative work not only expressly includes a "musical arrangement" but also contemplates "any other form in which a work may be recast, transformed, or adapted."[22] Copyright owners generally enjoy these exclusive rights for a term of the author's life plus an additional seventy years.[23]

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15. *See infra* Part IV.
16. No. 06 Civ. 0606(DAB), 2009 WL 856637 (S.D.N.Y. Mar. 25, 2009).
17. 17 U.S.C. § 106 (2012).
18. U.S. CONST. art. 1, § 8.
19. 17 U.S.C. § 106(4).
20. *Id.* § 106(2).
21. *Id.* § 101. Certain transmissions may qualify as public performances as well. *Id.*
22. *Id.*
23. *Id.* § 302(a).

The Copyright Act affords copyright owners various means to enforce these rights. Infringement broadly encompasses "[a]nyone who violates any of the exclusive rights of the copyright owner."[24] Infringers could face liability in both civil actions[25] and criminal prosecution.[26] Remedies include temporary and final injunctions,[27] seizure and destruction of infringing materials,[28] and monetary damages.[29] A copyright owner may elect to pursue either actual damages or statutory damages.[30]

If an owner opts for statutory damages, damages are awarded upon the basis of each infringed work rather than for each infringing act.[31] Under current law, however, if one infringing act draws from multiple independent copyrights, the statutory damage award can be multiplied to reflect the number of independent copyrights.[32] For each work infringed, the court is given discretion to award between $750 and $30,000.[33] If the copyright owner proves the infringer acted willfully, that ceiling is lifted to $150,000.[34] Although the Copyright Act does not define what constitutes willful infringement, it is generally understood to mean acting "with knowledge that the defendant's conduct constitutes copyright infringement."[35] Moreover, the Second Circuit—highly regarded for its copyright jurisprudence[36]—broadens willful infringement to include a reckless disregard for the rights of copyright holders.[37] On the other hand, if the infringer is able to prove he was not aware and had no reason to believe such acts constituted infringement, the court has discretion to reduce the statutory award "to a sum of not less than $200."[38]

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24. *Id.* § 501(a).

25. *Id.* § 501(b).

26. *Id.* § 506.

27. *Id.* § 502(a).

28. *Id.* § 503.

29. *Id.* § 504.

30. *Id.* § 504(c)(1).

31. *Id.* § 504(c)(1); *see* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.04[E][2][a][i] (Matthew Bender rev. ed. 2014) [hereinafter NIMMER ON COPYRIGHT] (quoting a House of Representatives Report as explaining that "a single infringer of a single work is liable for a single amount [in statutory damages] . . . no matter how many acts of infringement are involved").

32. NIMMER ON COPYRIGHT, *supra* note 31, § 14.04[E][1][a].

33. 17 U.S.C. § 504(c)(1).

34. *Id.* § 504(c)(2).

35. NIMMER ON COPYRIGHT, *supra* note 31, § 14.04[B][3][a] (footnotes omitted); *see also* Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 507–08 (1st Cir. 2011) (joining the Fourth and Sixth Circuits in concluding "an infringement is willful under § 504 if it is 'knowing'").

36. William K. Ford, *Judging Expertise in Copyright Law*, 14 J. INTELL. PROP. L. 1, 41 (2006).

37. Island Software & Computer Serv., Inc. v. Microsoft Corp., 413 F.3d 257, 263 (2d Cir. 2005).

38. 17 U.S.C. § 504(c)(2).

Any copyright holder wishing to enforce his copyrights is encouraged to act quickly. Civil actions must be brought within three years of the infringing act,[39] and criminal acts must be prosecuted within five years.[40]

B. Licensing Dramatic Musical Works

Musical theater works, such as those works that would appear in a Broadway-style revue onboard a cruise ship, are treated differently than their pop song counterparts. This is due to the enumeration of "dramatic works, including any accompanying music"[41] as distinct and separate from "musical works, including any accompanying words"[42] within the Copyright Act's categories of works eligible for protection.[43] At the time the Copyright Act was revised in 1976, legislators did not define a dramatic work because they believed its meaning was "'fairly settled.'"[44] In his usual pithy manner, Justice Holmes once interpreted a dramatic work (somewhat unhelpfully) to mean "that we see the event or story lived."[45] Nimmer has distilled the various case law rulings concerning dramatic works and extracted "two essential elements . . . : (1) that it relate a story, and (2) that it provide directions whereby a substantial portion of the story may be visually or audibly represented to an audience as actually occurring, rather than merely being narrated or described."[46] Thus, a court will generally respect operas, operettas, and musical comedies (including Broadway musicals) as dramatic works.[47]

The distinction between dramatic and nondramatic works has far-reaching consequences. The Copyright Act provides that certain performances will be exempt from infringement actions,[48] but each of these is extended only to *nondramatic* musical works.[49] Similarly, the three large performing rights organizations—American Society of Composers, Authors, and Publishers (ASCAP); Broadcast Music Incorporated (BMI); and Society of European Stage Authors and Composers (SESAC)—that

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39. *Id.* § 507(b).

40. *Id.* § 507(a).

41. *Id.* § 102(a)(3). Under the previous 1909 Copyright Act, this category was termed "dramatico-musical composition." 1 NIMMER ON COPYRIGHT, *supra* note 31, § 2.06[C].

42. 17 U.S.C. § 102(a)(2).

43. *Id.* § 1.02(a).

44. 1 NIMMER ON COPYRIGHT, *supra* note 31, § 2.06[A].

45. Kalem Co. v. Harper Bros., 222 U.S. 55, 61 (1911).

46. 1 NIMMER ON COPYRIGHT, *supra* note 31, § 2.06[A] (footnote omitted).

47. *See* April Prods. v. Strand Enters., 79 F. Supp. 515, 516 (S.D.N.Y. 1948) ("Operas, operettas and musical comedies are the most usual form of dramatico-musical compositions." (quoting LEON H. AMDUR, COPYRIGHT LAW AND PRACTICE § 20, at 127 (1936)) (internal quotation marks)).

48. 17 U.S.C. § 110(2)–(4), (6)–(7).

49. 1 NIMMER ON COPYRIGHT, *supra* note 31, § 2.06[D].

negotiate blanket performance licenses on behalf of copyright holders[50] do not include any dramatic rights (or "grand rights") within such licensing schemes.[51] Thus, a blanket license acquired from one of the performing rights organizations will not shield a defendant from liability for infringing upon a dramatic work.[52]

In the realm of cruise ship entertainment—briefly ignoring any issues of extraterritoriality—the performance rights to a revue of popular music *would* be included under a blanket performance license. But the same rights to a Broadway-style show utilizing characters, costumes, and sets certainly would not.

C. *Extraterritorial Application of the Copyright Act*

The idea that copyright laws do not extend beyond U.S. borders predates even the 1909 Copyright Act.[53] Today, this idea is firmly entrenched in copyright jurisprudence: the Copyright Act has no extraterritorial application.[54]

But like most rules, there is an exception: the predicate-act doctrine. If a single act of infringement occurs within the United States, the injured copyright holder may recover for all related damages, including foreign infringements, flowing from that initial infringing act.[55] In at least one circuit, a plaintiff may even assert an infringement claim based upon a

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50. RON SOBEL & DICK WEISSMAN, MUSIC PUBLISHING: THE ROADMAP TO ROYALTIES 34 (2008).

51. *About Publishing*, SESAC, http://www.sesac.com/EDU/Publishing.aspx, *archived at* http://perma.cc/S3QX-6S9F; *BMI and Performing Rights*, BMI, http://www.bmi.com/licensing/entry/business_using_music_bmi_and_performing_rights, *archived at* http://perma.cc/U2Z5-4DW5; *Common Music Licensing Terms*, ASCAP, http://www.ascap.com/licensing/termsdefined.aspx, *archived at* http://perma.cc/D9UA-UT45; *see also* United States v. Am. Soc'y of Composers, Authors & Publishers, No. 41-1395, 2001 WL 1589999, at *2 (S.D.N.Y. June 11, 2001) (defining "right of public performance," in a suit involving the scope of ASCAP's licensing abilities, as limited to "the right to perform a work publicly in a nondramatic manner").

52. *See, e.g.*, Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 511 (9th Cir. 1985) (holding that defendant hotel's musical tribute to *Kismet* was not covered under the hotel's blanket ASCAP license).

53. *See, e.g.*, McLoughlin v. Raphael Tuck & Co., 191 U.S. 267, 268, 270 (1903) (affirming a trial court's determination that a statutory penalty for displaying a false U.S. copyright notice had no extraterritorial application).

54. *See, e.g.*, Subafilms, Ltd. v. MGM-Pathe Commc'ns Co., 24 F.3d 1088, 1095 (9th Cir. 1994) ("[W]e are unwilling to overturn over eighty years of consistent jurisprudence on the extra-territorial reach of the copyright laws . . . .").

55. *See* Tire Eng'g & Distrib., LLC v. Shandong Linglong Rubber Co., 682 F.3d 292, 307 (4th Cir. 2012) (per curiam) ("Once a plaintiff demonstrates a domestic violation of the Copyright Act, then, it may collect damages from foreign violations that are directly linked to the U.S. infringement.").

predicate act that would otherwise be time barred under the Copyright Act's statute of limitations.[56]

The predicate-act doctrine is attributed to Judge Learned Hand.[57] In deciding whether to allow foreign profits to be included in a damages award stemming from the unauthorized domestic copying of a motion picture, Hand wrote:

> The Culver Company made the negatives in this country, or had them made here, and shipped them abroad, where the positives were produced and exhibited. The negatives were "records" from which the work could be "reproduced[,"] and it was a tort to make them in this country. The plaintiffs acquired an equitable interest in them as soon as they were made, which attached to any profits from their exploitation, whether in the form of money remitted to the United States, or of increase in the value of shares of foreign companies held by the defendants. . . . [A]s soon as any of the profits so realized took the form of property whose situs was in the United States, our law seized upon them and impressed them with a constructive trust, whatever their form.[58]

Though Hand's rationale is not without its critics,[59] the predicate-act doctrine seems to be alive and well in American courts.[60]

III. The Controversy: Copyright Protection on the High Seas

Before we dive into the deep waters, we should pause briefly to get our feet wet. The high seas could be regarded as a no-man's land, but it is in fact an everyman's land.[61] The high seas are a residual category, which is

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56. *See id.* at 306 ("No court applying the [predicate-act] doctrine has ascribed significance to the timeliness of domestic claims, and we decline to . . . limit its application to cases where a domestic violation is not time barred.").

57. *Id.*

58. Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45, 52 (2d Cir. 1939).

59. *See, e.g.*, 7 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 25:89 (2014) [hereinafter PATRY ON COPYRIGHT] (attacking Hand's constructive trust idea as "farfetched" and "sophistry"). Patry is highly critical of any intimation of a predicate-act doctrine. *See id.* § 25.90 ("Until an international consensus develops on global jurisdiction . . . U.S. courts should decline the role of world enforcer of Copyright Americana.").

60. *See Tire Eng'g & Distrib.*, 682 F.3d at 307–08 (recognizing the validity of the predicate-act doctrine); Litecubes, LLC v. N. Light Prods., Inc., 523 F.3d 1353, 1371 (Fed. Cir. 2008) (same); L.A. News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987, 990–92 (9th Cir. 1998) (same); Liberty Toy Co. v. Fred Silber Co., 149 F.3d 1183 (6th Cir. 1998) (unpublished table decision) (same); Update Art, Inc. v. Modlin Publ'g, Ltd., 843 F.2d 67, 73 (2d Cir. 1988) (same).

61. *See* United Nations Convention on the Law of the Sea art. 87, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (guaranteeing that "[t]he high seas are open to all States, whether coastal or land-locked" and granting certain freedoms to "be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas"). Although the United States has not ratified UNCLOS, the United States Supreme Court has acknowledged its authority as "customary international law." United States v. Alaska, 503 U.S. 569, 588 n.10 (1992). For a broader discussion of the reluctance on the part of the United States

to say it consists of whatever is left after individual countries have claimed territorial and economic zones.[62] The United States claims the maximum area allowed by international law: twelve nautical miles from the shore.[63] Once a cruise ship passes outside this zone, onboard activities such as bingo, casino games, and gift shops may operate without regard to U.S. law.[64]

While sailing upon the high seas, cruise ships are required to fly the flag of a country of registry,[65] if for no other reason than to ward off uninvited visitors.[66] The flag state is charged with oversight and care of a vessel.[67] Thus, under international law, flag states have exclusive jurisdiction over their flagged vessels while those vessels are sailing upon the high seas.[68]

Because of this exclusive jurisdiction principle, registering a vessel becomes a calculated strategy, rife with abuse. When a ship is registered in a country other than the beneficial shipowner's country, the ship can be characterized as flying a "flag of convenience."[69] This is especially true of the cruise ship industry: all the major cruise lines, even those that sail year-round from American ports, register their vessels under non-U.S. flags.[70] Common registries include those of developing nations like Panama, Liberia, Malta, and the Bahamas.[71] Developing nations attract cruise lines to their registries by offering lower tax rates and freedom from restrictive regulatory schemes.[72] Furthermore, because the flag state economies

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to ratify UNCLOS, nothwithstanding the United States' leading role in negotiating and drafting its terms, see generally Elizabeth M. Hudzik, Note, *A Treaty on Thin Ice: Debunking the Arguments Against U.S. Ratification of the U.N. Convention on the Law of the Sea in a Time of Global Climate Crisis*, 9 WASH. U. GLOBAL STUD. L. REV. 353, 354–59 (2010).

