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ARTICLES

BOOK REVIEWS

NOTES

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Articles

Statutes in Common Law Courts

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The Supreme Court teaches that federal courts, unlike their counterparts in the states, are not general common law courts. Nevertheless, a perennial point of contention among federal law scholars is whether and how a court's common law powers affect its treatment of statutes. Textualists point to federal courts' lack of common law powers to reject purposivist statutory interpretation. Critics of textualism challenge this characterization of federal courts' powers, leveraging a more robust notion of the judicial power to support purposivist or dynamic interpretation. This disagreement has become more important in recent years with the emergence of a refreshing movement in the theory of statutory interpretation. While debate about federal statutory interpretation has settled into a holding pattern, scholars have begun to consider whether state courts should interpret statutes differently than federal courts and, if so, the implications of that fact for federal and general interpretation.

This Article aspires to help theorize this emerging field as a whole while making progress on one of its most important parts, namely the question of the difference that common law powers make to statutory interpretation. This inquiry takes us beyond the familiar moves in federal debates on interpretation. In turn, it suggests an interpretive method that defies both orthodox textualism and purposivism in that it may permit courts to extend statutory rules and principles by analogy while prohibiting courts from narrowing the scope of statutes in the name of purpose or equity. Such a model accounts for state court practice at the intersection of statutes and common law that recent work on state court textualism neither confronts nor explains. This model also informs federal theorization, both by challenging received wisdom about the relationship between common law and statutes and by offering guidance to federal courts at the intersection of statutes and pockets of federal common law.

The framework this Article constructs to approach the common law question can also help organize the fledgling field of state–federal comparison more generally. With this framework, we can begin to sort out the conflicting

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and overlapping strands of argument already in the literature while also having a template for future inquiries. At the same time, this framework can help us think about intersystemic interpretation with greater rigor—an advance that can aid state and federal jurisprudence alike.

Introduction

The revival of theory in statutory interpretation is one of the most significant events in American public law in the past three decades.[1] The field continues to develop and its participants continue to disagree about how to read statutes. Yet even among some of the partisans, there is a sense that where there was once wide-ranging debate, there is now a settled equilibrium, if not an argumentative rut. "The guns in the statutory interpretation wars," one commentator muses, "are now largely silent."[2] Another, a critic of academic textualism, finds a "strong consensus on the interpretive enterprise that dwarfs any differences that remain."[3] Existing debate, on this account, obscures "just how thoroughly modern textualism has succeeded in dominating contemporary statutory interpretation."[4]

The dust from the Thirty Years' statutory interpretation wars may have settled and, while textualism has not won an unconditional surrender in the Supreme Court, it appears to have gained substantial territory before its truce with purposivism. If this is so, the scope of interpretive argument at the Supreme Court has narrowed in recent decades. Thus, scholars that synthesize and criticize that jurisprudence on its own terms may have to focus on a correspondingly modest number of questions. Even assuming that the Court's equilibrium is stable, however, that agreement covers only a tip of the interpretive iceberg. Statutory interpretation scholars have filled shelves of law reviews while focusing almost exclusively on the Supreme Court in general and on its exposition of federal public law in particular.[5] This inquiry usually ignores the bulk of statutory interpretation cases in the United

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1. *See* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 250–56 (1992) (chronicling the rise of interpretation theory in the 1980s).

2. Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 732 (2010).

3. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2 (2006).

4. *Id.* at 36.

5. For salutary exceptions, see Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 318 (2005) (arguing that inferior courts have no sound basis for applying the Supreme Court's doctrine of statutory stare decisis); Aaron-Andrew P. Bruhl, *Hierarchy and Heterogenity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 433 (2012) (describing institutional differences between different courts in the appellate hierarchy and arguing that these differences "justify a heterogeneous regime in which courts at different levels of the judicial hierarchy use somewhat different interpretive methods"); Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 875 (1991) (exploring how modern common law judges, in light of the role of statutes as the primary source of law, should view their role in relationship to the legislature).

States, namely those resolved by state courts.[6] The question of whether federal and state court interpretive methodology should run parallel is important, hardly obvious, and rarely pondered.

Or at least that was so until very recently. In the past few years, a small number of legal scholars have begun to examine theories of interpretation with a lens wider than that of federal review.[7] This work, primarily by junior scholars, is the beginning of a fresh line of inquiry that promises insights not only on neglected matters of state court interpretation, but also on the received wisdom in federal interpretation and interpretive theory more generally. Two questions are prominent in this fledgling literature. First, whether state courts should interpret their statutes differently than how federal courts read federal statutes.[8] Second, if methods diverge, how to interpret statutes across the borders of jurisdictions with different methods.[9]

This Article pursues the first divergence question with hopes of also shedding light on both the second intersystemic question and federal interpretation more generally. It does so by taking up an important but underexplored problem: whether a state court with general common law powers should approach statutes differently than a federal court that, in the post-*Erie* era,[10] is understood to lack such powers. This question will also serve as a platform for building a more general framework for considering the divergence question. With this framework, we can begin to sort out the conflicting and overlapping strands of inquiry already in the literature while having a template for future inquiries. At the same time, this framework can help us think about the intersystemic question with greater rigor—an advance that will aid state and federal jurisprudence alike. In short, this Article aspires to help define and theorize a promising new line of inquiry as a whole while making progress on one of its more substantial parts.

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6. *See* NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS iv (2010) (noting that approximately 95% of all cases filed in the United States are filed in state court); *see also* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1753 (2010) [hereinafter Gluck, *Laboratories*] ("The vast majority of statutory interpretation theory is based on a strikingly small slice of American jurisprudence, the mere two percent of litigation that takes place in federal courts—and, really, only the less-than-one percent of that litigation that the U.S. Supreme Court decides.").

7. *See, e.g.*, Gluck, *Laboratories*, *supra* note 6, at 1750 (discussing modern statutory interpretation in several state courts of last resort).

8. *See, e.g.*, Bruhl, *supra* note 5, at 439 (identifying several institutional differences that "militate in favor of interpretive divergences across courts").

9. *See, e.g.*, Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1991–92 (2011) [hereinafter Gluck, *Intersystemic*] (highlighting that federal and state courts do not consider whether they are required to apply one another's methodology when interpreting each other's statutes).

10. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision.").

Exploring the difference common law powers make in courts' treatment of statutes takes the inquiry beyond the familiar moves in debates about federal statutory interpretation. State courts assessing the interpretive implications of their common law powers should consider sources besides Supreme Court precedent on ordinary interpretation. Indeed, perhaps the most instructive body of precedent on this question can be found not in the United States Reports, but in the high courts of commonwealth jurisdictions like the United Kingdom and Australia which, like American state courts, must reconcile their general common lawmaking powers with a superior legislature's statutes. Finally, common law courts may have to confront jurisprudential questions about the interpretation of statutes and precedent that federal courts arguably can avoid.

All told, a plausible result of these inquiries is an interpretive method that defies both orthodox textualism and purposivism as we know it, a hybrid model that permits courts to extend statutory rules and principles by analogy while prohibiting courts from narrowing the scope of statutes in the name of nontextual purpose or equity. This common law/parliamentary hybrid accounts for state court practice at the intersection of statutes and common law that recent groundbreaking work on state court textualism neither confronts nor explains. Such a model can also inform federal theorization, both by challenging received wisdom about the relationship between common law and statutes and by offering guidance to federal courts when statutes and enclaves of federal common law meet.

I. Federal and State Statutory Interpretation

To set the stage for the broader argument, this Part summarizes the state of play in both federal and state statutory interpretation theory. In many respects, the state of scholarship in the two fields could not be more different. In the federal context, decades of sustained argument appear to have narrowed disagreement among scholars and judges to a smaller set of problems. If the revival of statutory interpretation theory in federal courts has settled down to a new equilibrium, theorization about interpretation outside the federal context is just starting to stir. This small but diverse body of work both hints at and calls out for a general framework for thinking about interpretation in state courts and across jurisdictions.

A. Federal Statutory Interpretation and Faithful Agent Equilibrium

Federal statutory interpretation theory is a natural baseline for comparison with the state context, if only because such work defines most of the conceptual space in which American courts and scholars operate. A review of recent case law and much of the scholarly literature suggests that encapsulating this federal jurisprudence is easier now than it was twenty years ago. A vigorous, wide-ranging debate between textualism and its critics appears to have stabilized and turned to a set of narrower, albeit

fundamental, questions about interpretation. At the Supreme Court, the assumed framework in recent decades is one of faithful agency to Congress, a framework in significant part constructed on textualist terms. Although the Court has not granted every item on the textualist wish list, the Court's jurisprudence appears to reject strong purposivist or dynamic approaches to interpretation.

If, as some have argued, "[t]he guns in the statutory interpretation wars are now largely silent,"[11] it is fair to ask how they quieted so. Professor John Manning's recent history of interpretive theory tells a story of dialectic and synthesis between textualism and purposivism in the Supreme Court's reading of statutes.[12] Starting in the early 1980s, founding textualists emphasized empirical challenges to the use of legislative history and the coherence of invoking a legislative body's "intent" or "purpose."[13] In response, textualism's critics drew on public choice theory to defend a moderated use of legislative history and to shore up the cogency and reliability of appeals to congressional intent and purpose.[14] At the same time, purposivists and intentionalists pointed out that textualists regularly relied on interpretive tools beyond the statutory text, such as canons of interpretation, common law understandings, and dictionaries.[15] Textualism, according to these criticisms, was premised on bad political science and was internally contradictory in its use of external sources.[16]

In response, Manning accedes that this criticism "clouded the cleanly intuitive appeal of the empirical claims" that early textualists made against legislative history, intent, and purpose.[17] Manning also agrees that texts are not self-revealing and that textualists can, do, and should use some extrinsic sources.[18] This is not because those extrinsic sources are authoritative, but because they are useful contextual evidence for identifying what a hypothetical legislator at the time of enactment would seek to convey to a

11. Monaghan, *supra* note 2, at 732.

12. John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010) [hereinafter Manning, *Second-Generation*].

13. *Id.* at 1291–92.

14. *See id.* at 1298–303 (discussing the responses of textualism's critics—including Farber and Frickey's specific critiques of textualists' interest group theory and social choice theory—to the practical assumptions underlying textualism). For a recent philosophical defense of collective, parliamentary intent, see generally Richard Ekins, *The Intention of Parliament*, 2010 PUB. L. 709.

15. *See, e.g.*, Molot, *supra* note 3, at 30–36 (praising textualism's recognition that language only has meaning in context); *see also* John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 79–85 (2006) [hereinafter Manning, *What Divides*] (discussing modern textualists' use of extrastatutory context as a means of discerning the objective intent of a statutory text).

16. *See* Molot, *supra* note 3, at 49–50 (explaining that when modern or aggressive textualists ignore a statute's context, they risk being judicial activists and disregarding congressional intent).

17. Manning, *Second-Generation*, *supra* note 12, at 1303.

18. *Id.* at 1308.

reasonable reader of legal English.[19] Finally, Manning accedes that when a text remains vague or ambiguous, textualists can justifiably make "rough estimates" of statutory purpose to resolve cases.[20] On the other hand, he notes that purposivists not only use similar extrinsic sources to understand statutes, but in recent years have focused increasingly on statutory text and structure.[21] Like textualists, "purposivists start—and most of the time end—their inquiry with the semantic meaning of the text."[22] Given these similarities, a sharp contrast between textualism and its rivals is hard to see, and much recent scholarship searches for that very distinction.[23]

On this question, Manning emphasizes nonempirical, constitutional arguments for textualism. He posits a theoretically simpler textualism that adheres to a more modest and basic tenet about statutory interpretation: when the semantic meaning of a statutory text is clear to the reasonable reader, a court must honor that meaning even when doing so appears to conflict with a statute's broader purpose or policy.[24] This choice between semantic meaning and conflicting policy, Manning explains, is the basic question dividing textualists and purposivists.[25] The textualist's prioritization of semantic meaning over broader purpose is controversial. Some purposivists call on academic textualists, who have "won" the interpretive "war" in the Supreme Court, to accept moderate deviations from this tenet, such as the canon against absurd interpretations.[26] Others claim that this apparently modest

19. *See* Manning, *What Divides*, *supra* note 15, at 79 (describing modern textualists' belief that language is only intelligible in its context); *see also* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2457 (2003) [hereinafter Manning, *Absurdity Doctrine*] (discussing modern textualism's emphasis on understanding language in its social context).

20. Manning, *What Divides*, *supra* note 15, at 84–85.

21. *Id.* at 85.

22. *Id.* at 87.

23. *Compare* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347 (2005) (observing that prior scholarship has exaggerated the difference between the goals of textualism and intentionalism while underappreciating their differing attitudes towards rules and standards), *with* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005) (maintaining that textualists and intentionalists offer differing conceptions of legislative intent), *and* Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451 (2005) (reiterating that textualists and purposivists largely agree on the goals of interpretation); *compare* Molot, *supra* note 3 (rejecting the traditional line dividing textualists and purposivists and proposing a moderate version of textualism to appeal to both sides), *with* Manning, *What Divides*, *supra* note 15 (conceding that textualism and purposivism share more conceptual common ground than normally acknowledged but noting that textualism prioritizes semantic context while purposivism prioritizes policy context); *see also* Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 982–84 (2004) (arguing that textualism is most plausibly understood as rule-restricted intentionalism).

24. Manning, *Second-Generation*, *supra* note 12, at 1309–10; *see also* Manning, *What Divides*, *supra* note 15, at 76 (noting that textualists give semantic cues determinative weight even where conflicting evidence of policy exists).