62. *See* UNCLOS, *supra* note 61, at art. 86 (applying the high seas provisions only to those parts of the sea "not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State").

63. Proclamation No. 5928, 3 C.F.R. 547 (1988), *reprinted in* 43 U.S.C. § 1331 (2012).

64. *See* UNCLOS, *supra* note 61, at art. 89 ("No State may validly purport to subject any part of the high seas to its sovereignty.").

65. *Id.* at art. 92.

66. *See id.* at art. 110(d) ("Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship . . . is not justified in boarding it unless there is reasonable ground for suspecting that: . . . the ship is without nationality . . . .").

67. *Id.* at art. 94(1).

68. *Id.* at art. 92.

69. Stephen Thomas, Jr., *State Regulation of Cruise Ship Pollution: Alaska's Commercial Passenger Vessel Compliance Program as a Model for Florida*, 13 J. TRANSNAT'L L. & POL'Y 533, 539 (2004).

70. ROSS A. KLEIN, CRUISE SHIP BLUES: THE UNDERSIDE OF THE CRUISE SHIP INDUSTRY 139 (2002).

71. Andrew Schulkin, Note, *Safe Harbors: Crafting an International Solution to Cruise Ship Pollution*, 15 GEO. INT'L ENVTL. L. REV. 105, 115 (2002).

72. *See* LOUIS B. SOHN & JOHN E. NOYES, CASES AND MATERIAL ON THE LAW OF THE SEA 107 (2004) (pointing out the benefits of "flag of convenience" countries of which shipowners may

depend on the revenue, it stands to reason that a flag state will be less likely to discipline a vessel for fear of losing its business.[73] This begs the question: if a port country cannot reach a foreign-flagged vessel, and if a flag state ignores its exclusive right to oversee the vessel's operations, who is left to answer for the vessel's injuries? This conundrum constantly plagues consumers in the cruise line industry.[74] The litigation story memorialized in *Jacobs v. Carnival Corp.* provides a clear illustration: plaintiffs' rights to recover for their injuries are currently lost at sea.

A. The Original Complaint

Early in 2006, a complaint was filed in the Southern District of New York on behalf of the author–composers of the musical *Grease* against several cruise line defendants.[75] Plaintiffs alleged two counts of copyright infringement: the cruise lines willfully infringed upon their copyrighted works through (1) unlicensed public performances[76] and (2) alterations and modifications of the protected works.[77] The suit also sought to incorporate similarly situated copyright holders as a class.[78] In the initial prayer for relief, plaintiffs sought a permanent injunction to prevent the cruise lines from infringing class members' copyrighted works and a judgment for no less than $50 million—representing disgorgement of profits, compensatory damages, punitive damages, and attorneys' fees.[79]

If you find the $50 million shocking, you are probably in good company.[80] Recall that if the owner were to elect for statutory damages

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take advantage, including "low taxes or fees" and no requirement for "national ownership or control of a registered vessel, or a national crew or officers, or national build").

73. *See* Schulkin, *supra* note 71, at 115 (citing these registry nations' "dependence on registry fees" as a reason they have "little incentive to punish" polluting cruise ships).

74. *See, e.g.*, Tomlinson, *supra* note 3, at 146–48 (summarizing a 2006 congressional hearing "focused on the lack of uniform standards regarding both incident reporting and security procedures to be followed after an incident occurs"). As one Congressman testified, the well-being of those travelling in international waters "too often depends upon an unpredictable combination of facts, circumstance, and happenstance that may or may not mean the protection of U.S. laws are available to those in peril at sea." *International Maritime Security II: Law Enforcement, Passenger Security and Incident Investigation on Cruise Ships: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats, and Int'l Relations of the H. Comm. on Gov't Reform*, 109th Cong. 1 (2006) (statement of Rep. Christopher Shays, Chairman, Subcomm. on Nat'l Sec., Emerging Threats, and Int'l Relations).

75. Complaint and Jury Demand at 1–2, Jacobs v. Carnival Corp., No. 06 CV 0606 (S.D.N.Y. Mar. 25, 2009), 2006 WL 551156.

76. *Id.* at 10–11.

77. *Id.* at 11–12.

78. *Id.* at 6.

79. *Id.* at 13.

80. The only copyright decision to approximate a $50 million award in damages is *UMG Recordings, Inc. v. MP3.com, Inc.*, No. 00 Civ. 472(JSR), 2000 WL 1262568 (S.D.N.Y. Sept. 6, 2000), but that award was based upon 4,700 counts of infringement. 4 NIMMER ON COPYRIGHT, *supra* note 31, § 14.04[E][1][a] (awarding $53,400,000).

under U.S. copyright law, the maximum award for willful infringement is $150,000 *per work*, not per infringement.[81] Given the ambiguities of copyright protection on the high seas, it seems unlikely that a judge would find the cruise lines acted with the requisite knowledge[82] to rise to a level of willful infringement. Further, under a more generous Second Circuit standard of willful infringement,[83] the statutory maximum would still need to be applied to 334 works in order to reach a $50 million judgment.[84] Such a scenario is difficult to imagine, even within a class action against multiple cruise lines.

The *Jacobs* plaintiffs might fare better to prove actual damages. Consider the following scenario: the musical *The Phantom of the Opera* averaged gross box office sales of roughly $688,000 per week in 1996.[85] Assuming the author–composers receive a royalty rate of 6% of gross box office sales,[86] the plaintiffs could claim they lost more than $536,000 each year in lost profits.[87] Over the course of the three-year limitation for civil actions[88] and accounting for the thirteen cruise lines named in the complaint,[89] lost profits could approach $21 million.[90] In addition to actual damages, § 504 of the Copyright Act allows a copyright holder to disgorge

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81. *See supra* notes 31–34 and accompanying text.

82. *See supra* note 35 and accompanying text.

83. *See supra* note 37 and accompanying text.

84. $150,000 per work × 334 works = $50,100,000. *See supra* note 34 and accompanying text.

85. *Broadway Grosses – 1996*, BROADWAYWORLD.COM, http://www.broadwayworld.com/grossesbyyear.cfm?year=1996, *archived at* http://perma.cc/4AJ-CDBC.

86. *See, e.g.*, Jeff Brabec & Todd Brabec, *The Investment Economics of Broadway Musicals*, CORP. COUNS. (Nov. 14, 2014), http://www.corpcounsel.com/id=1202676298498/The-Investment-Economics-of-Broadway-Musicals?slreturn=20141030235422, *archived at* http://perma.cc/UP4L-VE6R (noting that, under the Dramatists Guild of America Approved Production Contract, authors receive "4.5 percent of the gross weekly box-office receipts prior to recoupment and 6 percent once a show's investment has been recouped"). Even so, the 6% figure is perhaps simplistic. The theater industry now prefers a royalty-pool scheme tied to revenues net weekly expenses. *See* JAY SHANKER ET AL., ENTERTAINMENT LAW & BUSINESS: A GUIDE TO THE LAW AND BUSINESS PRACTICES OF THE ENTERTAINMENT INDUSTRY § 9.2.3.3 (3rd ed. 2009) (explaining the concept of a royalty pool and characterizing royalty pools as "the most common form of royalty agreement for commercial productions on or Off-Broadway").

87. *Phantom* typically sells tickets to eight shows per week. *Broadway Grosses – The Phantom of the Opera*, BROADWAYWORLD.COM, http://www.broadwayworld.com/grossesshow.cfm?show=THE-PHANTOM-OF-THE-OPERA&year=1996, *archived at* http://perma.cc/Z2NV-XYLN. I am assuming for my calculation that a cruise line will present one Broadway-style revue each week with two seatings. Thus, $688,000 gross weekly receipts ÷ 8 *Phantom* shows × 2 ship seatings × 52 weeks × 6% royalty rate = $536,640.

88. *See supra* note 39 and accompanying text.

89. *See* Complaint and Jury Demand, *supra* note 75, at 2–5 (naming Carnival Cruise Lines, Costa, Cunard, Holland America, Princess, Seabourn, Swan, Windstar, Royal Caribbean International, Celebrity, Crystal, Norwegian Cruise Line, and Radisson).

90. $536,640 annual lost profits × 3 years × 13 cruise lines = $20,928,960.

the infringer's unjust profits.[91] Once the copyright holder proves the infringer's gross revenue, the burden shifts to the infringer to prove any deductible expenses and to allocate the remaining profit among other factors.[92] Here, it is important to remember that the production show has a very specific purpose: to keep guests out of their rooms and contributing to onboard revenue.[93] On similar facts, copyright holders of the musical *Kismet* were able to recover 2% of a hotel's indirect profits for the hotel's unlicensed musical "tribute."[94]

Defendants in *Jacobs* responded to plaintiffs' infringement claim with a motion to dismiss the complaint, asserting a predictable panoply of defenses. First, the defendants claimed the court lacked subject matter jurisdiction to hear the case.[95] To this end, defendants stated that U.S. copyright law lacks extraterritorial application and that the plaintiffs could not rely upon diversity jurisdiction.[96] Second, defendants asserted they possessed valid licenses to perform the copyrighted works as a result of reciprocal arrangements between ASCAP and ASCAP's foreign counterparts such as the Panamanian Society of Authors and Composers (SPAC).[97] Defendants argued the court should respect the forum selection and arbitration clauses contained in those agreements.[98] As discussed previously in subpart II(B), it was essential that defendants characterize the performances of *Grease* songs as "nondramatic" in order to implicate ASCAP license coverage, and so they did.[99] Finally, defendants asserted a forum non conveniens defense, noting a concern with a U.S. court attempting to apply foreign law.[100]

Defendants conceded, however, to performing certain songs from *Grease* in "revue-type shows."[101] It is worth calling attention to the prevalence of this industry practice of incorporating unlicensed copyrighted

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91. 17 U.S.C. § 504(b) (2012).

92. *Id.*

93. *See* Golden, *supra* note 6 (noting that onboard revenue, as compared to ticket sales to board the ship, "is disproportionately higher in terms of the net profit").

94. Frank Music Corp. v. Metro-Goldwyn-Mayer Inc., 886 F.2d 1545, 1550 & n.4 (9th Cir. 1989).

95. Memorandum of Law in Support of the Motion to Dismiss the Complaint by Carnival Corp., Carnival Cruise Lines, Carnival PLC, Holland America Line and Princess Cruises at 1, Jacobs v. Carnival Corp., No. 06 CV 0606 (S.D.N.Y. Mar. 25, 2009), 2006 WL 1444193 [hereinafter Memorandum of Law].

96. *Id.* at 1–2.

97. *Id.* at 5–6.

98. *Id.* at 2.

99. *See id.* at 5 (recognizing that "[w]hat constitutes a 'nondramatic' as opposed to a 'dramatic' performance is a central issue" in the dispute because "[n]one of the licenses at issue extend to . . . 'dramatic' performances of musical works").

100. *Id.* at 16, 19.

101. *Id.* at 4.

works into production shows: four of Carnival's twenty-one ships, eight of Holland America's thirteen ships, and eight of Princess's fourteen ships used at least one *Grease* song.[102] Using the same assumption of one protected work in one show per week with two seatings, this represents more than 2,000 unlicensed performances in a single year.[103] Also of note, defendants were deliberate in qualifying the location of such performances: "[Carnival's] ships sail *almost* entirely outside of United States territorial waters . . . . [Holland America's] ships also spend *a great deal* of time outside of United States territorial waters . . . . *Many* of [Princess's] performances also occur outside of U.S. waters . . . ."[104]

Unfortunately, like so many first-year law students, plaintiffs fell victim to the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*,[105] a tidal wave that rocked the legal world in 2007 by heightening the pleading standard.[106] Perhaps it was just a matter of bad timing. Judge Batts issued her ruling less than two years after the *Twombly* fallout.[107] As a result of these heightened requirements, Judge Batts felt dissatisfied that the plaintiffs pleaded with the appropriate level of specificity and dismissed the complaint with leave to amend.[108] In particular, Judge Batts pointed out two deficiencies: (1) the plaintiffs failed to allege a time period in which the infringing acts took place and (2) the plaintiffs failed to allege where such acts took place.[109] Judge Batts clarified that she wanted to know "where, literally in the world, the ships were at sea when the performances occurred"[110]—a rather high bar when one considers this was a prediscovery motion. Indeed, this location requirement was not an element of a copyright infringement claim under any prior precedent, but instead a requirement Judge Batts imposed sua sponte "because of the unusual circumstances of this case."[111] Judge Batts offered plaintiffs a glimmer of

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102. *Id.* at 4–5.