25. Manning, *What Divides*, *supra* note 15, at 91.

26. *See* Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 119 (2009) (citing Molot, *supra* note 3) (noting purposivists' suggestions that textualists

tenet is textualism's Achilles' heel, a methodological weakness that will ultimately doom a theory that upholds increasingly absurd and outmoded interpretations.[27]

Yet disagreement on this basic point stands out among a broader convergence in both the Supreme Court and much recent scholarship.[28] Manning argues persuasively that the Supreme Court has now settled at an equilibrium in which it has reduced, rather than eliminated, its use of legislative history while also increasing its attention to statutory text at the expense of broader purposive inquiry.[29] Further, the disagreement at the Supreme Court concerns not whether the interpreter should be a faithful agent of Congress or a dynamic partner in governance, but whether Congress's faithful agent should adhere to text or purpose when the two conflict. Even the Court's more purposivist opinions take pains to ground their interpretations in both semantic meaning *and* overarching policy.[30] If there are any Calabresian judicial artists or metademocrats on the Court,[31] they are well-hidden.

This is not to judge the merits of strong purposivist or dynamic statutory interpretation, but to note that the Court does not approach statutes on those terms, or at least does not do so explicitly. If anything, Manning's assessment might understate textualism's recent strides at the Supreme Court. The last Court majority to rely on *Church of the Holy Trinity v. United States*[32]—the case famous for holding that a statute's literal textual meaning must yield in the face of absurd results—predates the fall of the Berlin Wall.[33] The practice of implying private rights of action to effectuate

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should cease to advocate for an "aggressive textualism" and instead embrace the moderate approaches on which scholars and judges have agreed).

27. *Id.* at 121–22 (arguing that textualists cannot accept the more moderate approaches suggested by accommodationists such as Professors Molot and Nelson "without ceasing to be textualists").

28. *But see id.* at 119–20 (contrasting the view—shared by Professors Molot and Nelson—that textualism and intentionalism have generally converged, with his own position that textualists' adherence to a formalist axiom ensures that "their war with other methods can never cease").

29. Manning, *Second-Generation*, *supra* note 12, at 1307; *id.* at 1308 (citing Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568–69 (2005) as exemplifying the new equilibrium).

30. *Id.* at 1313 n.117 (citing Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 94–99 (2007) and Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 591 (2004)).

31. *See generally* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995) (identifying a new "metademocratic" conception of statutory interpretation whereby courts assign meaning to contested statutory terms via interpretive rules designed to produce democratizing effects); Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213 (1983) (characterizing Calabresi's activist conception of judges as artists capable of recasting the law).

32. 143 U.S. 457 (1892).

33. Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 454 (1989) (citing *Church of the Holy Trinity*, 143 U.S. at 459). The Court has, however, since invoked the absurdity doctrine to depart from textual meaning. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 429 (1998) (rejecting the government's novel reading of § 692 of the Line Item Veto Act because acceptance of such an

uncodified legislative intent and promote overarching legislative purposes has fared only slightly better.[34] In fact, one commentator read a recent Supreme Court opinion as signaling the complete victory of the new textualism over strong purposivism.[35] In *Astrue v. Ratliff*,[36] the Court gave force to the clear semantic meaning of a term in a fee-shifting statute despite arguments—grounded in legislative findings and history—that: (i) Congress would have preferred a different result had it considered that particular problem; and (ii) that the semantic meaning undercut the statute's remedial purpose.[37] Justice Sotomayor pressed these points in a concurring opinion joined by Justices Stevens and Ginsberg, but all three joined Justice Thomas's opinion of the Court *in full* because the textual analysis "compell[ed] the conclusion."[38]

In other words, nine Justices, including the last one to invoke *Church of the Holy Trinity*,[39] chose objective semantic meaning gleaned from text, structure, and linguistic canons over policy inferences and an imaginative reconstruction of what the enacting legislators *would* have wanted had they considered the issue.[40] Thus, when faced with the choice between semantic meaning and statutory purpose—Manning's dividing line between textualism and purposivism—the Court chose semantic meaning unanimously. In 1991, a similar question produced a foundational textualist decision, but in a 5–4

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interpretation would "produce an absurd and unjust result which Congress could not have intended").

34. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."); *cf.* Gonzaga Univ. v. Doe, 536 U.S. 273, 283–86 (2002) (foreclosing the plaintiff's action for violation of a federal statute because the statute did not manifest an unambiguous intent to create individual rights enforceable under 42 U.S.C. § 1983).

35. Frederick Liu, Astrue v. Ratliff *and the Death of Strong Purposivism*, 159 U. PA. L. REV. PENNUMBRA 167, 173 (2011) ("Interpretive consensus on the Supreme Court is not impossible. . . . If *Ratliff* is any indication, strong purposivism is dead . . . .").

36. 130 S. Ct. 2521 (2010).

37. *Id.* at 2530–31 (Sotomayor, J., concurring).

38. *Id.* at 2529–30.

39. *See* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 107 n.3 (2007) (Stevens, J., concurring) (citing *Church of the Holy Trinity* to support his position that a literal reading of statutory text should give way when Congress's intent as to the precise issue before the Court is clear).

40. *See* Liu, *supra* note 35, at 170 (identifying a legislator's subjective intent as one of two kinds of "intent" a court should look for when interpreting statutes). *But see* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (arguing that the purposive approach of "imaginative reconstruction" is a model of faithful agency superior to textualism).

split with three separate dissents.[41] In *Astrue*, those with misgivings saw no option but appeal to Congress for textual amendment.[42]

B. *State Court Statutory Interpretation*

If federal disputes about statutory interpretation have stabilized, serious scholarship about interpretation in the state context has only just begun. This subpart reviews and synthesizes scholarship on statutory interpretation in state courts. The subpart focuses on the questions of whether state court interpretation should differ from federal court interpretation and the consequent question of whether interpretive method should travel with a statute across jurisdictional bounds. This growing body of scholarship both hints at and calls out for a more general framework for thinking about interpretation in state courts and across jurisdictions.

1. The Jurists.—Until recently, most modern theory on state statutory interpretation came via state judges' speeches later reprinted in the host institutions' law reviews. These works flag potential points of difference between state and federal court interpretation, such as state courts' general common law powers and the relevant similarities and differences in state and federal constitutional structures. These arguments, however, raise as many questions as they answer about state court interpretation.

The leading example of this genre is a lecture by Judith Kaye as chief judge of the New York Court of Appeals.[43] The touchstone of her argument for state court divergence is the fact that state courts "are the keepers of the common law."[44] Even in an age of statutes, state courts, unlike federal courts of limited jurisdiction, retain general common law powers.[45] Because of this, Judge Kaye argues, state law is a complex tapestry of common law and statute, making the court an interlocutor with the legislature, not just a passive interpreter of statutory commands.[46] This "common-law method compels courts" to depart from a statute's plain meaning when doing so leads

41. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101–03 (1991) (holding, based on plain language, that a federal statute conveyed no authority to shift expert fees, but with Justices Marshall and Stevens dissenting on the grounds that statutory interpretation should also involve extratextual considerations).

42. *See Astrue*, 130 S. Ct. at 2533 (Sotomayor, J., concurring) (quoting Bartlett v. Strickland, 556 U.S. 1, 44 (2009) (Ginsburg, J., dissenting)) ("While I join the Court's opinion and agree with its textual analysis, the foregoing persuades me that the practical effect of our decision 'severely undermines the [statute's] estimable aim . . . . The Legislature has just cause to clarify beyond debate' whether this effect is one it actually intends.").

43. Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1 (1995).

44. *Id.* at 6.

45. *Id.* at 20 (citing City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) and Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640–42 (1981)).

46. *See id.* at 20–26 (describing the state legislative/judicial dialogue and surveying instances of legislative–judicial give-and-take).

to absurd results.[47] To bring this back to Manning's dichotomy, Kaye argues that her court's common law powers and tradition allow it to choose broader purpose over semantic meaning when the two conflict.

Judge Kaye does not point to specific examples on how a state and federal court might rule differently when faced with a similar statutory problem.[48] That said, her emphasis on the legitimacy of the state court's role in law and policy development suggests that her comparative target is federal textualism.[49] It is also not clear that she believes federal courts are barred from applying the common law method in statutory interpretation. If anything, her approving citations to federal scholars like William Eskridge, Daniel Farber, and Philip Frickey suggest the contrary.[50] In this light, a state court's common law *powers* (as opposed to method) may be a sufficient and additional justification for the dialogic purposivism she advances, but not a necessary feature.[51]

Connecticut State Supreme Court Justice Ellen A. Peters also addresses state statutory interpretation in her work distinguishing the state and federal traditions of separation of powers.[52] As with Judge Kaye, Justice Peters invokes the state court's common law powers, claiming them as an interpretive resource that federal courts lack.[53] Again like Judge Kaye, Justice Peters also is ambivalent on whether this cashes out in any methodological differences for state and federal judges facing similar statutory problems. She claims that "[m]ost state court judges, like most federal judges," hold the "mainstream view" rejecting federal textualism.[54] Although Peters notes other differences in the separation of powers in the states, she does not offer a strong link between them and an approach to statutory interpretation.[55]

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47. *Id.* at 26.

48. She does note, however, that state courts have less access to legislative history than federal courts. *Id.* at 29–30. This difference appears to have narrowed in recent years. Gluck, *Laboratories*, *supra* note 6, at 1829 n.301, 1859 n.398.

49. *See* Kaye, *supra* note 43, at 9–11 (rejecting as a canard criticism of "judicial activism").

50. For example, Kaye cites Eskridge alone twelve times. *Id.* at 19 nn.106–08, 22 n.119, 23 n.124, 29 n.165, 30 n.167, 33 n.182, 34 n.185.

51. *See* Eric Lane, *How to Read a Statute in New York: A Response to Judge Kaye and Some More*, 28 HOFSTRA L. REV. 85, 86–87 (1999) (arguing that both federal and state courts use the "common law" method of interpretation Kaye describes).

52. Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543 (1997).

53. *Id.* at 1555–56.

54. *Id.* at 1555.

55. *See id.* at 1555–64 (detailing various differences between federal and state separation of powers and giving examples of their effect on statutory construction and on the day-to-day functioning of state courts, but failing to give a definitive link); *see also* Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1081–82, 1085 (1991) (observing that some state supreme courts offer advisory opinions, some state judges sit on law reform committees, and some informally lobby legislators); *cf.* Hans A. Linde, *Observations of a State Court Judge*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 117, 128 (Robert A. Katzmann ed., 1988) (finding "no

Michigan Supreme Court Justice Robert Young, Jr., by contrast, embraces federal-style textualism and criticizes Judge Kaye's approach to statutory interpretation.[56] He argues that statutory interpretation is "not a branch of common-law exegesis" because the separation of powers requires the court to respect the legislature's expressed intent.[57] Like many federal textualists, Young would employ semantic canons, consult a limited set of nontextual sources, be suspicious of legislative history, and look beyond expressed intent only when a statute is ambiguous.[58] In doing so, he rejects the absurdity doctrine and notes that the Michigan Supreme Court only invokes particularly reliable forms of legislative history.[59]

Justice Young's approach tracks the faithful-agent equilibrium identified in federal practice.[60] Although he discusses a substantial amount of textualist Michigan precedent, he does not distinguish the federal and state contexts at the level of principle. His embrace of textualism on grounds that "ours is a constitutional republic" does not specifically refer to the constitution of either Michigan or the United States.[61] Presumably, the notions of legislative supremacy and separation of powers in Michigan that underwrite Justice Young's theory of statutory interpretation are no different than their federal counterparts, resulting in a unified methodology.

2. The Scholars.—The judges' writings offer kernels of arguments about federal–state divergence: the significance of state courts' general common law powers; the significance of distinct separation of powers arrangements; and, by contrast, the potential irrelevance of common law powers in the face of federal–state parallels in the judicial role and constitutional structure. According to recent accounts of litigated cases, moreover, many state judges assume that federal law and scholarship on

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insurmountable legal obstacles to useful interaction between judges and legislators in the development of good policies" if there are "clear distinctions as to whether a judge speaks for the institutional concerns of the judicial branch, for the personal interests of judges as a group, or as an individual citizen").

56. *See* Robert P. Young, Jr., *A Judicial Traditionalist Confronts Justice Brennan's School of Judicial Philosophy*, 33 OKLA. CITY U. L. REV. 263, 268–69 (2008) (criticizing Judge Kaye's judicial philosophy, which views judges as having a "responsibility" to reshape society and to interpret statutes based on "perception[s] of the 'common good,'" as an "unfortunately . . . commonplace" notion); *see also* Lane, *supra* note 51, at 86–87 (challenging Judge Kaye's description of common law interpretive methods because she limits its reach to state courts and arguing instead that differences in interpretive methods do not align by jurisdiction but rather by "individual judicial sensibilities").

57. Young, *supra* note 56, at 280.

58. *Id.* at 280–82.

59. *Id.* at 281–82.

60. The Michigan Supreme Court, however, has not explicitly repudiated the absurdity doctrine, and Young's parsimony in identifying ambiguity may be stricter than current Michigan Supreme Court practice. *See id.* (finding statutes ambiguous if their provisions are in irreconcilable conflict or if competing interpretations are in equipoise).

61. *Id.* at 280.

statutory interpretation translate well to the state context.[62] Absent further judicial development, it falls to scholars to explore questions of comparative methodology. Yet even when the explosion of writing about statutory interpretation was at its apex, few considered such questions.[63] Even Robert Summers, one of the greatest comparativists in statutory interpretation, focused almost exclusively on Supreme Court decisions for his chapter on American methodology in a volume on comparative statutory interpretation.[64]

In the past five years, however, a handful of scholars began to take state interpretive methodology seriously. The earliest work hewed close to federal matters. Professor Alex Long, for example, considered interpretation of state discrimination statutes that parallel federal law.[65] He concluded that interests of judicial integrity, legislative efficiency, and respect for legislative intent recommend that state courts presumptively follow federal interpretations.[66] Professor Anthony J. Bellia then studied state court interpretations of federal statutes in the post-Ratification era.[67] There, Bellia asked whether state courts applied the doctrine known as the "equity of the statute" when interpreting federal statutes.[68] This common law doctrine allows courts to depart from a statute's clear text in light of the reason or "equity" of the legislation—either by extending the statute's applicability beyond its scope but within its purpose or by restricting the scope of a statute when the text applies to a matter but the purpose does not.[69] Bellia found state courts invoking the doctrine for state statutes while not equitably interpreting

62. *See* Gluck, *Laboratories*, *supra* note 6, at 1858 (observing that state courts "do not see institutional differences as substantial enough to pose barriers to the exchange of theory" between state and federal interpretive tools).