103. 1 protected work × 1 show per week × 2 seatings × 52 weeks × 20 ships = 2,080 unlicensed performances.

104. Memorandum of Law, *supra* note 95, at 4–5 (emphasis added).

105. 550 U.S. 544 (2007).

106. *Twiqbal*, as is commonly used to refer to *Twombly* and its companion case *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), presented a true game changer in legal pleading. *See* David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1204 & n.3 (2013) (noting the "furor" that *Twombly* caused when it replaced notice pleading with "a more demanding pleading standard").

107. *Compare Twombly*, 550 U.S. at 544 (decided May 21, 2007), *with* Jacobs v. Carnival Corp., No. 06 Civ. 0606(DAB), 2009 WL 856637, at *1 (S.D.N.Y. Mar. 25, 2009) (decided March 25, 2009).

108. *See Jacobs*, 2009 WL 856637, at *3, *6, *8 (identifying the *Twombly* standard, concluding "[p]laintiffs have failed to satisfy the pleading requirements," and granting plaintiffs thirty days to amend their complaint).

109. *Id.* at *5.

110. *Id.*

111. *Id.* at *4.

hope, however: "[I]f any of the allegedly infringing performances took place within the territorial waters of the United States, and/or the preparation of those performances took place in Defendants' United States' offices, this Court would have subject matter jurisdiction over those performances and any preparation that amounted to infringement."[112] Before concluding, Judge Batts warned plaintiffs to abandon their attempts to establish any form of class action.[113]

B. The First Amended Complaint

Not to be dissuaded, plaintiffs filed an amended complaint. As to Judge Batts's preliminary concern for the time period of the allegedly infringing acts, plaintiffs added general qualifications such as "since at least January 2003" or, in one case, "since at least February 26, 2004."[114] Presumably, plaintiffs were following the lead of the case Judge Batts cited with approval in her ruling, which did not require plaintiffs to assign a specific date but rather to specify a "'limited period.'"[115] As to the location of the acts, plaintiffs amended the complaint to read that each ship was "in the territorial waters of the United States."[116] Perhaps this was also a direct response to the judge's express language.[117]

Plaintiffs made other material improvements to their complaint that were not addressed by the first ruling. With regard to each named defendant, plaintiffs recorded the fleet's registry, noting that each country of registry was a signatory to the Berne Convention.[118] Plaintiffs indicated any additional performances occurring outside of U.S. territorial waters would still be subject to the court's jurisdiction under the Berne Convention.[119] Finally, plaintiffs reduced their damages demand to $10 million.[120]

Defendants responded to the amended complaint in much the same way as the original. They renewed their arguments that the court lacked

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112. *Id.* at *7.

113. *See id.* at *6 n.2 ("[I]t is not advisable for Jonah to attempt to swallow the whale by taking on the onerous additional class action requirements.").

114. First Amended Complaint and Jury Demand at 6–8, Jacobs v. Carnival Corp., No. 06 Civ. 0606 (S.D.N.Y. Aug. 20, 2010), 2009 WL 244298.

115. *Jacobs*, 2009 WL 856637, at *5 (quoting Tangorre v. Mako's, Inc., No. 01CIV4430(BSJ)(DF), 2002 WL 313156, at *3 (S.D.N.Y. Jan. 30, 2002)).

116. First Amended Complaint and Jury Demand, *supra* note 114, at 6–8.

117. *See supra* note 112 and accompanying text.

118. First Amended Complaint and Jury Demand, *supra* note 114, at 6–9. The Berne Convention is a multilateral international treaty mandating certain minimum standards of protection for literary and artistic works. Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1, 2 (1989).

119. First Amended Complaint and Jury Demand, *supra* note 114, at 9.

120. *Id.* at 12.

subject matter jurisdiction, that the performances were licensed under controlling foreign forum-selection and arbitration clauses, and that the court should dispose of the case on forum non conveniens grounds.[121] By this time, *Iqbal*[122] had been handed down from the Supreme Court, and defendants were armed with additional language with which to color their attacks on the amended complaint's sufficiency.[123] While making no mention of the amended time provisions, defendants characterized the amended location—"'in the territorial waters of the United States'"—as being as "patently deficient" as the original.[124] Furthermore, in response to plaintiffs' new pleadings regarding the Berne Convention, defendants asserted that while the Berne Convention provides a certain level of protection throughout member states, it does not "create jurisdiction over extraterritorial acts."[125]

A reply memo filed by plaintiffs in response to defendants' motion to dismiss the amended complaint raised two interesting points that provoked this author's interest in writing this Note. First, regarding the court's federal subject matter jurisdiction, plaintiffs drew the court's attention to the developing body of cases that carefully distinguish between subject matter jurisdiction and a substantive ingredient of a claim for relief, discussed below in subpart IV(A).[126] As a result, any question of extraterritoriality should not prevent the court from asserting subject matter jurisdiction to hear the controversy.[127] Second, the reply memo questioned the underlying assumption that "ships in international water are, by definition, 'extraterritorial' for the purpose of the Copyright Act."[128] Plaintiffs then went on to describe the unique factors in assessing choice of law in maritime matters.[129]

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121. Memorandum of Law in Support of the Motion to Dismiss the First Amended Complaint by Carnival Corp., Carnival Cruise Lines, Carnival PLC, Holland America Line Inc. and Princess Cruise Lines, Ltd. at 2–3, Jacobs v. Carnival Corp., No. 06 CV 0606 (S.D.N.Y. Aug. 20, 2010), 2009 WL 2443000 [hereinafter Memorandum in Support of the Motion to Dismiss].

122. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

123. *See* Memorandum in Support of the Motion to Dismiss, *supra* note 121, at 10 ("Rule 8 requires 'more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" (quoting *Ashcroft*, 556 U.S. at 678).

124. *Id.* at 2.

125. *Id.* at 14 n.10.

126. *See* Plaintiffs James H. Jacobs and the Estate of Warren Casey's Memorandum in Opposition to Defendants' Motions to Dismiss and/or Sever and Transfer at 3–5, Jacobs v. Carnival Corp., No. 06 CV 0606 (S.D.N.Y. Aug. 20, 2010), 2009 WL 3191325 [hereinafter Plaintiffs James H. Jacobs Memorandum] (discussing the bright-line test created by the Supreme Court in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), and how the Court of Appeals for the Federal Circuit applied *Arbaugh* to an extraterritorial copyright infringement claim).

127. *See id.* at 5–6 ("The issue of extraterritoriality is an element of proof of infringement, not one of subject matter jurisdiction.").

128. *Id.* at 6.

129. *Id.* at 6–7.

Defendant's reply brief in further support of their motion to dismiss was perhaps evidence of their growing desperation. Defendants staunchly clung to their attacks on the sufficiency of the amended complaint and summarily dismissed plaintiffs' dichotomy between subject matter jurisdiction and elements of a claim.[130] Defendants also dismissed plaintiffs' choice of law argument as a "complicated, multi-factor analysis" with "no relevance to this case, where the performances are governed by the Vessel Licenses."[131] Perhaps in their weakest moment, defendants argued a supposedly resulting parade of horribles.[132]

Briefly harboring plaintiffs' claims, Judge Batts ruled to deny defendants' motion to dismiss.[133] However, she agreed with defendants that "[p]laintiffs have not made a showing of any of the allegedly infringing performances taking place within the territorial waters of the United States."[134] Thus, Judge Batts ordered discovery limited to the jurisdictional issue.[135]

Unfortunately, the copyright questions raised by plaintiffs' complaint have never been answered. Plaintiffs' porthole to recovery was unceremoniously closed by Judge Batts in August 2010 when she ordered the case to be dismissed with prejudice for plaintiffs' failure to file a second amended complaint at the end of limited discovery.[136] Thus, plaintiffs spent more than four years in an attempt to recover from the defendant cruise lines and were never able to move past the pleadings.

IV. Fishing for a Remedy

The plaintiffs in *Jacobs* came close to arguing their merits before the court but ultimately missed the boat. The non-extraterritorial nature of U.S. copyright law proved fatal to their claim. In this Part, I argue that the predicate-act doctrine would have provided the *Jacobs* plaintiffs with a

130. *See* Reply Memorandum of Law in Further Support of the Motion to Dismiss the First Amended Complaint by Carnival Corp., Carnival Cruise Lines, Carnival PLC, Holland America Line Inc., and Princess Cruise Lines, Ltd. at 1, Jacobs v. Carnival Corp., No. 06 CV 0606 (S.D.N.Y. Aug. 20, 2010), 2009 WL 4888827 ("But whether 'territoriality' is a limitation on this Court's jurisdiction or an element of the claim makes no difference to the viability of the complaint.").

131. *Id.* at 2.

132. *See id.* at 2–3 (suggesting a choice of law analysis would threaten "a stable international regime of intellectual property rights" and to give effect to any other license beside the Vessel Licenses regarding the performances "would cause chaos in the international licensing regime for copyrighted music").

133. Jacobs v. Carnival Corp., No. 06 Civ. 0606, slip op. at 2 (S.D.N.Y. Mar. 1, 2010).

134. *Id.* at 1–2.

135. *Id.* at 2.

136. Jacobs v. Carnival Corp., No. 06 Civ. 0606, slip op. at 2 (S.D.N.Y. Aug. 20, 2010).

navigable path to relief.[137] In turn, I will (1) address the jurisdictional question at issue; (2) examine what acts might qualify in this context as a domestic infringing predicate act; and (3) dispose of the defenses previously asserted by the defendant cruise lines.

A. Personal and Subject Matter Jurisdiction

Before a U.S. court can hear a controversy, the court must be satisfied that it may assert both jurisdiction over the defendant—personal jurisdiction[138]—and jurisdiction over the particular claim asserted—subject matter jurisdiction.[139] For the purposes of my analysis, I will assume the court properly asserted its personal jurisdiction over the defendant cruise lines in *Jacobs*. This issue was never challenged in the initial proceedings.

With regard to the question of subject matter jurisdiction, courts are in disagreement as to whether the extraterritorial nature of an allegedly infringing act should be analyzed (1) within the realm of subject matter jurisdiction, and thus subject to a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction; or rather (2) as an element of the plaintiffs' prima facie infringement claim, and thus subject to a Rule 12(b)(6) motion to dismiss for failure to state a claim.[140] In *Jacobs*, the various cruise lines filed both Rule 12(b)(1) and Rule 12(b)(6) motions.[141] Judge Batts acknowledged that, even though the leading copyright infringement precedent did not have a place-of-infringement requirement, she was adding such a requirement to the plaintiffs' initial burden due to the fact that the

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137. It seems the plaintiffs tried to assert the predicate-act doctrine, but it was too late. The magistrate judge assigned to manage discovery after Judge Batts ruled on the First Amended Complaint denied the plaintiffs' motion to compel discovery for "information concerning auditions, rehearsals, and other activities that took place in the United States" because plaintiffs failed to raise the predicate-act doctrine in their earlier complaint. Jacobs v. Carnival Corp., No. 06 Civ. 0606(DAB)(JCF), 2010 WL 2593923, at *1 (S.D.N.Y. June 22, 2010). It seems odd that the magistrate did not give effect to the fact that Judge Batts clearly acknowledged the possibility of a predicate act in an earlier ruling:

> In the present case, although not at all discernable from this Complaint, if any of the allegedly infringing performances took place within the territorial waters of the United States, and/or the preparation of those performances took place in Defendants' United States' offices, this Court would have subject matter jurisdiction over those performances and any preparation that amounted to infringement under the United States Copyright Act.

Jacobs v. Carnival Corp., No. 06 Civ. 0606(DAB), 2009 WL 856637, at *7 (S.D.N.Y. Mar. 25, 2009).

138. *See* FED. R. CIV. P. 12(b)(2) (granting lack of personal jurisdiction as a defense to a claim).

139. *See id.* R. 12(b)(1) (granting lack of subject matter jurisdiction as a defense to a claim).

140. *See* PATRY ON COPYRIGHT, *supra* note 59, § 25:86 (commenting on the difficulty of discerning the distinction between subject matter jurisdiction and an element of a claim and observing disagreement among courts as to whether extraterritoriality is a question of jurisdiction or substantive law).

141. *Jacobs*, 2009 WL 856637, at *1.

court was relying on the Copyright Act for subject matter jurisdiction.[142] She granted the 12(b)(6) motions as to certain defendant cruise lines but declined to reach the subject matter jurisdiction question for the remaining defendants until plaintiffs could allege with some specificity where the infringing acts actually occurred.[143]

The predicate-act doctrine would make short work of such an overly burdened jurisdictional analysis. The predicate-act doctrine requires at least one act of purely domestic infringement, thereby granting courts the jurisdictional authority to hear the case and award recovery for all damages, foreign and domestic, that flow from the initial domestic infringement.[144] A single predicate act occurring wholly within the United States, then, will satisfy the court's subject matter jurisdiction inquiry.

B. Invoking the Predicate-Act Doctrine

Invoking the predicate-act doctrine is fairly straightforward. Most recently, the Fourth Circuit held that the doctrine has but two requirements: "[A] plaintiff is required to show a domestic violation of the Copyright Act and damages flowing from foreign exploitation of that infringing act."[145] The plaintiff's burden for proving the predicate act presumably mirrors a normal infringement analysis.[146] In the *Jacobs* court, Judge Batts stated the elements as follows: "(1) [W]hich specific original works are the subject of the copyright claim, (2) that plaintiff owns the copyrights in those works, (3) that the copyrights have been registered in accordance with the statute, and (4) by what acts and during what time the defendant infringed the copyright."[147] What is essential to this context, though, is that the infringement be a domestic violation.

But what sorts of domestic violations might suffice in this context? In Judge Hand's seminal *Sheldon* opinion, discussed above, he pointed to the illegal copying of motion picture negatives, which he characterized as "'records' from which the work could be 'reproduced'" abroad.[148] In a cruise ship Broadway-style revue, the printed musical score is a close analogy to the negatives of a motion picture. The musical score is the precise roadmap, note by note, of melodic and lyrical directives needed to

142. *Id.* at *4.

143. *Id.* at *5–7.

144. *See supra* subpart II(C).

145. Tire Eng'g & Distrib., LLC v. Shandong Linglong Rubber Co., 682 F.3d 292, 308 (4th Cir. 2012) (per curiam).

146. *Cf.* De Bardossy v. Puski, 763 F. Supp. 1239, 1243 (S.D.N.Y. 1991) ("[J]urisdiction would be proper in the United States . . . if plaintiff can show that an infringing act occurred in the United States and that this act has led to further infringement abroad.").

147. *Jacobs*, 2009 WL 856637, at *4.

148. Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45, 52 (2d Cir. 1939).

replicate the work that is being performed.[149] Even if the musical score was purchased outright from the music publisher, such a sale would not include any public performance rights or a right to prepare derivative works.[150] Typically, these musical scores must be rented through a licensing agency to ensure that only those who have purchased the grand performance rights have access to these precious materials.[151]

For those bad actors who wish to avoid the expense of such a licensing scheme, there are other ways of replicating a musical score. For instance, someone with a particular talent in this field may be able to listen to a musical recording of the score and notate her own musical arrangement that is substantially similar. Such a process is typically referred to as a "transcription."[152] A person can then take the transcription and create a new musical arrangement for a new ensemble of musicians to record. Thus, with access to a single bootleg[153] or commercial recording of the music from a Broadway show, a cruise line production company could easily create its own arrangements without ever contacting the composer, the licensing agency, or the music publisher. This process would also allow a production company to alter the original copyrighted music to fit its own needs, perhaps reducing the duration of a certain musical number, trimming down the size of the accompanying instrumentation, or excerpting one song from one musical to fit in a sequence with songs from other musicals. Without question, such reproductions and derivative works would qualify as acts of infringements if occurring within the United States.[154]

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149. *Cf.* THE HARVARD DICTIONARY OF MUSIC 765 (Don Michael Randel ed., 4th ed. 2003) (defining a musical score as the "notation of a work" where each part is "notated on its own staff").

150. *See* JAMES H. LASTER, SO YOU'RE THE NEW MUSICAL DIRECTOR!: AN INTRODUCTION TO CONDUCTING A BROADWAY MUSICAL 13 (2001) ("No one can legally put on a production of a musical by simply purchasing the piano/vocal score of the show."); *Licensing Help: General FAQ*, ASCAP, http://www.ascap.com/licensing/licensingfaq.aspx, *archived at* http://perma.cc/N2BM-6TW4 (following the "I bought the record or sheet music. Why do I need permission to perform the music?" hyperlink, ASCAP clarifies that "[r]ental or purchase of sheet music . . . does not authorize its public performance.").

151. *See* HALLER LAUGHLIN & RANDY WHEELER, PRODUCING THE MUSICAL: A GUIDE FOR SCHOOL, COLLEGE, AND COMMUNITY THEATRES 5 (1984) ("Unlike non-musical scripts, which may be purchased, libretti for most musicals and the music itself for all musicals may only be rented for a given period of time . . . and [must be] returned to the controlling organization as soon as the final performance has been given.").

152. *Cf.* THE HARVARD DICTIONARY OF MUSIC, *supra* note 149, at 902 (defining transcription as "[t]he reduction of music from live or recorded sound to written notation").

153. A bootleg recording made in the United States would also qualify as a predicate act if completed by an agent of the cruise ship production company. *See* 17 U.S.C. § 1101(a) (2012) ("Anyone who, without the consent of the performer or performers involved—(1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord" will be liable "to the same extent as an infringer of copyright.").

154. *See id.* § 106(1) (forbidding the unauthorized reproduction of a copyrighted work); *id.* § 106(2) (forbidding the unauthorized preparation of derivative works).

It is also very likely that after the arrangements have been made, the arrangements will then be recorded by musicians in a studio for use as an accompanying track onboard the ship. Due to the economic implications, it is much simpler to record a musical track for onboard playback rather than hire a full orchestra for each performance, give them room and board, purchase the necessary sound equipment to amplify the instruments, maintain the health of the instruments onboard, and so forth. Therefore, if the production company records a musical track in the United States for use onboard the ship, yet another predicate act exists to which liability can attach.

Furthermore, there may be predicate acts occurring within the companies' rehearsal facilities. Several of the cruise ships operate rehearsal facilities near their headquarters in Miami, Florida.[155] This is where the singers and dancers meet with the creative staff to learn the shows before they travel to the ship. These rehearsals could qualify as infringing public performances if it could be shown that the rehearsal facility is a "place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[156]

Thus, there are ample opportunities for a predicate act to occur on U.S. soil throughout the process of creating a Broadway-style revue before the show ever makes it to sea. An injured plaintiff need only prove one instance in order to recover for all of the subsequent damages.[157] As discussed earlier, the plaintiffs could reasonably claim nearly $21 million dollars in actual damages from unlicensed performances at sea over the three-year statute of limitations, plus disgorgement of the cruise ship's profits that are attributable to those performances.[158]

C. *Cruise Ship Defenses*

The defendant cruise lines in *Jacobs* offered three main defenses that need to be addressed: the extraterritoriality defense, the foreign licenses, and forum non conveniens.[159] The predicate-act doctrine, as discussed in subpart IV(B), already disposes of any extraterritoriality defense.[160] The two remaining defenses can be disposed of quickly.

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155. Executives from both Celebrity and Royal Caribbean acknowledged that planning and preparation for these performances took place in the Miami area. Plaintiffs James H. Jacobs and the Estate of Warren Casey's Memorandum in Support of Their Motion to Compel Defendants Celebrity Cruise Inc. and Royal Car[ib]bean Cruise Ltd. to Produce Documents at 9–10, Jacobs v. Carnival Corp., No. 06 CV 0606 (S.D.N.Y. June 22, 2010), 2010 WL 3054696.

156. 17 U.S.C. § 101.

157. *See supra* note 55 and accompanying text.

158. *See supra* notes 85–91 and accompanying text.

159. Jacobs v. Carnival Corp., No. 06 Civ. 0606(DAB), 2009 WL 856637, at *1 (S.D.N.Y. Mar. 25, 2009).

160. *See supra* subpart IV(B).

1. Blanket Licenses.—First, and most frivolously, defendants asserted that the performances in question are authorized by certain foreign licenses through reciprocal agreements with ASCAP.[161] As previously discussed, ASCAP does not have the authority to grant performance rights to dramatic works.[162] The more pertinent issue is whether the infringing performance is dramatic or nondramatic, a point defendants buried in their first reply.[163] To this end, plaintiffs eventually hit the nail squarely on its head: a Broadway-style revue has already been adjudged to be outside the scope of an ASCAP license under Second Circuit precedent.[164] Moreover, it is fundamental to our property system that "no one gives what he does not have."[165] In short, any defense based upon a blanket license theory is but a smokescreen.

2. Forum Non Conveniens.—Second, the forum non conveniens argument is often used as a trump card for cruise ship defendants.[166] Unlike passengers, though, copyright holders never subjected themselves to boilerplate forum selection clauses.[167] While a complete analysis is beyond the scope of this Note, a court could (and should) dispose of a forum non conveniens defense quickly by limiting its scope of analysis to the predicate act. In such a case, assuming the court can assert personal jurisdiction over the defendant, a court should have no trouble honoring the U.S. plaintiff's choice of venue concerning an act of infringement of a U.S. copyright that took place on U.S. soil.

V. Conclusion

American courts are well equipped to decide the issues presented in *Jacobs v. Carnival Corp.* Producing a Broadway-style revue is no small task, and the path to the stage is littered with preparatory acts, any one of which could qualify as a predicate act. Once the infringement claim is

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161. *See supra* note 97 and accompanying text.

162. *See supra* notes 51–52 and accompanying text.

163. *See supra* note 99 and accompanying text.

164. Plaintiffs James H. Jacobs Memorandum, *supra* note 126, at 15 ("That there is a distinction between a dramatic grand right and a nondramatic small right pursuant to the ASCAP license, and that the ASCAP licenses do not grant grand rights, is well settled in the Second Circuit as well.").

165. *See, e.g.*, Mitchell v. Hawley, 83 U.S. (16 Wall.) 544, 550 (1872) ("No one in general can sell personal property and convey a valid title to it unless he is the owner or lawfully represents the owner. *Nemo dat quod non habet.*").

166. *See, e.g.*, Membreño v. Costa Crociere S.P.A., 425 F.3d 932, 937–38 (11th Cir. 2005) (briefly weighing forum non conveniens factors in favor of a cruise ship defendant).

167. *See generally* Linda S. Mullenix, *Another Easy Case, Some More Bad Law:* Carnival Cruise Lines *and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323 (1992) (disagreeing with the application of a forum-selection clause to dismiss a personal injury suit against a cruise line in *Carnival Cruise Lines v. Shute*).

cemented in a U.S. court under the predicate-act doctrine, a just verdict requires little more than peering past the fiction that cruise lines are licensing dramatic works through blanket nondramatic licenses. Thus, injured copyright holders can put an end to these copyright pirates who are enjoying the spoils of substantial contact with the American forum while hiding behind a flag of convenience.

—Jeff Pettit

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Loose Constraints: The Bare Minimum for Solum's Originalism*

I. Introduction

Originalism as a theory has grown progressively larger and more inclusive over time. Its earliest disciples, such as Raoul Berger, advocated a strict adherence to the original intentions of either the framers or the ratifiers of the Constitution.[1] As the theory evolved and originalists responded to criticism, looser variations emerged, such as a version that bases its analysis on the communicative content of the text instead of the founders' intentions[2] and the view that the original public meaning of the text is binding on interpretation.[3] One of the more recent theories that has emerged in the context of "New Originalism" involves the "interpretation–construction distinction": the idea that the process of discovering meaning (interpretation) is separate from the process of determining that meaning's legal effect (construction).[4]

Notable originalist scholar Lawrence B. Solum's article *Originalism and Constitutional Construction* primarily serves to advance his theories regarding the ineliminable nature of construction as it applies to the interpretation–construction distinction.[5] However, in justifying this position, Solum also proposes a definition for what qualifies a theory as being originalist.[6] Solum identifies two key propositions that he claims all originalist theories share, which he labels the "Fixation Thesis" and the

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1. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 363–65 (1977) (advocating the framers' intent as the proper source to guide interpretation); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 113 (1988) ("[A]t least some of the founders saw the ratifiers' historical or subjective intent as a check on constructions which cut loose from the original understandings of the sovereign people.").

2. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997) (rejecting the drafters' intent as a source of meaning in favor of "objective meaning of the text").