63. William Popkin is an early exception. Yet in both his general theorizing and his close study of a state court's opinions, his work assumes that state and federal cases are interchangeable for purposes of his theoretical analysis. *See* William D. Popkin, *Statutory Interpretation in State Courts—A Study of Indiana Opinions*, 24 IND. L. REV. 1155, 1158 (1991) (arguing that "[t]wo of the issues prominent in contemporary literature [on statutory interpretation] can be profitably explored in the context of state cases"). *See generally* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION (1999) (providing a historical analysis of the evolution of statutory interpretation at the state and federal levels). This may be true, but, as we will see later, not obviously so.

64. Robert S. Summers, *Statutory Interpretation in the United States*, *in* INTERPRETING STATUTES: A COMPARATIVE STUDY 407, 407 (D. Neil MacCormick & Robert S. Summers eds., 1991).

65. Alex B. Long, *"If the Train Should Jump the Track . . .": Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 475–76 (2006).

66. *Id.* at 476.

67. *See generally* Anthony J. Bellia Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1529–52 (2006) (analyzing the practices of state courts in interpreting federal statutes from 1789 to 1820).

68. *Id.* at 1547.

69. *Id.* at 1508–09; *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 29–36 (2001) [hereinafter Manning, *Equity of the Statute*] (summarizing the origins and scope of the doctrine in English courts).

federal statutes.[70] He ascribed this difference to the Supremacy Clause's limitation on state courts' federal lawmaking and its requirement of uniformity in federal law.[71] Equitable interpretation, Bellia explained, would contravene both requirements in the federal context.[72]

Professor Abbe Gluck has recently taken up the question of state court interpretation more generally. In her first work, Gluck studied interpretation in five states and identified a three-step interpretive approach she calls "modified textualism"—a method she claims is the controlling interpretative approach in the states studied.[73] Gluck finds this coalescence important because it shows that, unlike the conclusions put forward by many federal commentators, courts *can* agree on an interpretive method and treat it as a binding framework, even in the face of legislation to the contrary.[74] This consensus, Gluck argues, indicates that statutory methodology can itself be a form of *law*.[75] Gluck's second work asks whether interpretive methodology travels with a statute across jurisdictional lines.[76] Gluck finds an erratic federal practice, in which federal courts reading state statutes often ignore state interpretive methods.[77] She argues that, under *Erie*, a federal court interpreting a state statute should apply the state's method—such as modified textualism—if the state's courts consider that approach to be binding law.[78]

Finally, Professors Aaron-Andrew Bruhl and Ethan Leib have examined the implications of one notable difference between state and federal courts: the fact that most state court judges are elected.[79] They argue that elections should not matter in cases without valence in popular opinion or in cases easily resolved by traditional tools of interpretation.[80] By contrast, electoral accountability and its accompanying political knowledge may justify a more active judicial role interpreting legislation that (a) reflects stale popular

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70. Bellia, *supra* note 67, at 1506–07. Bellia also notes that equitable interpretation of state statutes was increasingly less favorable as courts began to focus on legislative intent. *Id.* at 1507.

71. *Id.* at 1548–52.

72. *Id.* at 1552.

73. Gluck, *Laboratories*, *supra* note 6, at 1758. "Modified textualism" looks first to text, then legislative history, and then substantive canons. A court proceeds to the next step only if the prior leaves the question unresolved. *Id.*

74. *See id.* at 1787–91 (describing the Texas textualist courts' defiance of legislated rules of interpretation).

75. *See id.* at 1757–58 (arguing that state court practice "challenge[s] the prevailing theoretical resistance to [methodological consistency] and highlight[s] the possibility that [courts] might be receptive to consistent methodological frameworks"); *id.* at 1862 ("Is methodology 'law'? The Supreme Court does not act as if it is. The state courts studied here appear to conclude otherwise.").

76. Gluck, *Intersystemic*, *supra* note 9, at 1901.

77. *Id.* at 1905.

78. *See id.* at 1990–91 (arguing that the underpinnings of *Erie* point to the conclusion that state statutory questions should be decided by federal courts under state interpretive methodology or else deviations should be justified).

79. Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1215 (2012).

80. *Id.* at 1255–57.

preferences, (b) reflects special interests rather than popular preferences, or (c) violates minority rights in ways that are otherwise constitutional.[81] In this respect, Bruhl and Leib suggest that state courts are better situated than federal courts to engage in statutory updating of the kind advocated by some federal scholars.[82]

3. Moving Forward.—Widening the focus beyond the federal context also reveals what I call the divergence question: whether state courts should read their statutes as federal courts read statutes. Some scholarship has begun to explore parts of this large question, but even though these initial efforts are few, they adopt a dizzying array of lenses. State court judges, for example, point to common law powers and constitutional structure as possible points of departure.[83] Similarly, although Bellia examined state interpretation for its implications on federal practice, his emphasis on constitutional norms suggests that interpretation of state statutes could be distinct due to differences in federal and state constitutional structures.[84] Long's work focused only on discrimination statutes tracking federal law, but his analysis of the benefits of uniform interpretation may point to a broader argument about the desirability of interpretive divergence or convergence in general.[85] In particular, he points to complying with legislative preferences, promoting legislative efficiency, and preserving the reputation of the state judiciaries and moral authority of the Supreme Court.[86] Bruhl and Leib's argument for the difference elections make in state interpretation considers other variables, such as institutional competence, democratic legitimacy, and pragmatic considerations.[87] It is fair, even at this early point, to ask how these varying approaches interrelate and what they might be missing.

This possibility of divergence raises the second matter—the intersystemic question—about how to negotiate interpretation of statutes across jurisdictional lines. Gluck focuses on this second question, but shows ambivalence about the first. Both of her major works depend on interpretive divergence: The state court textualism she first identifies is "new" and "modified" *compared to* federal textualism.[88] The *Erie* question in statutory interpretation she addresses in her second work is most pressing only if state and federal courts adopt different methodologies—otherwise a federal court facing an open question of state statutory law would get to work much as it

81. *Id.* at 1258–67.

82. *Id.*

83. *See* Kaye, *supra* note 43, at 20–26; Peters, *supra* note 52, at 1555–56.

84. Bellia, *supra* note 67, at 1548–52 (discussing the effect the Supremacy Clause has on state interpretations of federal statutes).

85. *See* Long, *supra* note 65, at 476 (arguing for a presumption towards uniform construction when interpreting similar statutory language).

86. *Id.* at 507.

87. Bruhl & Leib, *supra* note 79, at 1223–30.

88. Gluck, *Laboratories*, *supra* note 6, at 1758.

would in ordinary course. Yet sometimes Gluck identifies potential sources of state–federal divergence only to downplay their relevance compared to cross-jurisdictional similarities.[89] The source of this tension, it seems, is a desire to establish the relevance of state court practice to the federal context and vice versa.[90] Gluck's claim of relevance seems correct, though it may hold even if there are substantial differences in the two contexts.

While Gluck's recognition of state–federal divergence does not require her to explain or justify it, this gap in the analysis may weaken confidence in the broader lessons she draws about interpretation more generally. Knowing whether and why state court interpretation should diverge from federal interpretation can shed light on whether interpretative method is in fact "law," what kind of "law" it is, and whether other tribunals are bound to respect it.[91] For example, Gluck's invocation of *Erie* treats interpretive method as a kind of positive, judge-made state law.[92] This understanding, however plausible, conflicts with practice in the very courts she studies.[93] These courts, as Gluck notes, repeatedly resist statutes that attempt to dictate interpretive methods to courts.[94] Aside from lawless intransigence, such resistance could suggest that courts treat interpretive method not as displaceable common law in the positivistic sense, but rather as a form of constitutional law.[95] Or it may suggest a belief that methods of interpreting statutes cannot be legislated any more effectively than the methods for understanding ordinary English.[96] These options—and their underlying reasons for interpretive divergence or convergence—may lead to very different answers to the intersystemic question.

This Article seeks to make progress on the divergence question while also shedding light on the intersystemic question. It does so by addressing a

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89. *See, e.g.*, *id.* at 1858–59 ("I do not wish to understate the extent of potential intersystemic differences . . . . But there are at least two reasons why the states seem right not to allow these differences to prevent comparisons . . . . First, the most often noted differences between state and federal governments do not seem to be doing much work here.").

90. *See id.* at 1861 ("[I]nstitutional differences should not be used as a reason to discount the relevance of state court legisprudence for federal statutory interpretation . . . .").

91. *See id.* at 1862 n.409 (explaining that discovery of state methodology raises the related reverse-*Erie* questions she addresses in the second part of her project).

92. *See, e.g.*, Gluck, *Intersystemic*, *supra* note 9, at 1990 (observing that if federal courts apply state methodology, "it should be because . . . a sovereign's court chooses to apply them, not because they are ready to be plucked from the sky").

93. *See* Gluck, *Laboratories*, *supra* note 6, at 1862 ("Is methodology 'law'? . . . The state courts studied here appear to conclude otherwise.").

94. *Id.* at 1755–56, 1785–98.

95. Such a result might also trigger an *Erie*-like rule for federal courts. *But see* Bruhl & Leib, *supra* note 79, at 1268–69 (noting that the challenges of "crossover" interpretation possibly could "generate good reasons to reject interpretive divergence").

96. *Cf.* Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 100 (2003) ("[I]f the goal is to understand the intentions of authors and speakers, one cannot be artificially constrained by fixed meanings or rules.").

noted but underexplored aspect of the divergence question—the effect a state court's common law powers may have on its interpretation of statutes. As with judicial elections, these general common law powers may distinguish state courts from their federal counterparts. Unlike judicial elections, existing scholarship does not address the effects of these powers on state courts in a systemic fashion. The following analysis introduces the prospect of interpretive divergence due to a court's common law powers.

II. Approaching Statutes as "Keepers of the Common Law"

A state court's broad common law powers offer an intriguing point of comparison. At the threshold, analyzing the effect of state courts' common law powers may mitigate the dangers of comparing state courts in gross. Nearly every state court understands itself to possess some common law power, even after substantial movements for codification.[97] Courts may have different understandings about the nature of the common law and its interaction with statutes,[98] but at least here we have a feature that cuts across almost all states. Furthermore, the fact that state courts are "keepers of the common law," as Judge Kaye notes, offers a substantial, systemic contrast with the federal system.[99] Even many who accept the legitimacy of federal common law understand it to exist in limited enclaves, compared to the more expansive common law powers of state courts.[100]

This Part lays out a prima facie case for why a state court's broader common law powers could justify a different approach to statutes than in federal courts. For a comparative baseline, I will assume federal courts incline toward textualism, a possible oversimplification that nevertheless captures the thrust of the Supreme Court's jurisprudence in the past decade.[101] So put, the primary question is whether state courts have more flexibility in their treatment of their statutes than federal-style textualism affords. This Part draws on state court commentary and on broader theories of statutory interpretation to make a case for why that should be so.

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97. *See* Kaye, *supra* note 43, at 6 (highlighting the integral role the common law plays in decision making at the state court level). A possible exception is Louisiana, whose civil law tradition separates it from other common law jurisdictions, though the practical difference of its civil law frame is contested. *See* J.-R. Trahan, *The Continuing Influence of* le Droit Civil *and* el Derecho Civil *in the Private Law of Louisiana*, 63 LA. L. REV. 1019, 1053–55 (2003) (chronicling the purported decline of the civil law system in Louisiana and subsequent attempts by the Louisiana legislature and law schools to reverse the trend in the mid-twentieth century).

98. For a fascinating discussion on this, see Michael Steven Green, Erie*'s Suppressed Premise*, 95 MINN. L. REV. 1111, 1126–27 & nn.88–90 (2011).

99. Kaye, *supra* note 43, at 6.

100. *See, e.g.*, Monaghan, *supra* note 2, at 758–59 ("The relatively freewheeling era of federal judicial lawmaking (akin to that of a state common law court) to 'fill in the gaps' in a federal statutory regime . . . is long gone. Most writers now posit a narrower sphere for judge-made common law." (footnote omitted)).

101. *See supra* subpart I(A).

A. The Importance of Common Law Powers

State jurists like Judge Kaye and Justice Peters who seek to separate state court statutory interpretation from federal textualism refer to the "common law" nature of their courts.[102] The state jurists' invocation of the "common law" is a broad one and it pays to winnow down that appellation to see what most plausibly distinguishes state and federal practice.

For example, Judge Kaye notes that state statutes codify common law causes of action and abrogate common law doctrines.[103] Federal legislation, however, also incorporates common law concepts and textualists have no problem reading such statutes in that light.[104] Federal statutes also abrogate judicial decisions at the intersection of common and statutory law.[105] As Lilly Ledbetter's experience attests, Kaye's reliance on the fact that the "state legislative/judicial relationship often takes the form of an open dialogue"[106] is also not a significant ground for distinguishing state and federal practice.[107] The same holds for Kaye's emphasis of provisions of state statutes that are often unclear and require judicial elaboration.[108] Proponents of both expansive and restrictive approaches to federal common law regard this interpretive leeway as a kind of common law, and a legitimate form at that.[109]

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102. *See* Kaye, *supra* note 43, at 6 (describing state courts as the "keepers of the common law"); Peters, *supra* note 52, at 1155–56 (contrasting the large body of common law available to assist state courts in statutory construction with the much smaller amount of available federal common law).