3. *E.g.*, Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1132–33 (2003) (defending "original, objective-public-meaning" as the authoritative meaning of the text).

4. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95–96 (2010) [hereinafter Solum, *Interpretation-Construction Distinction*].

5. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 458 (2013) [hereinafter Solum, *Originalism and Constitutional Construction*].

6. *Id.* at 456.

"Constraint Principle."[7] Solum has honed these terms over several articles and publications[8] but, until now, has not been as insistent about their universality and centrality in originalist doctrine.[9]

The Fixation Thesis stands for the proposition that "the linguistic meaning of the constitutional text is fixed for each provision at the time that provision was framed and ratified."[10] It is relatively uncontroversial—virtually all schools of originalist thought (e.g., framers' intention, ratifiers' intention, and original public meaning) fix meaning for the purpose of interpretation at roughly the time of the text's creation.[11] Even relatively unorthodox originalist theorists such as Gary Lawson agree on the fixity of meaning for the purposes of interpretation.[12]

The Constraint Principle, however, is significantly more complex and subject to more wide-ranging disagreement.[13] The authors whom Solum identifies as adhering to the Constraint Principle range from denying the need for construction almost entirely[14] to actively encouraging construction to "flesh out" the text.[15] Solum acknowledges the controversial nature of the Constraint Principle and the large number of contrasting viewpoints on the issue,[16] but he maintains that all originalists accept the Constraint Principle and that it is a defining characteristic of all originalist theories.[17]

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7. *Id.*

8. *See, e.g.*, Lawrence B. Solum, *We Are All Originalists Now*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 12, 18 (2011) [hereinafter Solum, *We Are All Originalists Now*] (explaining both the Fixation Thesis and the "textual constraint thesis"); Lawrence B. Solum, *Semantic Originalism* 2 (Ill. Pub. Law & Legal Theory Research Papers Series, Paper No. 07-24, 2008), *available at* http://ssrn.com/abstract=1120244, *archived at* http://perma.cc/NK5X-GYHG (articulating the meaning of the Fixation Thesis).

9. *See* Lawrence B. Solum, *Living with Originalism*, *in* CONSTITUTIONAL ORIGINALISM, *supra* note 8, at 143, 150 [hereinafter Solum, *Living with Originalism*] (asserting that "almost all" originalists agree with the Constraint Principle). In contrast, Solum's latest article states definitively that the "originalist family converges on these two core ideas." Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 456.

10. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 459.

11. As examples, see authors cited *supra* notes 1–3.

12. *See* Gary Lawson, Response, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1834–35 (1997) (arguing that originalism is the best approach for interpretation but allowing that originalist interpretations "are generally entitled only to epistemological deference, not legal deference").

13. Solum himself has acknowledged this in several articles, including Lawrence B. Solum, *Construction and Constraint: Discussion of* Living Originalism, 7 JERUSALEM REV. LEGAL STUD. 17, 25 (2013) (book review) [hereinafter Solum, *Construction and Constraint*]; Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEXAS L. REV. 147, 155 (2012) (book review) [hereinafter Solum, *Faith and Fidelity*]; and Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 460–61.

14. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 752 (2009).

15. JACK M. BALKIN, LIVING ORIGINALISM 14 (2011).

16. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 525.

17. *Id.* at 461.

Given the uncontroversial nature of the Fixation Theory in even quasi-originalist (and some nonoriginalist) schools of thought, the true test of whether a theory is originalist under Solum's definition will come down to whether or not it sufficiently accepts the Constraint Principle. The bare minimum that can be considered constraint also serves as Solum's dividing line between what is originalist and nonoriginalist. Thus, determining what does and does not satisfy the Constraint Principle is crucial to Solum's theory of originalism. However, Solum does curiously little to define these minimum standards beyond noting that minimal constraint "limits the range of possible constructions to those that are *consistent* with the constitutional text."[18]

This Note aims to identify what Solum counts as the bare minimum for a theory that accepts the Constraint Principle and what it means to be "consistent" with the original text. It then examines whether acceptance of the Constraint Principle is a useful distinction for determining whether or not a theory can be properly considered "originalist." More than just an argument over labeling, the distinction between what is and is not originalist has importance when drawing the lines of academic debate.[19] This Note argues that minimal constraint may undermine that distinction.

This Note is necessarily quite limited in scope. The Note generally takes Solum's terms as defined in his articles, with the exception of the Constraint Principle itself. While I will discuss the interpretation–construction distinction's place in Solum's theory, this Note does not offer a critique of the theory. Similarly, I will not explore the relative strengths and weaknesses of originalism. While any and all of these could still be fruitful subjects for further discussion and debate, this Note looks to examine and evaluate Solum's distinctions on his own terms.

II. Fixation, Constraint, and the Interpretation–Construction Distinction

Solum's theory claims that two ideas form the "core" of originalist theory: the Fixation Thesis and the Constraint Principle.[20] An additional concept is embraced by "New Originalists": the Interpretation–Construction Distinction, which effectively implements the Fixation Thesis and Constraint Principle, first by determining the law's communicative content, then giving it legal effect through construction.[21] Given the key importance of these ideas

18. *Id.* at 526 (emphasis added).

19. This Note is not the first work to address Solum's categorization of what constitutes originalism. See James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEXAS L. REV. 1785 (2013), where Fleming argues that Solum's theory assumes that originalism is the best method of fidelity to the text and proceeds to debate the originalist approach as a whole. *Id.* at 1786–88. In contrast, this Note focuses specifically on Solum's definition of the Constraint Principle and whether it is a useful way to define originalist theories.

20. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 456.

21. Solum, *Interpretation-Construction Distinction*, *supra* note 4, at 100–01, 103.

for determining what is and is not originalist under Solum's definition, it is necessary to go into some depth to explain these terms and how they are defined.

A. What Is Fixation?

Solum has described the Fixation Thesis thus: "The communicative content of the [C]onstitution (the linguistic meaning of the words in context) is fixed at the time each constitutional provision is framed and ratified."[22] This idea is fairly straightforward: the communicative content of the text is the words and phrases placed in context.[23] The Fixation Thesis operates to limit that context to a particular period of time: when the provision was framed and ratified.[24]

Solum notes that there may be disagreement about the method of fixation,[25] which in turn could slightly change the context that determines the communicative content. For example, some originalists believe fixation comes from the intentions of the framers, while others believe fixation comes through the common understanding of the words and phrases (the "public meaning") at the time of adoption.[26]

Solum declares that every originalist agrees about the general time frame for fixation, and this presumption appears accurate: after all, "originalism" is named after the search for the meaning of the text at the time of its origin.[27] Unlike some nonoriginalists who find the contemporary meaning of the text relevant for interpretation,[28] originalists think the text's meaning is set at the time of its creation and that contemporary meanings should be discounted or excluded entirely.[29] Despite possible differences in the method of fixation, the level of generality of Solum's claim makes it relatively uncontroversial.

B. What Is Constraint?

Solum has done less to fully describe the Constraint Principle. Where fixation deals with the text as a source of law, the Constraint Principle is a

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22. Solum, *Construction and Constraint*, *supra* note 13, at 20.

23. *Id.* at 21.

24. *Id.*

25. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 459.

26. *Id.*

27. *Id.*

28. *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 106 (2010) ("[U]sually this will mean that the words of the Constitution should be given their ordinary, current meaning—even in preference to the meaning the framers understood. . . . The current meaning of words will be obvious and a natural point of agreement.").

29. *See, e.g.*, Scalia, *supra* note 2, at 38–40 (rejecting the use of "current meaning" as anti-democratic and insisting on the use of original meaning as a better way of construing the Constitution).

normative theory of adjudication: "The communicative content of the constitutional text should constrain the content of constitutional doctrine."[30] So what does it mean to "constrain" doctrine? Solum quotes constitutional law scholar Thomas Colby to explain both judicial constraint and restraint:

> [A]lthough originalism in its New incarnation no longer emphasizes judicial restraint—in the sense of deference to legislative majorities—it continues to a substantial degree to emphasize judicial constraint—in the sense of promising to narrow the discretion of judges. New Originalists believe that the courts should sometimes be quite active in preserving (or restoring) the original constitutional meaning, but they do not believe that the courts are unconstrained in that activism. They are constrained by their obligation to remain faithful to the original meaning.[31]

The Constraint Principle thus purports to limit the discretion of judges and justices by requiring them to follow the fixed communicative content of the text. Yet just how much discretion is limited, and under which circumstances discretion is allowed, is left entirely undefined.

Solum contends that the point where originalists converge on the Constraint Principle is "abstract and vague."[32] As a result, he describes the Constraint Principle as a "complex scalar" with many dimensions and several possible permutations within those dimensions.[33] To show the breadth of possible options, Solum has given rough descriptions of what could constitute maximum and minimum constraint, as well as examples of authors whose works would and would not satisfy the Constraint Principle.[34] Solum provides a table to represent this possible spectrum.[35]

Solum largely identifies a maximal constraint position with John McGinnis and Michael Rappaport, authors who have denied the necessity of construction beyond the communicative content of the text.[36] For this position, the communicative content of the text alone is enough to fully resolve any possible constitutional controversy, and as a result judges are constrained to using only that content in their decisions.[37] Solum labels this position "complete constraint";[38] the notion that this account of originalism

30. Solum, *Construction and Constraint*, *supra* note 13, at 21.

31. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 524 (quoting Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 751 (2011)).

32. Solum, *Construction and Constraint*, *supra* note 13, at 22.

33. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 525.

34. *Id.* at 526, 534 tbl.1. This table is the source of many of this Note's conclusions, as it is as definitive a categorization of what constitutes originalism and nonoriginalism as Solum has provided. The relevant subdivisions of the table will be described *infra*, but for further clarification one may wish to consult the original.

35. *Id.* at 534 tbl.1.

36. *Id.* at 526, 534 tbl.1.

37. *Id.* at 535.

38. *Id.* at 534 tbl.1.

provides one of the highest levels of constraint seems accurate given the strict limitations imposed by the theory.

What is more confusing is the minimal definition of constraint, which in Solum's theoretical framework is equated with the minimal version of originalism.[39] Solum has described minimal constraint in varying ways, many of which are vague or outright contradictory.[40] Solum labels minimal constraint as "[i]ncomplete constraint and restraint," notes that it embraces both living constitutionalism and originalism, and provides three examples of authors that align with the theory: Jack Balkin, James Ryan, and Randy Barnett.[41] These authors share some central tenets of their theories but have significant differences that further complicate the fact that Solum has bracketed them together in the table.[42] As a result, this position requires more analysis. The next Part of this Note goes into further detail in describing the possibilities for the minimal version of constraint.

Solum is much clearer about which theories should be considered nonoriginalist. He acknowledges that nonoriginalists could find the communicative content of the text "relevant" but argues that under their theories, it would not "operate as a hard constraint."[43] As examples, Solum cites Philip Bobbitt's Multiple Modalities theory and Ronald Dworkin's theory of Law as Integrity.[44] This essentially identifies nonoriginalism with the most vigorous multimodal and discretionary theories, where judges are encouraged to balance several possible theories and justifications in order to come to a sound constitutional decision.[45] Solum has particularly singled out Bobbitt because Bobbitt's theory "does not provide a hierarchy or lexical ordering";[46] none of Bobbitt's factors for decision making are privileged above the others, so the text plays no special role. However, it is prudent to note at this point that there are authors who identify as nonoriginalists but *do* set out potential hierarchies of modes, some of which may privilege text

39. *See supra* text accompanying notes 16–18.

40. *See, e.g.*, Solum, *Construction and Constraint*, *supra* note 13, at 22 (proclaiming that constitutional doctrine must "fairly capture" the spirit of the communicative content); Solum, *Faith and Fidelity*, *supra* note 13, at 154 (asserting that "original meaning is one factor that must be considered in formulating constitutional doctrine"); Solum, *Living with Originalism*, *supra* note 9, at 150 (stating that judicial decisions should "respect the core of settled meaning"); Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 461 (declaring that doctrine must seek "consistency" with the text).

41. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 534 tbl.1.

42. *Id.*

43. *Id.*

44. *Id.*

45. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 95–96 (1986) (noting that "conventionalis[t]" theories require "explicit" consistency with past political decisions, but "law as integrity" can find consistency in "principles of personal and political morality").

46. Solum, *Construction and Constraint*, *supra* note 13, at 32.

while still allowing other factors to occasionally take precedence.[47] Whether these nonoriginalists would share the same nonoriginalist column above with Bobbitt and Dworkin is another key question this Note intends to address.

C. *The Interpretation–Construction Distinction*

Solum's theories on the Fixation Thesis and Constraint Principle dovetail with his conception of the interpretation–construction distinction. As Solum defines it, interpretation is the process of "discover[ing] the linguistic meaning of an authoritative legal text."[48] Construction, in turn, is what "gives legal effect" to that linguistic meaning.[49] While both political and judicial construction are possible, construction is most easily observed when the Court takes a vague constitutional mandate and creates legal doctrine that specifically applies it.[50]

The interpretation–construction distinction's major purpose is to define these two tasks as separate enterprises: "[T]he interpretation-construction distinction marks the difference between (1) inquiries into meaning of the constitutional text and (2) the process of deciding which doctrines of constitutional law and what decisions of constitutional cases are associated with (or required by) that meaning."[51] Solum envisions this as a two-step process (rather than a more integrated approach), where interpretation comes first and construction follows.[52] In his more recent works, Solum has taken the interpretation–construction distinction a step further by arguing that construction is ineliminable[53] and always occurs, even when the text is clear and meaning appears to flow directly from its linguistic content.[54] Under this

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47. *See, e.g.*, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1193–94 (1987) (ranking arguments from the text as the most influential but noting that "[a]rguments from text and from the framers' intent therefore possess less independent influence than their hierarchical status suggests").

48. Solum, *Interpretation-Construction Distinction*, *supra* note 4, at 100.

49. *Id.* at 103.

50. *See id.* at 104 (explaining that courts engage in constitutional construction by translating the "semantic content of the constitutional text" into the "legal content of constitutional doctrine"). Solum's example of an obvious construction (though not necessarily one that satisfies the Constraint Principle) is the set of "Time, Place, and Manner" restrictions that were crafted as doctrine based on the First Amendment. *Id.* at 99, 104.

51. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 457.

52. *Id.* at 495–96.

53. *Id.* at 458.

54. *See id.* at 469 (discussing "direct application" of the text's meaning for explicit constitutional rules). Solum's version of the interpretation–construction distinction is not the only take on the theory, and other theorists have debated where the distinction should be drawn. *See* Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 563–66 (2013) (discussing the differences between Keith Whittington's and Solum's respective versions of the interpretation–construction division).

view, any application of the law involves construction because construction is *required* to turn linguistic meaning into legal effect.

Of course, neither interpretation nor construction is necessarily tied to originalism; an interpretive process could plausibly use the contemporary meaning of the text rather than its original meaning, and construction could involve numerous other techniques (such as stare decisis or balancing policy concerns) rather than using a meaning fixed at the time of adoption and limiting construction through the use of that meaning. Solum has even noted that multiple-modalities theories can adopt a version of the interpretation–construction distinction.[55] The Fixation Thesis and Constraint Principle can be seen as a way to integrate originalism with the interpretation–construction distinction. Fixation limits interpretation to the original linguistic meaning of the text, while constraint prevents construction from overstepping its bounds when the text is vague or indeterminate.

III. What Are the Lower Limits of the Constraint Principle?

Having a rough grasp on Solum's terms is necessary to evaluate his definition of originalism. However, in order to find where Solum has placed the line between originalism and nonoriginalism, a more definite sense of what constitutes the lower bounds of originalism is required. Given the relatively uniform nature of originalist interpretation, this boundary is most likely to come from the process of construction. Essentially, Solum's divide between originalism and nonoriginalism can be boiled down to what does and does not accept the Constraint Principle.

Unfortunately, Solum has not provided a clear definition of what the lower bound of the Constraint Principle should be. On the occasions when Solum has mentioned a possible minimal version of originalist constraint, he has provided varying descriptions, including: (1) a two-factor test where doctrine "may not be inconsistent" with the communicative content and "must include rules that fairly capture" that content in "all of the portions of the text that are in force";[56] (2) a bare requirement of "consistency" with the text;[57] (3) a requirement to "respect the core of settled meaning";[58] and (4) "the position that the original meaning is one factor that must be considered in formulating constitutional doctrine or engaging in constitutional practice."[59] These quotes are not selective; unlike the maximal

55. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 481 & figs.2 & 3.

56. Solum, *Construction and Constraint*, *supra* note 13, at 22. Solum further specifies that "[t]his minimalist version of the constraint principle would allow for constitutional doctrine that supplements the text in various ways—implementing rules (like the prior restraint doctrine in free-speech doctrine) are allowed." *Id.*

57. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 461.

58. Solum, *Living with Originalism*, *supra* note 9, at 150.

59. Solum, *Faith and Fidelity*, *supra* note 13, at 154.

version of constraint,[60] Solum has not provided a definitive answer on this subject but has instead only briefly described possibilities.

What's more, these possibilities are not consistent with one another. For example, the fourth position—original meaning as "one factor"—is significantly less constraining than the two-factor test in the first, to the extent that many overtly nonoriginalist theories would fit into its purview.[61] Additionally, some of these options are significantly more detailed than others. The first option's two-factor test appears more structured than the nebulous consistency requirement in the second. The third option is simply unclear: what would "respect" entail? Is the "core of settled meaning" some subdivision of the entirety of the linguistic content?

None of these options provides a specific viewpoint on what "consistency" requires, much less how *much* consistency is required when the text is vague or how much construction is allowed. This leads to a significant question: by what means do we measure what is "consistent"?

A. The Requirements of "Consistency"

The question of whether a construction can be considered "consistent" for originalism is a complex one, particularly when one opens the field (as Solum has)[62] to rule-like constructions when the text is vague.[63] One clear example of a vague term that has since seen rule-like construction is the prohibition against "unreasonable searches and seizures" in the Fourth Amendment.[64] In *Atwater v. City of Lago Vista*,[65] the Court dealt with a case where a police officer arrested and handcuffed a woman (Gail Atwater) for not wearing her seatbelt.[66] The woman subsequently sued the city, saying that this violated her Fourth Amendment right against an unreasonable seizure.[67] The Court was concerned that the reasonableness standard given by the text could create a chilling effect on officers who could be reluctant to take necessary actions in the face of potential lawsuits for Fourth Amendment violations based on claims that a seizure was unreasonable.[68] The majority's

60. *See supra* text accompanying notes 36–38.

61. *See infra* subpart IV(A).

62. Solum's version of the Constraint Principle is designed to allow rule-like constructions when the communicative content is vague. Solum, *Construction and Constraint*, *supra* note 13, at 22.

63. *See* Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39, 43–44 & n.10 (2010), for a summation of some of the views that lead to this question and an accurate version of the question itself.

64. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

65. 532 U.S. 318 (2001).

66. *Id.* at 323–24.

67. *Id.* at 325.

68. *Id.* at 351.

actual response to the case was to create a rule-like construction, holding that "[when] an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."[69] Is such a rule-like construction "consistent" with the text? This largely depends on how consistency is defined.

A highly restrictive version of consistency could require that the Court's construction mirror the text exactly. This would limit the Court to applying only the communicative content of the text, even if that text was vague or ambiguous. This type of system would prevent the construction of more definite rules or standards, such as the formulation the Court eventually made in *Atwater*. Instead, the Court would have been limited to repeating the vague standard of "reasonableness" given in the text and likely would have made a determination based on the facts as applied, without creating a test for the lower courts' use.[70] This version of consistency is clearly greater than the one Solum envisions for minimum "consistency," as Solum's theory generally allows the construction of rules when interpreting vague texts.[71] However, this formulation is also easily defensible on the grounds of consistency and constraint—it is hard to imagine a situation where the Court would *not* be constrained by the text when it is forced to mirror its content.

Alternatively, one could posit that "consistency" could require consistent empirical results—constructed doctrine should be constrained so that it will produce the same results as the communicative content. However, whenever one reduces a standard to a rule, the resulting loss of nuance is bound to make the rule overinclusive, underinclusive, or both. Under the *Atwater* standard, some seizures that could be found "unreasonable" under the Fourth Amendment standard will be found *per se* reasonable—Atwater's arrest itself is a likely example. It seems implausible—if not outright impossible—that most rule-like constructions will lead to the same results as vague communicative content. A version of consistency that requires that the empirical extensions of the communicative content and constructed doctrine be the same seems different from the one Solum has in mind.

A significantly looser version of "consistency" could only require *logical* consistency with the communicative content of the text, regardless of the empirical actualities. Using *Atwater* as an example, the majority's standard doesn't necessarily mean that the arrests made are unreasonable seizures; it is hypothetically possible that each of the arrests that would be

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69. *Id.* at 354. For more detailed analysis of this decision, see Berman, *supra* note 63, at 62–66.

70. The majority opinion seems to indicate that this would have led to the opposite result: "Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case." *Atwater*, 532 U.S. at 347.

71. Solum, *Construction and Constraint*, *supra* note 13, at 22.

made under the standard would be a reasonable one, thus there is no logical conflict between the communicative content and the constructed doctrine. However, logical consistency is a very low bar for what could be considered "consistent" and would likely allow greater departure from the text than most originalists would desire—the freedom to construct "logically consistent" doctrine would seem to undermine the discretion-narrowing goals of the Constraint Principle.[72]

Although there are undoubtedly more alternatives than this, one final approach to consider is a more nebulous, standard-like test, based on whether or not the constructed doctrine seems faithful to the underlying principles of the text—in other words, whether the construction aligns with the "spirit" of the communicative content. However, this standard brings its own set of issues to the question of consistency, including the highly probable necessity of looking outside the communicative content to find the underlying principles and the potential for disagreements to arise about what is and is not within the standard. While this version could potentially provide the right degree of "consistency" for minimal constraint, it would require further development in order to actually function as a test for whether a decision is originalist.

As another example of how these different definitions could or could not apply to construction, take a phrase that Solum himself has identified as vague: the prohibition of "cruel and unusual punishments."[73] In the recent case of *Miller v. Alabama*,[74] the majority once again imposed a rule-like construction on a vague text, this time holding that the mandatory imposition of a sentence of life without parole (LWOP) on a minor was cruel and unusual.[75] Could this construction be compatible with Solum's view of minimal constraint?

As in *Atwater*, the potential results of this test compared to those of the standard are likely over or underinclusive. One could imagine a situation where a sentencing code mandates LWOP for minors when they have committed repeated heinous crimes (e.g., if there were a seventeen-year-old serial killer); this situation might not be considered cruel and unusual punishment under the standard but is flatly forbidden by the rule. Logical consistency would allow such a rule to be constructed (theoretically each prohibited punishment here *could* be cruel and unusual). The question of whether this is in line with the "spirit" of the Eighth Amendment is more contentious—indeed, the dissent argued that LWOP "could not plausibly be

72. *See supra* note 30 and accompanying text.

73. U.S. CONST. amend. VIII; Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 502.

74. 132 S. Ct. 2455 (2012).

75. *Id.* at 2469. The rule notably still allows judges to exercise discretion in sentencing minors to LWOP but forbids the legislature from requiring such a sentence for any crime. *Id.*

described as [cruel and unusual]."[76] The debate between the majority and the dissent here is thus illustrative of the difficulties with such a test: reasonable minds can easily differ over what the "spirit" of the communicative content could be. The varying results of this case under separate definitions of "consistency" show just how much variation is possible in the term, and why a clear definition of "consistency" is so important.

Solum has largely talked around the question of the meaning of "consistency" instead of providing a definitive answer. In one of his most recent articles, *Construction and Constraint*, he only reaches the question of "how much constraint should originalists want" in his conclusion, where he declares that this is a "complex question[]" that requires further normative justification.[77] While he notes that some of the same normative justifications that originalists use to justify the theory as a whole may be applicable to the more specific argument regarding level of constraint,[78] Solum has not fully elaborated on this point, despite the fact that it appears crucial to an understanding of the Constraint Principle. However, his inclusion of some authors as originalists[79] and his statements about those authors' works, allow some conclusions about minimal constraint through inference. Here it makes sense to examine each author's position in more detail.

B. Balkin, Living Originalism, and Fidelity

Jack Balkin's *Living Originalism* attempts to do what was previously thought impossible by reconciling the opposing theories of living constitutionalism and originalism.[80] Balkin achieves this synthesis through what he calls "framework originalism," a system he contrasts with traditional originalism, which he labels "skyscraper originalism."[81] Balkin's explanation of the difference between the two centers of construction:

> [S]kyscraper originalism views following correct interpretive methodology as the central constraint on judges. Framework originalism also requires that judges apply the Constitution's original meaning. But it assumes that this will not be sufficient to decide a wide range of controversies and so judges will have to engage in considerable constitutional construction as well as the elaboration and application of previous constructions.[82]

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76. *Id.* at 2477 (Roberts, C.J., dissenting).
77. Solum, *Construction and Constraint*, *supra* note 13, at 33–34.
78. *Id.* at 34.
79. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 534 tbl.1.
80. BALKIN, *supra* note 15, at 3.
81. *Id.* at 3, 22.
82. *Id.* at 22.