103. Kaye, *supra* note 43, at 20–21.

104. *See, e.g.*, Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 613–15 (2009) (reading CERCLA liability apportionment in light of common law tort principles); *see also* Frank Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1913–14 (1999) (reading the common law defense of necessity into a criminal statute silent on that matter); John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1656 (2001) [hereinafter Manning, *Deriving Rules*] (discussing textualists' application of common law principles and terminology when construing a statute); Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 521–25 (2006) (cataloging the incorporation of common law concepts in the interpretation of statutes).

105. *See, e.g.*, NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968) (describing the congressional override of a decision holding that a statute abrogated the common law distinction between employees and independent contractors).

106. Kaye, *supra* note 43, at 23.

107. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting) (asking Congress to override the majority's interpretation); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (overriding *Ledbetter* because of its impairment of statutory protections); *see also* Astrue v. Ratliff, 130 S. Ct. 2521, 2533 (2010) (Sotomayor, J., concurring) (calling on Congress to clarify its statutory language).

108. Kaye, *supra* note 43, at 27–29, 32–34.

109. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983) ("[Sometimes a] statute plainly hands courts the power to create and revise a form of common law . . . ."); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 34–35 (1985) (discussing how the Supreme Court has sometimes ignored evidence of specific intention when construing vague statutory or constitutional provisions); Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 331–32 (1980) (concluding that a court serves the same function when engaging in statutory interpretation as it does when acting in a common law capacity).

Kaye also observes that challenging questions of statutory interpretation may require degrees of lawyerly skill, judgment, and creativity equal to those required for judging the arc of common law precedent.[110] Yet modern textualists do not claim that each statutory provision has a clear meaning.[111] To be sure, some textualists see less interpretive uncertainty than others, but they also advocate deference to administrative interpretation of unclear statutes because agencies are better equipped to make law through such decisions.[112] This gap-filling form of "common law" arising out of statutory vagueness or ambiguity does not brightly distinguish state and federal interpretation.

A more plausible point of common law differentiation is a state court's broad power to create and change law in areas where the legislature has not spoken at all, as opposed to having spoken unclearly.[113] Federal courts are less frequently seen creating common law actions, abandoning contributory negligence in favor of comparative fault,[114] newly recognizing living wills,[115] or updating common law rules in light of scientific advances.[116] By contrast, state courts, as Judge Kaye notes, can do so on their own initiative when the

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110. Kaye, *supra* note 43, at 27–29.

111. *See* Homemakers N. Shore, Inc. v. Bowen, 832 F.2d 408, 411 (7th Cir. 1987) (Easterbrook, J.) ("An ambiguous legal rule does not have a single 'right' meaning; there is a range of possible meanings; the selection from the range is an act of policymaking."); Manning, *What Divides*, *supra* note 15, at 75 (observing that because modern textualists understand that the meaning of statutory language is dependent on context, they realize that the distinction between statutory text and congressional purpose is not always clear); Manning, *Absurdity Doctrine*, *supra* note 19, at 2408 (noting that textualists acknowledge that all statutory language is at least somewhat open-ended).

112. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting) (arguing for broad deference to the interpretations of the administrative agency charged with enforcing the statute); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 4 (2006) (contending that the legal system is at its best when the interpretation of an ambiguous statute is left to an administrative agency).

113. This argument assumes that state constitutions vest in or impliedly reserve for the judiciary general common law powers. Common law powers in many states might be understood as legislative grants via reception statutes that incorporate common law not inconsistent with state law. *See, e.g.*, WASH. REV. CODE ANN. § 4.04.010 (West 2005). This might limit a court's prerogative. *See* Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 346 (1992) (citing reception statutes as legislative justification for state common law). Yet courts often treated these statutes as merely declaratory of existing judicial powers. *See* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 804 (1951) (noting that "where the passage of a reception statute came later in the development of a state or territory, it was deemed to be declaratory of existing law").

114. *See* Kaye, *supra* note 43, at 21 (discussing the judicial adoption of comparative fault by state courts). The Supreme Court will, however, make such changes in enclaves of federal common law, such as admiralty jurisdiction. *See* United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975) (abandoning the "divided damages" rule in admiralty jurisdiction in favor of comparative fault).

115. *See* Kaye, *supra* note 43, at 25 (noting New York Court of Appeals' willingness to recognize the concept of a living will without legislative action).

116. *See id.* (referencing the Supreme Judicial Court of Massachusetts's decision to overrule the common law "year and a day" rule in homicide prosecutions).

legislature has not acted.[117] It is this prerogative form of common lawmaking—as opposed to delegated lawmaking power—that raises the most substantial difference between the common law powers of state and federal courts.[118] Accordingly, Judge Kaye claims that this prerogative also allows state courts to work with statutes in a nontextualist fashion. She claims that sometimes the "common-law method" requires "plain meaning" to yield to "common-sense and substantial justice."[119] By contrast, federal textualists reject purposive or equitable interpretation. Similarly, advocates of common law differentiation will apply a statute beyond the fair construction of its textual terms when doing so comports with the purpose of the statute.[120] This filling of the *casus omissus*—treating an omitted statutory subject as included by analogy[121]—conflicts with the federal textualist's commitment to respecting the limits to which the legislature chose to pursue a given end.[122]

The challenging question, however, is how a court's freestanding common law prerogative changes the way in which that court should read or use statutes. Absent more argument about how to understand and integrate common law and statutes, it is not clear how judicial power to expound common law amid statutory silence also entails power to expand or contract legislative handiwork.[123] The task then, is to identify arguments that support the intuition that common law powers affect interpretive method. The following subparts begin that exploration.

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117. *Id.*

118. *See* Merrill, *supra* note 113, at 347 (arguing that state reception statutes confer broad prerogative/common lawmaking powers on state courts).

119. Kaye, *supra* note 43, at 26.

120. *See* Kaye, *supra* note 43, at 31 (quoting Roger J. Traynor, *Statutes Revolving in Common Law Orbits*, 17 CATH. U. L. REV. 401, 405 (1968) [hereinafter Traynor, *Statutes Revolving*]) (hypothesizing a situation where a judge might deem it proper to extend a statutorily created right or duty to a person not expressly covered by the language of the statute when the extension falls in line with the purpose of the statute).

121. *See* Derek Auchie, *The Undignified Death of the* Casus Omissus *Rule*, 25 STATUTE L. REV. 40, 41–42 (2004) (discussing the *casus omissus* rule's gap-filling role); Hans W. Baade, *The* Casus Omissus*: A Pre-History of Statutory Analogy*, 20 SYRACUSE J. INT'L L. & COM. 45, 46 (1994) (summarizing the history and development of the differing views of the *casus omissus* in civil law and common law systems).

122. *See* Easterbrook, *supra* note 109, at 544 (proposing a framework wherein the domain of a statute should only extend to cases contemplated by the statute's framers); Manning, *Second-Generation*, *supra* note 12, at 1316 (asserting that textualists believe that judges should "respect the level of generality at which the legislature expresses its policies"); *cf.* Auchie, *supra* note 121, at 42 (explaining that the rule against statutory analogy in England "finds its roots in the doctrine of parliamentary sovereignty").

123. *Cf.* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 370 (1981) (stating that a court's power to make law when the legislature has been silent does not imply a similar ability to alter statutes).

B. *Statutory Interpretation and the Constitution*

Knowing the tenets of theories like textualism and purposivism is necessary for thinking about statutory interpretation beyond the Supreme Court. Yet in asking whether state and federal methods should diverge, it helps to consider reasons for adopting any particular approach. A first lens for viewing the question of interpretive choice focuses on the interpreter's role in the constitutional regime.[124] A constitution may impose duties or limitations on interpreters that affect their approach to legal texts.[125] A constitution could, for example, require or prohibit the judiciary from considering purpose in the event of semantic textual clarity.[126] Attempts to derive rules of statutory interpretation from the constitution play a prominent part in federal scholarship and can serve as starting points for analysis in the state context.[127] In fact, constitutional textualists have left open the possibility that arguments for federal textualism may not carry over to the state context.[128] This subpart picks up that thread to explain how some constitutional arguments in the federal context weaken the case for textualism in state courts when one considers common law powers.[129]

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124. *See* Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) ("Any theory of statutory interpretation is at base a theory about constitutional law."); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 76 (2000) (coining the handy phrase: "interpretive choice"). One must also interpret the constitution to derive norms for interpreting statutes. The question of interpretive choice in the constitutional context is beyond the scope of this Article, but some argue that the method might differ in constitutional and statutory contexts. *See* Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 4–5 (2004) (summarizing the factors that justify a divergence in interpretive methods).

125. Here I focus on written constitutions. Unwritten constitutions pose additional questions and arguably blur into the third category—considerations about the nature of law. *Cf.* Jeffrey Goldsworthy, *The Myth of the Common Law Constitution*, *in* COMMON LAW THEORY 204, 235–36 (Douglas E. Edlin ed., 2007) (describing the legal nature of unwritten constitutions in terms of official consensus).

126. *Cf. Acts Interpretation Act 1901* (Cth) s 15AA (Austl.) (giving preference to interpretations that would "best achieve the purpose or object of the Act"); *id.* s 15AB (codifying permitted use and sources of legislative history).

127. *See generally* Manning, *Deriving Rules*, *supra* note 104 (describing different aspects of the Constitution that might inform statutory construction).

128. *See* Kaye, *supra* note 43, at 28–34 (pointing to the lack of voluminous legislative history materials and the presence of multiple plausible interpretations of statutes at the state level as evidence of the greater ability of state courts to use the common law process to make policy determinations); John Copeland Nagle, *The Worst Statutory Interpretation Case in History*, 94 NW. U. L. Rev. 1445, 1468 (2000) ("The received wisdom suggests that state court judges have been more likely to follow textualist approaches than federal judges, but Popkin offers an insightful reason for why the opposite should be the case.").

129. I appreciate the dangers of talking about state constitutions in gross. Nevertheless, state constitutions also share features, and scholars of state constitutionalism address state separation of powers questions in general, see, for example, Stanley H. Friedelbaum, *State Courts and the Separation of Powers: A Venerable Doctrine in Varied Contexts*, 61 ALB. L. REV. 1417, 1457–60 (1998); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1238–40 (1999); Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 107–08 (1998); G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*,

A good starting point is Professor Eskridge's argument that the original understanding of the "judicial Power" in Article III of the U.S. Constitution includes the equitable power to apply statutory provisions in light of statutory purpose and reason, even when doing so departs from the text's semantic meaning.[130] This historical argument relies on the practices of English common law judges between the years 1500–1800, as well as state court common law judges in the Founding and post-Founding eras.[131] Similar originalist arguments could apply to state courts with even greater force, at least for judiciary provisions framed around the time of the Founding.[132] Further, although Eskridge's evidence of practice in English and state courts with common law powers may be irrelevant for arguments about federal courts of limited jurisdiction,[133] this aspect of Eskridge's originalist case may be a feature, not a bug, for arguments about state court interpretation.

Differences in constitutional structure may also point away from state court textualism. Consider the argument for federal textualism based on constitutional structure. Manning argues that legislation is often a product of messy and possibly unknowable compromise; that legislative choices about textual *means* are significant, for they "reflect the price that the legislature was willing to pay" to achieve a given end; and that a legislative choice between rules and standards reflects that important decision about means.[134] Overriding clear text in the name of purpose risks upsetting these legislative compromises and the choices about means that instantiate them. Indeed, regular repair to purpose could impede compromise, for negotiators would always face the risk of courts abstracting away particular bargains in light of

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59 N.Y.U. ANN. SURV. AM. L. 329, 340 (2003). *But see* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 238 (2009) ("State constitutional separation of powers questions also call for a *state-specific* form of analysis rather than one applying a more generalized, or universalist, American-constitutional separation of powers doctrine."). At this stage of the inquiry, I am content to follow suit of the majority.

130. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1096–98 (2001) (arguing that interpretations of statutes necessarily encompass nontextual considerations).

131. *Id.* at 998–1008, 1010–30.

132. Perhaps it is no coincidence that some of the least originalist state courts, such as Kaye's New York and Peters's Connecticut, are charter members of the union.

133. *See* Manning, *Deriving Rules*, *supra* note 104, at 1662–63 (arguing that state judiciaries' inheritance of general common law powers may have made it more natural for state courts to treat statutes merely as starting points for further common law reasoning); Manning, *Equity of the Statute*, *supra* note 69, at 30–36 (discussing the origins of the equity of statute doctrine in England and noting that the English judiciary always felt significant freedom to engage in atextual interpretation, perhaps because of its significant conflation of lawmaking and judging authority); *see also* Bellia, *supra* note 67, at 1548 (arguing that state courts did not use equitable doctrines in their interpretation of federal statutes).

134. Manning, *Second-Generation*, *supra* note 12, at 1310–11; *see also* Frank H. Easterbrook, *The Role of Legislative Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 63–65 (1988) (emphasizing that the legislative process is essentially one of compromise; as such, any meaningful statutory interpretation must account for the means utilized by the legislature in getting a particular statute passed).

general purpose.[135] Avoiding such risks, Manning argues, honors the Constitution's structural norms. The bicameralism and presentment requirements of Article I, Section Seven, the protection of small states in the Senate, and internal legislative procedures place compromise at the center of the federal lawmaking process and create a supermajority requirement for passing legislation, thus giving political minorities the power to block legislation or exact compromise.[136] Article I's explicit and exclusive vesting of the legislative power in Congress also weighs against judicial revision of clear language emerging from such bargains.[137]

As Part III will discuss, many state constitutional structures also encourage compromise and separate the legislative and judicial power. Distinguishing features of state constitutional structure complicate this picture, however. First, the fact remains that state courts still have inherent lawmaking power that extends beyond filling gaps and resolving ambiguities in statutes—they can fashion common law in the absence of statutes.[138] The common law is a central point of contention in disputes between federal textualists and their critics. Proponents of dynamic statutory interpretation in federal courts emphasize the persistence of common lawmaking in substance, if not in name, in ordinary statutory interpretation.[139] Similarly, many scholars who criticize the Supreme Court's restrictive approach to *federal* common law also reject textualism and its formalist approach to separation of powers.[140] The limited, uncertain character of federal common law[141]

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135. *See* Manning, *Second-Generation*, *supra* note 12, at 1314 (describing, in particular, how judicial resort to purpose can run the risk of bypassing the compromise-forcing structures that are an important part of the legislative bargaining process).