Balkin's version of originalism focuses on the semantic meaning of the text rather than the full communicative content.[83] Balkin uses this to explicitly deny the role of expected application in the interpretation process but clearly acknowledges that this also eliminates "practical applications" and "associations" that could be relevant to interpretation.[84] While Solum believes that this view of interpretation adheres to the Fixation Thesis,[85] he has noted that this version of originalism "dramatically reduces the constraint imposed by original meaning."[86] Balkin's use of the semantic content as his sole source for original meaning and his embrace of significant construction around that semantic content give his work a substantial construction zone with little apparent constraint.

Balkin's work is also notable for emphasizing the "level of generality" theory of interpretation, suggesting that "[t]he principles underlying the text should be at roughly the same level of generality as the text."[87] Under this theory, when the Constitution is specific and rule like in its text, then it can be taken as a rule.[88] However, when the language is more generally stated, such as the Fourteenth Amendment's guarantee of "equal protection of the laws,"[89] the high level of generality means that the underlying principles are very broad and possibly subject to several understandings beyond the text's historical content.[90]

Curiously, Balkin explicitly denies the need for constraint as a component of his theory, claiming instead that restraints on judges will not come from theories "but rather from *institutional* constraints."[91] Balkin believes that the most powerful constraint for judges comes from checks inherent in our political culture.[92] Rather than seeing his system as a method of constraining judges, Balkin believes its importance lies in helping "express

83. *Id.* at 13. Balkin's reasoning regarding the choice to focus on semantic content rather than the full communicative content does not preclude the use of other content, such as expected application and postenactment history, but does not *require* those other methods and does not find them dispositive. *Id.* at 13–15.

84. *See id.* at 12–13 (arguing that fidelity to original meaning only refers to the semantic content of the words and not to other kinds of meaning).

85. Solum, *Faith and Fidelity*, *supra* note 13, at 158.

86. Solum, *Construction and Constraint*, *supra* note 13, at 28.

87. BALKIN, *supra* note 15, at 263.

88. *Cf. id.* ("If the text uses general language, the underlying principles that support and explain the text should as well").

89. U.S. CONST. amend. XIV, § 1.

90. BALKIN, *supra* note 15, at 263–64.

91. *Id.* at 22.

92. *Id.* at 22–23 (listing institutional constraints on "judges engaged in constitutional construction," including multimember courts, the judicial appointment process, social and cultural influences, and judicial professionalism).

claims about the legitimacy or illegitimacy of . . . constitutional arrangements"[93] and facilitating viable critiques of unjust constitutional policies.[94]

Solum reconciles this view with the Constraint Principle by focusing on another tenet of Balkin's theory, "fidelity."[95] Analyzing Balkin's past statements about fidelity,[96] Solum finds three possible versions of the theory: "(1) a character state that predisposes one to act in accordance with original meaning, (2) an action in compliance with the language game of constitutional interpretation, and (3) an attitude of confidence in the value of the Constitution."[97] These three options could all effectively operate in tandem, leading to a combined thesis: "Fidelity to the Constitution entails playing the language game with an attitude of confidence in the value of the Constitution that is produced by a stable character trait (or virtue)."[98] Following this thesis means that judges must "argue in terms of the original meaning of the text" while retaining a sincere belief in the value of that original meaning (as opposed to simply paying it lip service).[99]

Despite the expansive nature of the construction zone in Balkin's work, Solum sees fidelity itself as an acceptable form of constraint.[100] Together with the focus on original meaning, fidelity is what separates Balkin from nonoriginalists. When the semantic meaning is vague or ambiguous, Balkin adopts the methods of the definitive nonoriginalist, Phillip Bobbitt, in embracing multiple modalities for construction.[101] But according to Solum, fidelity constrains the multiple modalities process by subordinating the other modes below the text:

> Unlike Bobbitt, whose account of the modalities of constitutional argument does not provide a hierarchy or lexical ordering, Balkin's framework originalism privileges arguments from text: "Interpretations and constructions may not contradict original

93. *Id.* at 93.

94. *See id.* (stressing that normative theories of constitutional interpretation "offer people a language to defend and criticize parts of the Constitution-in-practice with the hope of moving it closer to their values and ideals").

95. Solum, *Faith and Fidelity*, *supra* note 13, at 158.

96. Balkin's words on fidelity are typically abstract, general pronouncements, such as: "Fidelity is an interpretive attitude about the object of interpretation that produces psychological pressures on us and affects us for good or for ill." JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 103–04 (2011). For the remainder of this paragraph, I have quoted Solum's analysis rather than Balkin's actual text not only because his view of fidelity seems apt, but because it is Solum's view of Balkin that is relevant to this Note, rather than Balkin's actual theory.

97. Solum, *Faith and Fidelity*, *supra* note 13, at 159.

98. *Id.*

99. *Id.* at 160.

100. *See id.* at 168 (explaining "hard core living constitutionalism" as a constrained version of living constitutionalism and identifying the fidelity theory as such a theory).

101. *Id.* at 171.

meaning; therefore once we know the original meaning of the text, it trumps any other form of argument."[102]

Balkin's view of construction is very broad for originalism, but by allowing the text to supersede other methods, Solum finds the level of constraint as compared to Bobbitt "relatively high."[103]

This in turn opens a new axis for ambiguity in Solum's minimal definition of originalism. The theories that he includes in the "Incomplete constraint and restraint" tier[104] allow for methods of construction that go beyond the text, provided they "privilege" the text or place it at the head of some lexical hierarchy.[105] The question is how strong that hierarchy must be. Is it the same as Balkin's view, where when the text is clear it automatically prevails over other modalities? Or are there situations where other modes could succeed against the text? If the text is open textured in some dimensions but somewhat clear in others, what relative weight does the text have, and what role does it play in the construction process? Including multimodal hierarchical systems in the definition of originalism raises many unanswered questions.

C. *Barnett and Public Meaning Originalism*

Barnett was formerly a nonoriginalist[106] but eventually changed his allegiance to a version of "original public meaning" originalism.[107] This entails searching for the meaning that a "reasonable listener would place on the words used in the constitutional provision at the time of its enactment."[108] Unlike Balkin, Barnett's view of fixation allows more than the semantic meaning of the text, relying significantly on context and inference in the rest of the text.[109] The use of this pragmatic content means Barnett's theory likely creates greater constraint than Balkin's, as the text will more definitively guide construction.

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102. Solum, *Construction and Constraint*, *supra* note 13, at 32 (quoting BALKIN, *supra* note 15, at 341 n.2).

103. *Id.* at 33.

104. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 534 tbl.1.

105. *See supra* notes 102–03 and accompanying text.

106. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 91 (2004).

107. *Id.* at 89, 92. Other theorists have similarly focused on original meaning, for example, Kesavan and Paulsen's "original objective-public-meaning textualism." Kesavan & Paulsen, *supra* note 3, at 1132–33. However, as noted *infra* subpart III(E), Barnett's views on supplementation set him apart from some other public meaning originalists.

108. BARNETT, *supra* note 106, at 92.

109. *See id.* at 93, 95 (detailing several possible methods for determining original public meaning, including dictionary definitions, common contemporary meanings, and the "social and linguistic context[s]" of the language (quoting Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 223 (1980)).

Barnett's theory fits nicely into Solum's view of the interpretation–construction distinction, positing that interpretation should be "distinguished from either contradicting or supplementing the meaning of a writing."[110] Much like Balkin's view of fidelity, Barnett finds a "commitment" to the written Constitution that requires interpreters to respect the original meaning.[111] However, his views on construction initially appear to be far more constraining than Balkin's, insisting that any modification to meaning must be through formal amendment.[112]

Regardless, Barnett's theory has a substantial construction zone. While his theory prohibits the Court from modifying or contradicting the written meaning, Barnett suggests that the Constitution, like a contract that is not completely integrated, allows for *supplementation*.[113] Through his acceptance of the same "levels of generality" theory that Balkin has espoused,[114] Barnett finds the Ninth Amendment and the Privileges and Immunities Clause to have broad underlying principles that allow for significant supplementation based on the "original understanding of the rights retained by the people."[115] Barnett argues that this understanding was so broad that the rights retained cannot be enumerated and thus finds that there should be "a general Presumption of Liberty" that requires the Court to strike down unnecessary governmental infringement on personal freedoms.[116]

This theory would certainly require substantial construction on the Court's part to determine what does and does not fall under the presumption of liberty. However, that construction would still be limited to situations that involved personal liberties, and the theory would likely be much more restrictive of construction for other parts of the Constitution, even those that are potentially ambiguous. This, combined with the use of the full communicative content rather than just the semantic content, means that Barnett's theory has generally stronger constraint than Balkin's.

D. Ryan and New Textualism

On the surface, James E. Ryan's *Laying Claim to the Constitution: The Promise of New Textualism* could not be more different from *Living Originalism*. Where Balkin embraces both living constitutionalism and originalism,[117] Ryan explicitly rejects both terms, instead preferring the term

110. BARNETT, *supra* note 106, at 105.

111. *Id.* at 112.

112. *Id.* at 106.

113. *Id.* at 106, 108.

114. *See supra* notes 87–90 and accompanying text.

115. BARNETT, *supra* note 106, at 257–59.

116. *See id.* at 259–60 (arguing that the presumption of liberty "places the burden on the government to establish the necessity and propriety of any infringement on individual freedom").

117. *See supra* note 80 and accompanying text.

"New Textualism" to describe his theory.[118] Not only does Ryan call for a clean break with "old" originalism,[119] he disavows the term "new originalism" as a descriptor: "Some might be tempted to label this movement 'new originalism,' but that is a misleading and weighted phrase, given the political baggage associated with the term originalism."[120] Why, then, does Solum place him with self-proclaimed originalists, such as Balkin and Barnett?[121]

While Ryan rejects the labels associated with them, his methods are fairly similar to Balkin's and Solum's. Much like Balkin, Ryan believes that "the open-ended provisions of the Constitution establish general principles" whose applications can change over time.[122] Ryan also denies expected application as determinative of the text's meaning,[123] focusing instead on fidelity to the text.[124] Ryan, like Barnett, adopts Balkin's "level of generality" theory to find the degree to which the text determines principle.[125] Perhaps most importantly for Solum, Ryan's theory embraces a version of the interpretation–construction distinction.[126] Ryan says that new textualists "recognize that constitutional adjudication often requires two steps—determining the meaning of the constitutional provision at issue as precisely as possible and then applying that meaning to the issue at hand."[127] This nearly mirrors Solum's "two moments" model[128] and similarly allows other methods such as stare decisis to enter into the process of construction.[129]

Based on this, is Ryan an originalist in all but his own designation? Ryan's views on constraint call this into doubt. Ryan notes that "everyone agrees that the text, where specific, should control."[130] However, when the

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118. James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1524 (2011).

119. Ryan's rebuke of Scalia's era of originalists is fairly stinging:

> [N]ew textualists reject the equally facile assertion of some conservatives that the text, properly interpreted, yields precise answers to just about every question imaginable. They reject, in other words, Justice Scalia's cheery but surely false assertion that interpretation is usually "easy as pie" because the Constitution dictates only one correct outcome.

Id. at 1553.

120. *Id.* at 1552.

121. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 534 tbl.1.

122. Ryan, *supra* note 118, at 1539.

123. *Id.* at 1540.

124. *Id.* at 1542.

125. *Id.* at 1544–46.

126. See *supra* subpart II(C) for Solum's views on this topic.

127. Ryan, *supra* note 118, at 1560–61.

128. *See supra* notes 51–52 and accompanying text.

129. Ryan, *supra* note 118, at 1560. Solum has also embraced the use of stare decisis. *See* Solum, *Living with Originalism*, *supra* note 9, at 158 (contending that "originalism is . . . consistent with a relatively strong version of the doctrine of stare decisis").

130. Ryan, *supra* note 118, at 1526.

text takes the more open-textured form of principle, Ryan's recommendation for constraint is very loose, suggesting only that scholars "linger a little longer than they do now over the text and history."[131] This is not even the absolute privilege that Balkin's living originalism affords the text;[132] Ryan's proposed lexical order lends the text greater weight but does not give it full control unless it is completely specific and determinative.

E. Synthesis

The three authors in the "Incomplete constraint and restraint" category of Solum's table organizing types of originalism and nonoriginalism share some defining features: all three accept the interpretation–construction distinction, have some form of fixation for original meaning but allow for levels of generality to have an impact on interpretation, and have the potential for substantial construction.[133] However, there are also clear differences—most notably between Barnett and the other two—such as the use of pragmatic communicative content instead of solely semantic content and the emphasis on supplementation over changing applications of principles over time. Balkin's theory and Ryan's theory also differ in the degree that the text weighs upon the other modes of construction, with original meaning appearing to have greater preclusive value in Balkin's theory.

Looking at the most loosely constrained portions of each theory, one can craft a potential version of where Solum draws the line between minimal originalism and nonoriginalism. A minimal version of constraint appears to be bound only by the semantic meaning of the text as discovered in interpretation. If this semantic meaning is open textured, vague, or otherwise indeterminate, construction is allowed, and the construction process can embrace the other common modes of argument, including stare decisis, structural theories, and policy concerns. However, the text must have some nebulous amount of greater weight over the other factors. The degree of that extra weight might not be terribly large and generally does not appear determinative. When formulated this way, minimal constraint appears to be at a very low threshold indeed.

IV. Is the Constraint Principle a Useful Distinction?

"Originalism" is essentially a term of art. It serves to describe a family of theories, rather than anything corporeal. Unlike biological taxonomy, which is defined by rules that strictly limit classification,[134] legal theory has

131. *Id.* at 1560–61.

132. *See supra* note 102 and accompanying text.

133. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 534 tbl.1.

134. For example, the cladistic species concept defines organisms by dividing them into distinct species based on speciation events, thus creating "perfect objectivity." Mark Ridley, *The Cladistic Solution to the Species Problem*, 4 BIOLOGY & PHIL. 1, 3–4 (1989).

no empirical foundation for its system of nomenclature. This is not to say that terminology does not serve a purpose. Originalism as a distinction serves at least three purposes: (1) it identifies a set of theories with common principles or goals; (2) it allows authors to identify themselves as within that set of theories, providing continuity and common ground for discussion; and (3) it allows for debate about those theories' relative merits and effectiveness.

In his most recent works, Solum has argued strongly for the usefulness of his definition of originalism: "Almost every version of originalist constitutional theory incorporates the Fixation Thesis and the Constraint Principle: originalism is *meaningfully* used to refer to the family of originalist theories that embrace these two ideas."[135] Solum uses this definition primarily to assert that originalism does not require "perfect" constraint and restraint and to argue against more conservative originalists' denial of the inclusion of New Originalism within the bounds of the theory.[136] However, beyond simply upsetting "old" originalists, Solum's definition is problematic because it could undermine the use of originalism as a distinct category of theories.

A. Minimal Constraint Is Overinclusive

One of the chief issues with Solum's definition of originalism is the risk of encompassing many theories that do not claim to be originalist, some of which overtly disassociate themselves from originalism as a whole. The clearest example of this is Ryan, who rejects the term "originalism," partially out of its political baggage and partly to distance New Textualism from the previous generations of originalists.[137] Solum's reasons for including Ryan in the "Incomplete constraint and restraint" portion of his table[138] can be easily surmised: Ryan's theory expressly endorses the interpretation–construction distinction and fixation on original meaning, and thus supports Solum's larger argument that New Originalism generally accepts the interpretation–construction distinction.

However, the inclusion of multimodal hierarchical theories that privilege the text opens the door to a number of theories that are generally considered nonoriginalist. For example, Richard H. Fallon's article *A Constructivist Coherence Theory of Constitutional Interpretation* sets out a "hierarchy of argument" that ranks "arguments from text" as the highest in a

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135. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 528.

136. Solum is chiefly concerned with rebutting Martin Redish and Matthew Arnould's claim that New Originalism is "Orwellian" in using the term "originalism" while simultaneously rejecting the "originalist endeavor." *Id.* (quoting Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1509 (2012)).

137. *See supra* notes 118–20 and accompanying text.

138. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 534 tbl.1.

set of decision-making factors.[139] "Where compelling arguments from text unambiguously require a conclusion, the text must be held dispositive"; however, "the open-textured character of many constitutional provisions" frequently requires the use of the other factors.[140] If this sounds familiar, it should; these are some of the same points used by Solum's New Originalists, delivered a few decades before the term had been invented.[141]

Fallon is an avowed pluralist who finds that "originalism fails spectacularly" as a theory of constitutional interpretation.[142] Yet, because of his use of a hierarchical system that privileges arguments from text, there are only two hypothetical arguments against including him in Solum's theory of originalism, and neither seems plausible. The first is that, while Fallon disagrees with "old" originalism, he is not arguing with what the theory has become and would agree with the New Originalists' position. This argument not only requires a great deal of speculation[143] but also points to further issues. Key among these is the question: If New Originalism is so far removed from old originalism that it has more in common with former detractors than old adherents, is it truly the same theory?

The second argument is that Fallon does not accept the Constraint Principle.[144] However, Fallon's hierarchy seems to privilege the text as much as—potentially even *more* than—Ryan's theory. Unless there is some extra element to "consistency" that Ryan embraces and Fallon does not, in order to include Ryan in originalism, Solum is effectively including Fallon as well.

If theorists who are generally considered nonoriginalist are included in Solum's theory of originalism, which theories of adjudication are excluded? According to Solum, it is "those who believe that original meaning is only one factor, *to be balanced against others* in constitutional construction (e.g., Bobbitt)."[145] Pure, nonhierarchical balancing tests are not included, and neither are theories of judicial discretion, such as Dworkin's Law as Integrity.[146] However, this category quickly narrows when one considers the

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139. Fallon, *supra* note 47, at 1243–44.

140. *Id.*

141. *See* discussion *supra* subparts III(B), III(D).

142. Fallon, *supra* note 47, at 1213.

143. Indeed, Fallon's recent work indicates he is still opposed to originalism as a whole. *See, e.g.*, Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5, 24 (2011) (asserting that, in many cases, "originalist theories are 'rationalization[s] for conservatism'" rather than successful theories of interpretation).

144. This argument could have a good basis were it not for the other theorists in the "Incomplete constraint and restraint" category. *See* Fallon, *supra* note 47, at 1213 (suggesting that while particular interpretations of the Framers' group intent are theoretically "dependent upon and constrained by historical materials . . . they also embody implicit or explicit normative judgments").

145. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 536 (emphasis added).

146. *See* DWORKIN, *supra* note 45, 95–96 (1986) (discussing his theory of Law as Integrity); Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 534 tbl.1.

range of theories that find the communicative content of the text dispositive when it is specific. Recall the way Ryan puts it: "[E]veryone agrees that the text, where specific, should control."[147] Many theories that are generally considered nonoriginalist privilege the text in some way. Including those theories under the umbrella of originalism goes against their self-identified positions, rendering the term highly overinclusive.

B. Minimal Constraint Is Under-Inclusive

As well as including several theories that have traditionally been considered nonoriginalist, Solum's definition actually excludes some theories that should properly be considered originalist. Originalism can be viewed as both a theory of law and a theory of adjudication.[148] A definition of originalism should allow scholars to embrace originalism as a theory of law without necessarily requiring the same theory of adjudication—to study what it means to take the text of the Constitution itself as law and how best to interpret it, without necessarily extending that study to the practice of applying the text. However, Solum believes that legal effect does not come about without construction that is subject to the Constraint Principle. As a result, Solum's definition prevents pure theories of law from being considered originalist.

One example of a work that would be excluded under Solum's definition is Gary Lawson's *On Reading Recipes . . . and Constitutions*. There, Lawson compares the process of interpretation to that of reading a recipe and settles definitively on original public meaning as the only proper method of interpretation.[149] Lawson also recognizes the difference between interpretation and application,[150] a difference that is very similar to the interpretation–construction distinction. Yet, in this article at least, Lawson does not go so far as to say that the Constitution as law should always guide adjudication, claiming that such a theory "must be justified by sound moral arguments. And that is a tall order."[151]

Lawson's response is clearly relevant to the field of originalism—his metaphor is a lengthy justification for the use of the original public meaning, and he discusses several possibilities for resolving ambiguities.[152] Under Solum's rubric, Lawson wholeheartedly accepts the Fixation Thesis, but he does not accept the Constraint Principle—in this response, he endorses no particular opinion about adjudication whatsoever. His theory of law exists

147. Ryan, *supra* note 118, at 1526.

148. *See* Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEXAS L. REV. 1739, 1744–46 (2013) (describing originalism both as a theory of law and as a theory of adjudication).

149. Lawson, *supra* note 12, at 1834.

150. *Id.* at 1835.

151. *Id.*

152. *Id.* at 1834–35.

independently of construction. And as a result, Lawson's response would not be considered an originalist work under Solum's definition, despite common sense indicating otherwise.

C. *Minimal Constraint Obscures Further Debate*

The fact that the Constraint Principle has such a broad scope is likely intentional. Solum's first entry in *Constitutional Originalism*, a set of debates with Robert Bennett, is titled *We Are All Originalists Now*.[153] A very wide-ranging, open-ended definition of originalism suits Solum's purposes, allowing him to place the New Originalists in direct contention with Old Originalism in the debate over the theory's future.[154] Solum has insisted that the question of "how much constraint should originalists want?" is one that has yet to be answered and that requires a high level of normative justification.[155]

The problem is that Solum has already presumed the answer to a facet of this debate without actually arguing his reasons for doing so. By defining Balkin and Ryan as originalists, Solum assumes their inclusion in the originalist family, preempting any further debate about whether they should be included in the group of theories. Additionally, by including so much of constitutional theory under the tent of originalism, Solum makes most of these arguments intramural, obscuring the actual groups in the debate and instead lumping everyone together. If almost everyone is an originalist, the term loses its meaning as a distinctive family of theories.

D. *Possible Alternatives*

Is there a better, more efficient way to define what is and is not originalism? The breadth of theories claiming to be originalist is one of the chief difficulties in creating a workable definition that both comports with theorists' self-identification and maintains plausible distinctions between what is originalist and what is nonoriginalist.

One option which would alleviate the difficulties with Solum's definition regarding originalist theories of law that do not deal with adjudication is to divide those theories that accept original interpretation and those that require originalist construction. This option essentially uses the interpretation–construction distinction to subdivide originalist theories between those that deal generally with fixation and theories of law and those

153. Solum, *We Are All Originalists Now*, *supra* note 8, at 1.

154. *See* Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 536 ("[This organization] illuminates the real stakes in contemporary debates among constitutional theorists. Much of the action in debates among contemporary originalists concerns the three positions represented by (1) McGinnis and Rappaport, (2) Lawson and Paulsen, and (3) Balkin and Barnett—the real stakes in these debates concern constraint and restraint.").

155. Solum, *Construction and Constraint*, *supra* note 13, at 33–34.

that focus on adjudication and how the meaning should constrain legal effect. This way, even a theory that does not endorse a specific method of constraint could be considered originalist, provided it adds to the discussion of how to interpret the original meaning. Theories that deal with both originalist interpretation and construction could potentially occupy a third category.

In order to properly differentiate theories of adjudication that diverge in their view of constraint, another option is to follow Ryan's strategy and simply change the name of the family of theories as a whole. However, this completely severs the connection between New Textualism and originalism and ignores the fact that there are several factors that the two bear in common, the focus on original meaning chief among them. A better way to address the problem might involve a spectrum of possibilities regarding constraint, acknowledging that some theories have significantly higher textual constraint than others. Elements of Solum's table actually reflect this method; the key issues occur when he reduces the categorization down to the binary option of "originalist" or "nonoriginalist."[156] Perhaps the complexities of the field now demand a more fine-grained terminology. If so, that is an argument for another article or note, as the assertion would require significant linguistic and philosophical justification.

V. Conclusion

Solum's concept of minimal constraint, and the definition that follows of what is and is not originalist, is problematic for both its breadth and lack of clarity. Solum has yet to provide a clear definition of what constitutes minimal constraint. However, by examining the authors Solum lists as originalist, one can construct a minimal version of constraint that seems to fall within Solum's theory. This version accepts as originalist any decision that privileges the semantic meaning of the text in any way, so long as the text is given added weight. Under this theory, even generally multimodal theories like Ryan's (and by extension Fallon's) could be included.

This formulation is significantly overbroad, but also underinclusive because it excludes pure originalist theories of law that do not examine adjudication. The examples Solum has given are clearly intended to reinforce the interpretation–construction distinction's presence in the new wave of originalism and to legitimize some of the newer, construction-heavy theorists as originalist. However, the definition obscures the terms of the debate and goes against some of its participants' respective self-identifications as to whether they are or are not originalist. At the very least, Solum's definition

156. Solum, *Originalism and Constitutional Construction*, *supra* note 5, at 534 tbl.1.

requires both a clear statement of its minimal bounds and reformulation to be more precise. But to truly capture the state of the current debate in constitutional theory, more must be done to clearly define and categorize each set of theories in order to prevent vagueness and confusion.

—Ethan J. Ranis

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