136. *Id.*

137. *Id.* at 1305–06.

138. *See* Kaye, *supra* note 43, at 5–6 ("The common law is, of course, lawmaking and policymaking by judges. It is law derived not from authoritative texts such as constitutions and statutes, but from human wisdom collected case by case . . . . That state courts—not federal courts—are the keepers of the common law has long been American orthodoxy." (footnotes omitted)). Many state courts also have legislative power to regulate court procedure and discipline the bar; moreover, some trial-level courts act like executive agencies in administering social services in family and drug courts. *Cf.* Peters, *supra* note 52, at 1554–55, 1561–62 (noting first that, in Connecticut and Minnesota, the legislature and judiciary occasionally clash over control of court procedure, and second that, in Connecticut, judicial officers often serve in a social-service capacity in family and drug courts).

139. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 383 (1990) (arguing that statutory interpretation is "fundamentally similar to judicial lawmaking in the areas of constitutional law and common law"); Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 225–26 (1999) (arguing that a fundamental commitment to a system of precedent is incompatible with the view that courts' only legitimate role in statutory interpretation is to seek textual meaning, because the reality of any common law system means that any judicial determination regarding a statute will affect that statute's subsequent interpretation).

140. *See, e.g.*, Martha A. Field, *The Legitimacy of Federal Common Law*, 12 PACE L. REV. 303, 317 (1992) (rejecting the Supreme Court's stance that federal common law violates the separation of powers, and instead embracing the view that federal common law operates to effect congressional intent); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 274–76

presents an obstacle to such arguments, however. The *leitmotif* of Justice Scalia's prominent defense of textualism is how federal courts are not common law courts—a tune Justice Young reprises in his defense of textualism in state courts.[142] Such objections fall away for state courts, which are undisputedly common law courts. The Supreme Court's parsimonious understanding of federal common law may relieve federal textualists from considering the implications of general common law powers on statutory interpretation. State court jurists have no such dispensation.

In considering this point, it is also worth noting that most state judges are elected or face executive reappointment.[143] This feature of state constitutional law originated in a wave of constitutional reform aimed at *weakening* powerful legislatures beholden to special interests.[144] Along with this broader aim of shifting power from the legislature to "the people," the embrace of judicial elections eliminated legislative appointment and reappointment in the hopes that the judiciary would check powerful, faction-driven legislatures by "protect[ing] property and individual rights."[145] Of course, judicial independence often connotes separation from politics, but one might understand judicial elections today as creating a politically accountable, policy-making corrective to legislative dysfunction.[146] If so, this could suggest a state law form of dynamic interpretation that links the

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(1992) (criticizing the view that the text of the Constitution can be read to establish a strict separation of powers between the legislative and judicial branches); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 838–42 (1989) (arguing that a narrow view of federal common law—which purports to respect principles of separation of powers—instead reflects an unrealistic assessment of the nature of the judicial process, legal realism, and the character of American federalism). *But cf.* Boyle v. United Techs. Corp., 487 U.S. 500, 507–12 (1988) (Scalia, J.) (authoring an opinion creating a federal common tort law defense).

141. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) (disavowing federal common law rule-making authority).

142. 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, 13 (Amy Gutmann ed., 1997); Young, *supra* note 56, at 281 (advancing the argument for textualism on the grounds that courts have no responsibility, absent constitutional violations, to remake poor legislative policy choices).

143. Bruhl & Leib, *supra* note 79, at 1217 n.1, 1253 n.149.

144. WILLIAMS, *supra* note 129, at 285. This reform movement also strengthened and gave independence to executive offices, citizen ballot initiatives and referenda, and procedural rules limiting legislative discretion. *See* James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 820 (1991) (discussing the introduction of new institutional devices, including the secret ballot, the initiative, and the referendum).

145. WILLIAMS, *supra* note 129, at 285; *cf.* Manning, *Equity of the Statute*, *supra* note 69, at 67–70 (discounting evidence of equitable interpretation in earlier periods because relevant courts were subject to legislative control).

146. Originalists might suspect this inference to be anachronistic. Advocates for judicial elections argued that the process would be best suited to select competent and impartial judges. Early advocates and opponents of judicial elections often shared a pre-legal realist understanding of the judge as an apolitical oracle or technician. Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 210–13 (1993).

common law tradition with political accountability to weave "common and statutory law . . . together in a complex fabric."[147]

In short, prerogative common law powers blur the separation of the legislative and judicial branches in state government as compared to in the federal Constitution. In general, this is an important datum for one seeking to derive interpretive principles from the Constitution. In particular, if equitable interpretation comes part and parcel with common law powers, many state courts undisputedly can claim these—and a measure of political legitimacy—in ways that federal courts might not.

C. *Statutory Interpretation and Institutional Competence*

A second, more empirical perspective on interpretive choice calibrates interpretive method with the practical competences of the interpreter. An adherent of the "institutional turn"[148] in interpretation first identifies or assumes a value or set of values, identifies the relevant interpreter, and then asks what interpretive methods are most likely to promote the desired values, given the interpreter's competences. Pure arguments from institutional competence assume that the Constitution does not mandate any particular approach to statutes, or at least permits interpretive choice along these lines.[149]

1. Institutional Arguments in Federal Scholarship.—Scholars have used institutional approaches to underwrite an array of interpretive methods. Professor Caleb Nelson grounds textualism in the belief that a rule-like approach to finding legislative intent will lead to fewer errors than reliance on legislative history or imaginative reconstruction.[150] Professor Adrian Vermeule is perhaps the most thoroughgoing institutional advocate of textualism. He argues that the federal judiciary's institutional limits recommend "wooden" interpretation that hews closely to the surface meaning of

147. Kaye, *supra* note 43, at 20 (quoting David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 937 (1992)); *see also* Bruhl & Leib, *supra* note 79, at 1258–59 (claiming that state judicial elections may legitimize updating statutory interpretation); Mashaw, *supra* note 124, at 1690; Popkin, *supra* note 63, at 194–97 (describing the republican statutory interpretation movement). *But see* Hans A. Linde, *The State and the Federal Courts in Governance:* Vive La Différence!, 46 WM. & MARY L. REV. 1273, 1286 (2005) ("I reject the thoughtless notion that a judge on an elective court should approach a legal issue differently from an appointed colleague in a neighboring state.").

148. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003).

149. *See* VERMEULE, *supra* note 112, at 33 (noting that decisions pertaining to interpretive methodology must necessarily be institutional because the Constitution cannot be read as suggesting one interpretive method over another).

150. Nelson, *supra* note 23, at 377, 403–16; *see* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 254–56 (supporting textual statutory interpretation methods on the basis that the plain meaning of the text provides some common ground upon which individuals with divergent interests and abilities can approach a problem).

the particular clause in question.[151] Because judges cannot know whether rules or standards generally lead to better empirical results, courts should always choose rules in particular cases to minimize decision costs without losing expected accuracy.[152] For this reason, he concludes that a minimalist rule of plain meaning should trump background purpose or inferences from statutory structure and related statutes.[153]

Not all institutional arguments conclude in textualism. The regime textualism sought to displace—the purposivism of the Legal Process School—anchored its approach in the competences of various legal institutions.[154] In fact, the current institutionalism in interpretive theory seems a direct descendent of the Legal Process.[155] If so, institutional textualism does not oppose Hart and Sacks in principle, but rather disagrees with the purposive conclusions the Legal Process thinkers drew from their institutional assessment. Similarly, Judge Posner's defense of purposive interpretation points to the advantage courts have in smoothing the rough edges of blunt statutory rules.[156] In theory, legislative amendment exists to cure absurd or over- and under-inclusive mischief in statutory language, but given the familiar costs and hurdles of legislative action, judicial reliance on legislative amendment is either foolish or mulish. Imaginative reconstruction of congressional intent in particular situations, the argument goes, is far more likely to promote legislative intent than waiting for legislative intervention.[157]

2. Institutional Competence and Common Law Powers.—The analysis below considers plausible goals an interpreter would seek to achieve through interpretation and then asks, in light of those goals, how the addition of general common law powers should change what courts do with statutes.

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151. VERMEULE, *supra* note 112, at 4.

152. *See, e.g., id.* at 192–93 (discussing the high costs of using legislative history relative to the indeterminate benefits it provides).

153. *See, e.g., id.* at 202–05 (concluding that enquiry beyond plain meaning provides little value and advocating for agency deference, as agencies are better suited than courts to delve into sources of collateral evidence regarding specific statutes). Such a "satisficing" approach "searches among options or choices until, but only until, one is found that meets preset aspiration level—until, but only until, the choice is 'good enough,'" as opposed to best or optimal. *Id.* at 176–77.

154. *See* Jeff A. King, *Institutional Approaches to Judicial Restraint*, 28 OXFORD J. LEGAL STUD. 409, 422–23 (2008) (describing the theories of the members of the Legal Process School that involved institutional competences).

155. *See id.* (linking the work of Vermeule and Sunstein with the Legal Process scholarship of Hart, Sacks, and Fuller).

156. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189–90 (1986).

157. *See* Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 608 (1996) (arguing that judges should imaginatively reconstruct legislative intent when the statute must be applied to situations the legislators did not foresee); Posner, *supra* note 40, at 817–18 (arguing that the judge should try to "imagine how [the enacting legislators] would have wanted the statute applied to the case at bar").

a. Historical Legislative Intent.—A common aim of statutory interpretation is giving effect to what the legislature intended at the time of enactment.[158] Here, general common law powers seem to offer only modest improvements in competence. If, as a matter of fact, common law concepts suffuse state statutes more than in federal legislation, a common law court may be more adept at inferring what the legislature meant in those instances. Accordingly, state judges may be more accurate in identifying an intended meaning that departs from a reasonably clear semantic meaning. But this also seems to say more about the mix of concepts in statutes than interpretive method itself.

This is not to deny other institutional differences between state and federal courts along this axis. Compared to federal judges, state court judges are more likely to consult legislative drafting, to have held political office themselves (perhaps at the time of passage), or to have greater familiarity with the workings of the state legislature.[159] These facts may increase a state judge's accuracy in assessing a majority of the legislature's actual or counterfactual intent. Nevertheless, while intent skepticism could be less justified in state courts, those institutional differences have little to do with being a keeper of the common law tradition.

b. Present Legislative Intent or Political Preferences.—Others argue that statutes should be interpreted to respect existing political preferences, whether they are reflected in the existing makeup of the legislature or the population more generally.[160] Here, the traditional idea of the common law reflecting social custom or shared communal understandings may support the notion that state courts better feel the pulse of the polity. Professor Eisenberg's claim that all common law doctrine turns

158. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479–80 (1987).

159. *See* G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 55 (1988) ("[O]ver 70 percent [of state judges] have held at least one nonjudicial political office prior to selection [as a judge], and most ha[ve] held two or more such offices."); Abrahamson & Hughes, *supra* note 55, at 1081–82, 1085 (noting that "[j]udges . . . participate in the formulation of proposed legislative policy through [formal] mechanisms" and informal mechanisms); Linde, *supra* note 147, at 1286 (explaining that elective state court members are more likely to have had legislative experience than the Supreme Court members and that judges in smaller states often consult with state legislators); Peters, *supra* note 52, at 1561 (observing that "[f]ederal courts . . . have much more limited opportunities to participate in institutional interventions" than state courts).

160. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 54–56 (1982) (insisting that "inconsistent, unprincipled, or preferential treatment" in lawmaking should be respected so long as it represents the wishes of the current majorities or coalitions of minorities and is constitutional); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 61 (1988) (proposing a "nautical theory" that would "treat statutes as if they were enacted yesterday"); Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2034 (2002) (supporting the proposition that judges should be constrained to maximize the extent to which statutory results accurately reflect the political preferences accepted in society).

on congruence with "social propositions"[161] suggests that sensitivity to popular norms is part of the daily work of a common law jurist in the way that it may not be for a federal judge. If common law practice offers a state court judge a more accurate gauge of societal norms than a federal judge can access, arguments over whether statutory "updating" is undemocratic or undermines legislative supremacy may be different in the state context.

Again, we find that different institutional considerations may bolster the claim of state court divergence. As Bruhl and Leib argue, the fact that many state judges face elections might—at least in some kinds of cases—give state judges an advantage over federal courts in identifying when contemporary popular preferences have outgrown text or historical intent.[162] One could make similar points about the fact that many judges face reappointment or are otherwise plugged in to state politics in ways that many federal judges are not.[163]

c. Good Policy.—A person assessing an interpretive methodology may consider not just faithful agency to statutory drafters or to contemporary opinion, but also desirable substantive results. We can ask which interpretive method is likely to produce the most good, however defined. If we think of the common law courts simply as bodies with general powers to make law through adjudication, state courts may have competence advantages over their federal court counterparts—advantages that may justify a more purposive or dynamic role in shaping policy via statutory interpretation.

In making the normative judgments that accompany shaping doctrine in fields like tort, contract, and property law, state court judges have more opportunities than their federal counterparts to develop skills useful for crafting "good" law. Common law courts also have greater opportunities to witness the consequences of their previous lawmaking actions, thus gaining the iterative experience of policy making over time and practice developing policy through adjudication.[164] Here we have a modern take on the classical common lawyer's claim that the discipline requires and produces judges "intimately familiar with the complex 'texture [of] human affairs,'" thus making its practitioners more apt in practical reasoning than the average

161. MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 2–3 (1988).

162. Bruhl & Leib, *supra* note 79, at 1250–53.

163. For a discussion of reappointment as opposed to re-election in state courts, see Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 860–61 (2012) (discussing how, even in states where judges serve by appointment, "the vast majority [of high court judges] must also run in either a contested election or, more often, an uncontested public referendum in order to keep their jobs").

164. *Cf.* Stephen M. Johnson, *Competition: The Next Generation of Environmental Regulation?*, 18 SOUTHEASTERN ENVTL. L.J. 1, 36 (2009) (considering, in the context of administrative law, that it is better to rely on "case-by-case adjudications to develop . . . general agency rules" than through rule making).

person or, presumably, the mere follower of legislative fiat.[165] Such experience would be useful in making *ex post* adjustments to legislation that, due to the limits of foreknowledge and human language, is necessarily imprecise when drafted *ex ante*.[166]

To be sure, federal courts may have similar opportunities in constitutional law and in interpreting ambiguous or open-ended statutes, but state courts combine that experience with freestanding policy duties.[167] This argument presumes, controversially, that common lawmaking is a discipline indistinct from practical policy making. But in a private law tradition that includes Holmes and Posner, an assumption that merges common law with legislative judgment is not beyond the pale.[168] Just as one might respect the Delaware Court of Chancery's wisdom in matters of corporate governance or defer to the Second Circuit's in securities law, we might also find that common law judges are pragmatically wiser than their more constrained federal counterparts. For judges like Roger Traynor, such faith in their ability to make reasoned and reasonable policy from the adjudicative perch underwrites not only their approach to the common law but their aggressive approach to statutory interpretation as well.[169]

We can bolster this argument by pointing to other institutional advantages that state judges may have over their federal counterparts. Some state judges may have further experience in the policy-making trenches due to de novo review of administrative agencies, as well as loosened justiciability doctrines that allow courts to resolve generalized grievances, issue advisory opinions in some states, and adjudicate disputes that federal courts would classify as political questions.[170] Similar advantages may flow

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165. Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1, 3 (2003). The classical common lawyer would not agree that his discipline is a mere branch of legislation or applied philosophy. *See id.* at 3–11 (describing the common lawyer's conception of "artificial reason[ing]").

166. *Cf.* H.L.A. HART, THE CONCEPT OF LAW 128–36 (2d ed. 1994) (discussing the necessarily "open texture" of legislation).

167. Federal courts, in principle, are also supposed to defer to administrative agencies on many questions of statutory policy. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844–85 (1984). Only sixteen states give *Chevron*-strength deference to agency interpretations, while fourteen states use de novo review. D. Zachary Hudson, Comment, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373, 374 (2009).

168. *But see* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 204, 206–08 (1995) (defending the autonomy of private law from public law); John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1661–62 (2012) (same).

169. *See* Traynor, *Statutes Revolving*, *supra* note 120, at 411 (explaining that American judges played a far more active—and creative—role than their English counterparts in developing a uniquely American common law). On Traynor's belief in his ability as a policymaker, see G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 243–66 (3d ed. 2007).

170. *See, e.g.*, WILLIAMS, *supra* note 129, 296–300 (pointing out significant state–federal distinctions such as "broad common-law powers of lawmaking," the ability to "render advisory opinions," and facility to litigate "issues that cannot be heard in federal courts because of the political question doctrine"); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking*

from implementing many state constitutions' more robust guarantees of positive political and economic rights.[171] Finally, it is plausible that state judges' political accountability may lead to better policy making.

The argument so framed begins to resemble a familiar justification in the federal context for *Chevron* deference to administrative agencies' interpretations of statutes. One justification of *Chevron* points to administrative agencies' political accountability—a point Bruhl and Leib explore in their work on judicial elections.[172] A second justification, and the one most relevant here, is the agency's policy-making expertise compared to that of Article III judges.[173] Professor Cass Sunstein has tellingly argued that federal agencies are the contemporary equivalents of the common law courts that previously forged the path of American law.[174] Sunstein and Vermeule further argue that even if federal judges should be textualists, there is good reason for them to defer to purposive interpretations by agencies.[175] Agencies' institutional advantages help them know when "departures from the text actually make sense" and whether such departures will destabilize the statutory scheme.[176] If, like federal agencies, state courts' policy competence is superior to that of the federal courts, the argument for state court textualism is weaker than in federal jurisprudence.

III. The Potential Irrelevance of Common Law Powers

The previous Part identified how general common law powers can strengthen the constitutional and institutional arguments for more purposive or dynamic approaches to statutes by state courts. This Part will challenge those constitution- and competence-based arguments and introduce more

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the Judicial Function, 114 HARV. L. REV. 1833, 1844–75 (2001) (explaining that, unlike federal courts, state courts can issue advisory opinions, adjudicate "political questions," and review administrative agency decisions); Linde, *supra* note 147, at 1274–75 (giving examples of state court decisions that would violate justiciability if ordered in federal courts).

171. *See, e.g.*, TARR & PORTER, *supra* note 159, at 51 (observing that some state constitutions offer "more detailed and extensive protections" than those contained in the federal Constitution); G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1176–78 (1992) (identifying examples of substantive constitutional rights that implement specific policies).

172. Bruhl & Leib, *supra* note 79, at 1248–49; *cf.* Hudson, *supra* note 167, at 375–77 (explaining that state agency officials and federal judges are not as politically accountable as state judges).

173. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly, or explicitly, by Congress." (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974))); Sunstein & Vermeule, *supra* note 148, at 904 ("[I]f a high degree of technical expertise is required, judicial judgments might well be unreliable." (footnote omitted)).

174. Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1019 (1998); *see also* Hudson, *supra* note 167, at 377–78 (explaining that state courts, due to their common law origins, are capable of filling in the legal and practical gaps resulting from legislative processes).

175. Sunstein & Vermeule, *supra* note 148, at 928.

176. *Id.*

basic philosophical reasons to question the difference that the common law prerogative makes in the statutory context.

A. Common Law and the Constitution

Not all inferences from state constitutional rules and structure suggest that general common law powers allow greater judicial flexibility with enacted legislation. If common law powers are grants of authority for courts to make law through adjudication, a skeptic could object that it is simply a non sequitur to infer that lawmaking in one domain—adjudication where the legislature is silent—translates into lawmaking authority in another—applying statutes a legislature has enacted.[177] As Professor Monaghan has argued in a related context, "the fact that the courts can make law when the political organs are silent . . . does not legitimate a similar authority when the political organs have spoken."[178] Without some understanding about the division of authority and the hierarchical relationship between the legislature and the courts, we can say little about how courts should fill gaps in statutes, extend or restrict statutes, correct absurd statutes and scrivener's errors, or even update or override outdated statutes.

As noted above, the constitutional case for common law differentiation may depend on an originalist argument linking the judicial power with equitable interpretation that can expand or restrict the scope of statutes in light of common law reason. One problem with this argument is that even state champions of common law differentiation concede that legislation can override judge-made rules.[179] State law may be a dialogue between courts

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177. Like the affirmative case, the skeptical case in this subpart assumes that common law adjudication is a form of positive lawmaking—a position that finds support on both sides of the purposivist–textualist divide. *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1247–49 (1996) (noting that federal courts engage in "interstitial 'lawmaking'" as part of the process of interpreting statutes and make positive law when they create federal common law rules); Kaye, *supra* note 43, at 11 ("[S]tate courts effectively 'make law,' and do so by reference to social policy, not only when deciding traditionally common-law cases but also when faced with cases that involve difficult questions of constitutional and statutory interpretation."); Kramer, *supra* note 140, at 267 (stating that courts make law when they articulate any rule "that is not easily found on the face of an applicable statute"). This last assumption is controversial and may not accord with how some state courts understand their common law jurisprudence. *See also* Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 898–901 (2005) (surveying state court decisions applying federal common law wherein the state courts, in creating new rules in federal common law cases, did not understand themselves to be making new law but rather were applying existing principles and precedent); Green, *supra* note 98, at 1126 (observing that some state courts understand common law in nonpositivist terms). Nevertheless, I hope to bracket jurisprudential questions about the nature of the common law until later.

178. Monaghan, *supra* note 123, at 370. For the record, Professor Monaghan voiced no objection to purposive interpretation. *See id.* ("We expect courts to interpret statutes, at least in their marginal applications, on the premise that the legislature seeks to promote the public good . . . .").

179. *See* Kaye, *supra* note 43, at 21 ("[L]egislatures at times express their disagreement by 'repealing' or 'vetoing' other common-law doctrines.").

and legislatures, but advocates of common law purposivism in state courts do not claim, for example, that a court can override legislative corrections of its previous interpretations.[180] If this is so, it is fair to ask why courts should have similar freedom with reasonably clear statutes when a legislature has not yet rebuked a court.[181]

Another problem with applying the originalist argument for equitable interpretation in the state context is the varying vintage of state compacts. It may be plausible to attribute a quasi-natural law, nonpositivistic understanding of judging as included in the "Judiciary Power" to a document like the 1780 Massachusetts Constitution.[182] Such an inference may be shakier for constitutions whose judiciary provisions were adopted or amended in a twentieth century where norms of legislative supremacy are comparatively stronger.[183] Accordingly, originalist arguments for equitable interpretation in many state courts could be vulnerable to a similar objection of anachronism raised by textualists in the federal context.[184]

Even setting these objections aside, other structural features of state constitutionalism suggest that common law powers should not play a strong role in the interpretation of statutes. As noted, constitutional arguments for federal textualism rely on text-based inferences in support of separation of powers formalism.[185] Many of the features textualists identify as separating the federal judiciary from Congress also exist in state regimes: bicameralism and presentment,[186] salary protection,[187] and the prohibition on bills of

180. *See id.* at 23 ("No one can question the legislature's authority to correct or redirect a state court's interpretation of a statute."). *But see* Gluck, *Laboratories*, *supra* note 6, at 1755–56, 1785–98 (describing state courts' refusal to follow legislated rules of statutory interpretation).

181. This objection also applies to theories that ascribe to federal courts similar common law powers. *See* Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CALIF. L. REV. 919, 939 (1989) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988)) ("Nothing in Eskridge's theory explains the disjunction between using purely positivistic approaches to interpretation in the easy cases—where a recently-enacted statute speaks plainly and no strong policy choices counsel another result—and nonpositivistic approaches in other situations."); Monaghan, *supra* note 123, at 375 (highlighting tension in nonoriginalist theories of constitutional interpretation that adhere to the original meaning of "'recent' constitutional amendments").

182. MASS. CONST. pt. 2, ch. 3.

183. *See* Tarr, *supra* note 129, at 332 ("[T]oday's state constitutions were established at various points in the nation's history, reflecting the political ideas reigning at those particular points in time, . . . this in turn has affected the institutions that were created and the relationships established among them.").

184. *See* Manning, *Equity of the Statute*, *supra* note 69, at 8 (arguing that the English doctrine of equitable interpretation of statutes as an inherent judicial power was rendered obsolete and anachronistic by the ratification of the Constitution).

185. *See generally* Manning, *Second-Generation*, *supra* note 12, at 1290, 1304–06 (justifying textualism by reference to principles of separation of powers and the structure and function of Congress as conceived of by the Constitution); Manning, *Deriving Rules*, *supra* note 104, at 1649–50 (contending that the structure of the Constitution and specific separation of powers provisions agitate against equitable interpretation of federal statutes by federal courts).

186. All states except Nebraska have a two-chambered legislature and all states have an executive veto.

attainder and ex post facto legislation.[188] Scholarship in state constitutional law also notes—if only to decry—that state courts often follow formalist federal jurisprudence on separation of powers.[189]

If anything, the separation norms in many state constitutional regimes are stronger than in the federal context. One specific indicator of judicial caution is the "antifederalist" approach to separation of powers that a leading scholar of state constitutional law has identified in state jurisprudence.[190] That line of thought adopts the Whig tradition of strict separation of powers and legislative omnipotence, a combination hostile to a vigorous judicial role in statutory interpretation. Unlike the federal Constitution, many state compacts also have explicit and strict separation of powers provisions.[191] Some question the effect of these textual commitments in state jurisprudence,[192] but such provisions bridge a potential pitfall for federal separation of powers formalists.[193] This feature of state constitutional theory has been prominent in the administrative law context, where state courts are more willing than their federal counterparts to enforce a nondelegation doctrine.[194] Similarly, a notable departure in state courts from strict

187. *See Amended State Constitutional Provisions Regarding Reductions to Judicial Salaries (January 2009)*, NCSC, http://www.ncsconline.org/d_kis/salary_survey/provisions.asp (reporting that twenty-nine states clearly prohibit reductions in judicial salaries and that another five states permit reductions only if applicable to all public officers).

188. U.S. CONST. art. I, § 10.

189. *See* Schapiro, *supra* note 129, at 88–92 (surveying and criticizing state supreme court decisions relying on federal separation of powers doctrine in interpreting state constitutions).

190. *See* Rossi, *supra* note 129, at 1172 ("Like Antifederalist political science, many states, more than federal courts, view separation of powers as requiring complete separation of functions and most states see the legislature as the supreme lawmaker.").

191. WILLIAMS, *supra* note 129, at 236–37; Tarr, *supra* note 129, at 337–38. *Compare* THE FEDERALIST NO. 48, at 332 (James Madison) (Jacob E. Cooke ed., 1961) ("[P]owers properly belonging to one of the departments ought *not to be directly and completely administered* by either of the other departments." (emphasis added)), *with* IND. CONST. art. 3, § 1 ("The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and *no person, charged with official duties under one of these departments, shall exercise any of the functions of another*, except as in this Constitution expressly provided." (emphasis added)).

192. Rossi, *supra* note 129, at 1220 (questioning the explanatory power of textual interpretations of state separation of powers provisions in light of the wide divergence in separation of powers approaches amongst states with similar separation of powers clauses). *But see* Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978) (deriving a strong nondelegation doctrine from the Florida Constitution's Separation of Powers Clause); Tarr, *supra* note 129, at 338 ("[Such text] encourages an interpreter to employ ... the formalist approach to the separation of powers . . . .").

193. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011) ("The Constitution contains no Separation of Powers Clause.").

194. *See* Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343, 1359 (2005) (arguing that state nondelegation doctrine is "much more rigid" than in the federal context).

separation—tolerance of a legislative veto—is consistent with a constitutional commitment to legislative branch policy making.[195]

Many state constitutions also contain more compromise-forcing "vetogates" than the U.S. Constitution. Beyond preexisting bicameralism and presentment requirements,[196] many state constitutions have line item vetoes, detailed rules governing legislative procedure, single-subject and balanced-budget requirements, and shortened legislative sessions.[197] To be sure, many of these requirements arose out of a second wave of amendments in response to the excesses of legislatures, which were awarded disproportionate power under original constitutional arrangements.[198] While these amendments may mute the parliamentary character of state constitutions, they do not encourage functionalist blending of legislative functions across branches. If, as federal textualists claim, constitutional vetogates are compromise-forcing mechanisms that judges should respect while interpreting statutes,[199] the more finely calibrated procedures and limits in state constitutions further militate against judicial smoothing of sharp statutory corners.

B. Common Law and Institutional Competence

The institutionalist arguments against common law differentiation minimize the potential benefits that the practice of such powers brings to courts, while emphasizing the limits to judicial competence—limits that general common law powers do not diminish and might even exacerbate.

If the aim of statutory interpretation is discerning historical legislative intent, a court's common law powers are of modest import.[200] As noted above, if common law concepts are more common in state statutes, a state court may be marginally better at identifying background norms at odds with semantic textual meaning. On the other hand, a common law court may overestimate the extent to which common law concepts pervade statutes, given the salience that those concepts have for a court steeped in that tradition. Accordingly, state courts could be more likely to erroneously impute common law meaning. In any event, intent in statutes that abrogate

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195. *See* Rossi, *supra* note 129, at 1217 (identifying "underenforcement of . . . restrictions on the legislative veto" in state constitutional law).

196. All states have a gubernatorial veto of some kind, and every state except Nebraska has two legislative chambers that must approve legislation.

197. *See* WILLIAMS, *supra* note 129, at 257–67 (exploring procedural restrictions state constitutions impose on the legislative process); Tarr, *supra* note 129, at 335 (surveying state constitutional restrictions on process and substance designed to check legislative abuses).

198. *Id.* at 334–35.

199. *See* Manning, *Second-Generation*, *supra* note 12, at 1314–15 (arguing that because of procedural mechanisms that promote compromise in the legislative process, courts should prefer clear text over legislative history in interpreting a statute in order to remain true to the political compromises presumably underlying the final text of the legislation).

200. *See supra* subsection II(C)(2)(a) (describing the limited improvements to competence in statutory interpretation provided by common law powers).

the common law or legislate in the absence of common law would not be intrinsically clearer to a common law court.

As with historical intent, one can argue that common law powers have little to do with gauging present legislative intent or more general political preferences. Even if one were to concede the (controversial) premise that common law courts more frequently must gauge social norms in adjudication,[201] it is fair to wonder whether practice makes more perfect in this context. Given that state judges, like their federal counterparts, are often part of the political and legal elite,[202] there are grounds for skepticism here, or at least there is reason to be more confident about judges' ability to estimate the current legislature's preferences, rather than those of the populace. Nor is it clear that any marginal advantage in gauging historical or present legislative intent or political preferences would justify a wholesale change in interpretive method. If the institutional textualist is convinced that a rule-like, plain meaning approach to interpretation will lead to significantly fewer errors over the long run in gauging intent,[203] she might ask for more than the concededly indirect gains that the advocate of common law difference offers her.

Finally, there are serious objections to the *Chevron*-inspired argument that, even if federal courts should be textualist, common law courts' superior policy-making expertise justifies their use of purposive or dynamic approaches.[204] State courts share many of the institutional infirmities that lead textualists to disfavor courts' interpretive policy making. Like federal courts, state courts lack expert staff and fact-finding abilities.[205] State courts must also take concrete cases as they come, rather than investigating and initiating general proceedings.[206] This case-based nature of adjudicative lawmaking limits a court's ability to control a policy agenda and to see the effects of policy over time. Adjudication's intense focus on the particular facts at hand rather than the broader picture may also lead to blinkered policy

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201. *See supra* subsection II(C)(2)(b) (discussing the contention that state court judges must weigh social custom and communal understanding in exercising their traditional common law powers).

202. *See* TARR & PORTER, *supra* note 159, at 55 (noting that "often . . . [state] justices are the products of politically active families," "20 percent have served in the state legislature," "almost 20 percent have served in the state attorney general's office," and "over 70 percent have held at least one nonjudicial political office prior to selection").

203. *See supra* section II(C)(1).

204. *See supra* subsection II(C)(2)(c).

205. *See* Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 836–37 (2010) (discussing agencies' comparative competence in fact gathering and policy making).

206. *See* WALTER F. MURPHY & JOSEPH TANENHAUS, THE STUDY OF PUBLIC LAW 65–66 (1972) (stating that courts are "usually passive instruments of government" lacking a "self-starter" and that "[n]ormally, someone outside of the judicial system has to bring a suit or invoke a set of special circumstances to transform judicial power from a potential to a kinetic state").

making.[207] As Lon Fuller also long ago noted, multidimensional policy problems—ones that are most likely to stretch courts beyond their familiar common law competence—may not be amenable to resolution through adjudication, including through the common law method.[208]

If we are looking to federal administrative law for guidance on this question, it pays to also consider how that body of learning is suspicious of adjudicative policy making by agencies—bodies with policy-making competences exceeding those of common law courts. There is doubt about whether *Chevron* deference applies to agencies that, like courts, have power to adjudicate but not promulgate legislative rules.[209] The deference that agency adjudications receive does not displace the longstanding criticism that scholars levy at agencies that eschew rule making in favor of adjudicative policy making.[210] Those concerns, if true and if extended by analogy to state courts, militate against purposivist or dynamic interpretation. A state legal system, just like a federal agency, has rule making and adjudicative outlets for policy making—the legislature and the courts, respectively. Purposive or dynamic interpretation by courts would be analogous to administrative policy making by adjudication: the adjudicative body—the courts—would develop and change general rules on a case-by-case basis, thus shifting the center of policy making gravity from legislation to adjudication. Textualism, by comparison, seeks to give primacy to a centralized lawmaker with broader perspective and fact-finding abilities.[211] If, as some have argued, a requirement that agencies use rule making in some instances is not judicially manageable,[212] it may also be challenging for a state court to decide whether de facto rule making (textualist) or adjudication (purposivist) is proper.

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207. *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006) (arguing that, if he or she only focuses on the facts of the case at hand, a judge may produce a suboptimal rule for later cases if the case at hand is not representative "of the full array of events that the ensuing rule or principle will encompass").

208. *See* LON L. FULLER, *The Forms and Limits of Adjudication*, *in* THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 86, 111–21 (Kenneth I. Winston ed., 1981) (explaining why "polycentric" problems are frequently unsuited to solution by adjudication).

209. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 890 (2001) (noting the circuit split on the issue and arguing that the power to issue binding, self-executing adjudications is sufficient). *Compare* Edelman v. Lynchburg Coll., 535 U.S. 106, 114 (2002) (reserving judgment on question), *with id.* at 122 (O'Connor, J., concurring) ("We have, of course, previously held that because the EEOC was not given rulemaking authority to interpret the *substantive* provisions of Title VII, its substantive regulations do not receive *Chevron* deference . . . .").

210. For an encomium to the superiority of rule making, see RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.8 (5th ed. 2010).

211. From this perspective, barriers to action facing state legislatures may still leave state court updating a second-best option. *Cf.* Paul R. Verkuil, *Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453, 453 (1995) (bemoaning procedural obstacles to administrative rule making).

212. John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 894–95 (2004).

C. *The Common Law and Concepts of Legal Interpretation*

A philosophically inclined person might object that talking straight away about constitutional authority and competence skips a critical first step, namely having a theory about what it means to "interpret" a legal text at all. If, for example, the textualist separation of semantic meaning from purpose is conceptually impossible or if equitable correction of texts is not "interpretation," the constitution- and competence-based arguments above may confuse more basic issues about law and interpretation. A critic with such concerns would instead put two theoretical horses before the constitutional or competence cart. First, we need a theory about reading and understanding legal texts. Let's call these commitments the interpreter's hermeneutical framework. Second, because we are interpreting *legal* texts, beliefs about the nature of law in general—or statutes and common law in particular—may be similarly basic. Let's call these beliefs the interpreter's jurisprudential framework. In recent years, legal philosophers have increasingly explored links between hermeneutical and jurisprudential understandings, an inquiry that may raise corresponding inferences about how an interpreter handles statutes.[213]

Considering these foundational questions offers two very different but plausible arguments that common law powers are irrelevant to interpretive choice. Before presenting those arguments, however, it helps first to say more about these more basic frameworks.

1. First Principles.

a. Hermeneutical Framework.—This may all sound quite abstract, and the literature and arguments on this score are vast and complex. But we can get the feel for this aspect of interpretive choice by going back to the classic debate between H.L.A. Hart and Lon Fuller about an ordinance prohibiting "vehicles in the park."[214] An interpreter must decide whether the ordinance applies to things like roller skates, ambulances, or strollers.[215] Hart would approach this problem by distinguishing between the "core" and "penumbra" of a rule.[216] There will be situations—think of a Hummer

213. For a collection of works along these lines, see LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY (Andrei Marmor ed., 1995). In his Preface, Marmor notes that in arguments about interpretation "a close but controversial link emerges . . . between the concept of interpretation and the concept of law." *Id.* at vii; *see also* Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY, *supra*, at 203.

214. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

215. Hart, *supra* note 214, at 607.

216. *Id.*

zooming across the grass, blasting hair metal from tricked-out speakers[217]—that are easy cases. There, the law governs without much work for the judge besides recognizing the fit between the situation and the ordinance. But there will also be peripheral cases—think of a tricycle—where it is unclear whether the rule prohibiting "vehicles" applies. There, the judge must exercise discretion. The judge makes new law, drawing sharp lines in a region that the legislature left fuzzy. As we move from the core of a rule to the periphery, we move from the realm of legal *interpretation* to lawmaking *discretion*.[218]

Lon Fuller challenged the core and penumbra dichotomy.[219] In the apparently peripheral case of a tricycle, the argument goes, the interpreter does not exercise legislative discretion to include or exclude trikes within the category of "vehicles," but rather seeks to identify, articulate, and apply the purpose of the statute, which either includes trikes or does not.[220] Nor in the ostensibly "core" case of a jeep does an interpreter simply recognize and categorize a jeep as a qualifying "vehicle." A functioning yet immobile jeep placed in the park as a war memorial is as vehicular as it gets, but is not obviously classified as core or penumbral.[221] Legal rules, Fuller argues, are only comprehensible in light of their background purposes, which thus collapses the distinction between linguistic rule following at the core and discretionary legislation at the periphery.[222]

A version of this hoary squabble continues today. Contemporary textualism depends on a similar distinction between the core and periphery. Manning's central tenet of textualism—privileging semantic meaning over statutory policy in cases of conflict—presumes the Hartian claim that there are cases in which a core semantic meaning covers and thus decides a case.[223]

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217. *See, e.g.*, MÖTLEY CRÜE, *Kickstart My Heart*, *on* DR. FEELGOOD (Elektra 1989) (exemplifying the genre).

218. *See* HART, *supra* note 166, 128–32 (arguing that courts must exercise discretion akin to that of rule-making bodies in difficult cases where there is no "one uniquely correct answer to be found, as distinct from an answer which is a reasonable compromise between many conflicting interests"); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 194–97 (1979) (explaining that legislators often pass "deliberately underdetermined rules" because they prefer to let the courts exercise discretion in filling in the gaps within the limits of a core general framework and giving rules referring to reasonableness, fairness, and just cause as examples).

219. *See* Fuller, *supra* note 214, at 661–69 (rejecting Hart's assertion that the only way to effectuate "the ideal of fidelity to law" is to adopt his theory of interpretation, which Fuller criticizes for its focus on the meaning of individual words rather than statutory purpose and structure).

220. *See id.* at 665–66 (stating that, in all situations, a judge should seek to decide whether a particular outcome is consistent with the purpose of the statute).

221. *Id.* at 663.

222. *Id.*

223. The cognate form of originalist textualism in constitutional interpretation relies on a similar distinction. *See generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95–96 (2010) (distinguishing "interpretation" of the original and public semantic meaning of constitutional text from "construction" of the text when its meaning is underdetermined).

By contrast, collapsing the meaning–purpose dichotomy will strengthen arguments that dynamic or strongly purposive approaches are compatible with legislative supremacy—an interpreter has a constructive role not merely at the putative periphery, but in all cases. Related claims about the insufficiency of textual meaning or original intent also have more force if a sharp distinction between text and context is untenable.[224] On that ground, textualism is impossible.

b. Jurisprudential Framework.—Hermeneutic beliefs—commitments about what it means to "interpret" a legal text—may also form "natural alliances" with understandings about the nature of law.[225] For example, some intentionalists link their approach to statutory interpretation with forms of legal positivism. Professor Alexander argues that because law's task is to make moral decisions more determinate, law does not do its job when it points us to general moral standards. To succeed, law must offer rules announced in texts that communicate the authority's determinations and override the audience's moral judgment. The aim of legal interpretation, then, is to understand what the authority intended to communicate. Anything more complex, Alexander argues, is an act of re-authorship or moral judgment, not legal interpretation.[226] One could craft a similar positivist argument for textualism by shifting the locus of authority from the speaker's meaning (intentionalism) to the reasonable reader's meaning (textualism). If the function and nature of law is to provide authoritative guidance, textualism's adherence to a text's objective, semantic meaning avoids both the uncertainty (or incoherence) of searching for subjective intent and the indeterminacy and discretion of seeking a coherent, overarching purpose.[227]

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224. *See, e.g.*, William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 618 (1990) ("[I]nterpreter and text are indissolubly linked as a matter of being; the text is part of the context that has formed the interpreter, and the interpreter is the agent of the text's continued viability."); Eskridge & Frickey, *supra* note 139, at 342–43 (noting the importance of both original and current context in textual interpretation).

225. Heidi M. Hurd, *Interpreting Authorities*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY, *supra* note 213, at 405, 406. Hurd's use of "alliances" is apt. The claim that a theory of law has necessary consequences for legal decision making is controversial. *See generally* Brian Bix, *Robert Alexy, Radbruch's Formula and the Nature of Legal Theory*, 37 RECHTSTHEORIE 139 (2006).

226. *See* Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY, *supra* note 213, at 357, 359–63 (explaining that "texts mean what their authors intend them to mean" and, therefore, when interpreting a text, a judge changes a text when he diverts from the author's intentions); *see also* Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, 42 SAN DIEGO L. REV. 493, 518 (2005) (condemning natural law theories of judicial decision making on the basis that they lead to the usurpation of legislative supremacy).

227. *See* Manning, *Absurdity Doctrine*, *supra* note 19, at 2457–58 (articulating a reasonable reader's approach to meaning); *cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) ("But when [a court] does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncement appears uncomfortably like legislation.").

Critics of original intent and textualist interpretation of statutes also point to links between these theories of meaning and legal positivism.[228] Connections between nonpositivist theories of law and theories of statutory interpretation are similarly evident. Ronald Dworkin provides a classic example; the initial chapter of *Law's Empire* is entitled "What is Law?" and probes that question through examples of statutory interpretation.[229] His general jurisprudence understands "law" not as merely posited rules that apply or not, but as a practice of "interpretive judgments" in which we construct from legal materials and moral principles a theory of the law that makes it the "best it can be."[230]

From this general statement about the nature of law follows Dworkin's claim "that statutes must be read in whatever way follows from the best interpretation of the legislative process as a whole."[231] Thus, he highlights the New York Court of Appeals' decision in *Riggs v. Palmer*[232] to deny an inheritance to a testator's murderer, even though murder fell into none of the exceptions to inheritance in New York's statute governing wills.[233] By contrast, he criticizes as formalistic the Supreme Court's decision to halt the construction of a nearly completed, $100 million dam pursuant to a statutory prohibition on projects jeopardizing the "continued existence" of an endangered "three-inch fish of no particular beauty or biological interest or general ecological importance."[234] Against arguments that semantically clear text, when it exists, should trump background principles and policies, Dworkin rejects any sharp distinction between clear and unclear cases.[235] Echoing Fuller's discussion of vehicles in the park, Dworkin argues that easy statutory cases only *appear* to be solved by text alone because the text and moral principles in those situations are harmonious.[236] Dworkin's theory

228. *See, e.g.*, SCOTT J. SHAPIRO, LEGALITY 252–54 (2011) (describing critics of textualism's linkage of the theory to legal positivism); Hurd, *supra* note 225, at 413–18 (arguing that the theory of intentionalist interpretation is compelling only when the citizenry believes that the legislature functions as a practical authority, i.e., that "laws function as commands rather than requests"). As Shapiro and Hurd note, textualism or intentionalism may not inextricably flow from positivism.

229. RONALD DWORKIN, LAW'S EMPIRE 15–23 (1986); *see also* Hurd, *supra* note 225, at 425 (locating "the theoretical authority of law" primarily in legislative text, while judging all "interpretive techniques" by "their ability to conform our conduct to the demands of morality"); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 286–88 (1985) (propounding a natural law theory of adjudication as opposed to one rooted in legal positivism); Goldsworthy, *supra* note 226, at 510–18 (exploring the links between these theorists' jurisprudential and interpretive theories).

230. DWORKIN, *supra* note 229, at 53, 225.

231. *Id.* at 337.

232. 22 N.E. 188 (N.Y. 1889).

233. *Id.* at 190–91.

234. DWORKIN, *supra* note 229, at 20–21 (discussing Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978)).

235. *Id.* at 350–54.

236. *See, e.g.*, *id.* at 351 (arguing that the will statute in *Riggs* is unclear only "because we ourselves have some reason to think that murderers should not inherit").

about how to read legal texts and how to conceive of law are one and the same.

With this rough-and-ready introduction to hermeneutical and jurisprudential approaches to statutory interpretation in hand, we can now turn to two plausible arguments that the presence or absence of general common law powers is irrelevant to a court's approach to statutory interpretation.

2. The Argument from Semantic Belief and Common Law Skepticism.— This offered approach first assumes that an interpreter can disentangle the text's semantic meaning from policy context or background moral principles. Like Hart, a person adopting this framework believes legal language can have a "core," in which a statute obviously covers the facts at hand. These semantically "easy" cases—the Hummer blasting music as a "vehicle in the park"—contrast with "hard" cases where application of the core meaning creates uncertain results—the tricycle in the park. Like Manning and Alexander, such a theorist believes that it is possible for semantic meaning to be clear and knowable even if it runs at cross-purposes with the statute's likely purpose. Barring ice cream trucks or ambulances from a park might seem strange, but the "no vehicles" rule covers both.

This framework would also assume that all law, including common law precedent, is modeled on posited, authoritative legislation. I call this common law "skepticism" because it doubts the traditional common lawyer's claim that the law is comprised of unfolding reason, preexisting custom, or principles immanent in the case law. Instead, as Alexander argues, common law adjudication consists of creating, following, or amending rules that happen to be handed down by judges rather than legislators.[237] This is so even if judges exercise restraint through stare decisis or decisional minimalism.[238] This legislative understanding of common law features into discussions of federal common law by its champions and critics alike.[239]

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237. *See* LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 25–26 (2008) (courts either "reason deductively from rules posited by others; or they posit law, relying on moral and empirical judgment, as any lawmaker must"); Pojanowski, *supra* note 205, at 814–20 (describing legislative understanding of common law); *see also* A.W.B. Simpson, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN JURISPRUDENCE: SECOND SERIES 77, 89 (1973) (describing and criticizing this as the "school-rules" model of common law).

238. *See* RAZ, *supra* note 218, at 200–01 (noting that even the traditionally conservative lawmaking role of the courts involves partial reform measures that "introduce[] pragmatic conflict into the law").

239. *See* D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 468 (1942) (Jackson, J., concurring) (explaining that federal common law "to put it bluntly," allows the Court to "make our own law from materials found in common-law sources"); Clark, *supra* note 177, at 1247–49 (raising concerns about federal judicial lawmaking intruding on the powers of the legislature and of the states); Kramer, *supra* note 140, at 267 ("[T]he common law includes any rule articulated by a court that is not easily found on the face of an applicable statute.").

Many state court judges, including those who reject semantic limits in statutory interpretation, also speak of the common law in such a fashion.[240]

An interpreter with these twin assumptions would not view many hard legal questions as concerning the "interpretation" of statutes or precedent at all. The difference between a rule's solid core of meaning and the open texture of its periphery renders the term law-"making" more apt than law-"finding" in unclear precedential and statutory cases alike. In cases of first impression or where a statute's semantic meaning or authoritative intent run out, the law offers no single answer and the judge has authority to resolve the matter through discretion.[241] Similarly, when a judge reverses a precedent or refuses to apply the no vehicles rule to the ambulance, these are exercises of legislative power, not interpretation. In short, this arrangement collapses common law into the legislative idiom, with the difference between common and statute law turning on a rule's mode of origin—judge versus legislature—not substance.[242]

From this perspective, a state court's possession of general common lawmaking powers does not alone entail divergence from federal court approaches to statutes. Both state and federal courts can have delegated authority to "make law" within statutory gaps, while the state courts have the additional prerogative to "legislate" in the absence of statutory coverage. The delegated lawmaking powers that state and federal courts share with respect to statutes have little to do with actual "interpretation," as both courts make law in the gaps rather than find legal meaning.[243] So understood, a state court's additional, general lawmaking powers lead to divergence from federal practice *only* if that power *further* authorizes state courts to override a statute's clear semantic commands in a way that federal courts cannot. A court's exercise of this expanded prerogative involves a de facto amendment of the statute, not its interpretation. Whether a court has that power is a question of constitutional rules regarding lawmaking hierarchy, not an entailment of a freestanding power to make law where the legislature has not. If state and federal courts both accept similar forms of legislative supremacy,

240. *See* Kaye, *supra* note 43, at 10 ("In spite of the anxiety surrounding the legitimacy of judicial lawmaking, I believe that the inherent, yet principled flexibility of the common law remains the defining feature of the state court judicial process today."); Roger J. Traynor, *Reasoning in a Circle of Law*, 56 VA. L. REV. 739, 751 (1970) [hereinafter Traynor, *Reasoning in a Circle*] (characterizing judging as "the recurring choice of one policy over another" in the formulation of new rules).

241. *Cf.* HART, *supra* note 166, at 131–32 (contending that precedent, despite its binding force, often leaves the law open for judicial legislation).

242. *See* Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. (forthcoming 2013) (manuscript at 6) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021489## ("Modern lawyers . . . . tend to assume that the unwritten law of each state is fundamentally like the written law of each state, except that it is made by a different branch of the state government . . . .").

243. *See* Alexander, *supra* note 226, at 359–63 (asserting that texts only carry the meaning that was intended by their authors and that therefore any changes to that meaning are not actually interpretations of the text at all).

however, it is not clear that a state court's broader yet nevertheless defeasible lawmaking powers make any difference in the interpretation of statutes.

3. The Argument from Semantic Skepticism and Common Law Belief.— A competing approach reverses these premises about interpretation and law, but only to reach the same conclusion that a state court's common law powers do not create divergence from interpretation in the federal context.

First, the theorist will reject the notion that the interpreter's perception of clear semantic meaning or intent is separable from the statute or the legal system's background purposes. The theorist sides with Fuller in his debate with Hart about language and interpretation.[244] The answers for both "easy" and "hard" questions about "vehicles in the park" turn on an understanding of nonsemantic norms existing above or behind the words on the page. Answering a "hard" case is not an act of legislative discretion, but a disciplined practice with an inevitable appeal to nonsemantic matters like history, purpose, and moral principle.[245] An "easy" case, by contrast, only appears to be so because of a close fit between the semantic meaning and the background norms.[246] Second, this approach would also reject the understanding of common law as a system of posited rules. I call this common law "belief" because it accepts in some form the traditional common lawyers' argument that the rules and principles announced in judicial decisions and legal treatises are merely evidence of the common law on a question, which in fact exists independent of those texts.[247] In this respect, Dworkin's claim that law is not just a system of rules and his competing interpretive theory of law as integrity cast him as a descendant of the common law tradition.[248]

This framework regards the language of both statutes and precedent as signs pointing the interpreter to the reasoned purpose that is in fact the law. Such regard for legislation resembles the classical common lawyers' treatment of statutes as well as Ronald Dworkin's purposive approach to

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244. Fuller, *supra* note 214, at 663–66. One can also see this premise in the statutory pragmatist's claim that it is impossible for interpreters to limit themselves to purely semantic sources when constructing the meaning of statutes. *See* Eskridge & Frickey, *supra* note 139, at 353–54 (describing the "funnel of abstraction," wherein the interpreter looks at a broad range of evidence which may support or contradict any particular meaning or understanding).

245. *See* DWORKIN, *supra* note 229, at 352 (arguing that when general principles of society conflict with the language of a statute, that statute may be unclear).

246. *See id.* at 353 (asserting that easy questions of law arise when general societal principles align with the statutory language).

247. *See* Gerald J. Postema, *Philosophy of the Common Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 588, 596 (Jules Coleman & Scott Shapiro eds., 2002) ("Classical common law jurisprudence resolutely resisted the theoretical pressure to identify law with canonically formulated, discrete rules of law.").

248. *See* Mark D. Walters, *Legal Humanism and Law-As-Integrity*, 67 CAMBRIDGE L.J. 352, 353, 363–64 (2008) (drawing parallels between Dworkin's thought and common law "humanists" like John Dodderidge and Francis Bacon); *see also* Goldsworthy, *supra* note 125, at 231–32 (echoing Walters's parallels with regards to Sir Edward Coke).

statutory interpretation.[249] This convergence also sounds in the calls of Roscoe Pound, James Landis, and Justice Stone for courts to use statutes as sources of fresh principles for the development of common law.[250] To be sure, classical common lawyers embraced supra-textual interpretation to integrate statutes into the superior common law, whereas twentieth-century jurists hoped progressive statutory principles would supplant the retrograde obscurities of their Blackstonian inheritance.[251] In both modes, however, judges have oracular power, whether by expounding the reason of judge-made law or principles immanent in legislation.

This second approach is the mirror image of the framework discussed above. It denies both the separation of semantic meaning from background purpose and the hard positivist understanding of common law and statute. Like its converse, it too collapses the distinction between common law and statute, though here it assimilates both into a model of law and legal reasoning reminiscent of nonpositivist common law theory. Its concept of "interpretation" is as capacious as its counterpart is narrow, so it emphatically maintains that broadening, narrowing, or extending statutes in common law fashion is in fact a matter of interpretation. Judge Kaye gestures at this approach, notwithstanding her concession to legislative supremacy. She claims the common law is derived "from human wisdom collected . . . over countless generations to form a stable body of rules"[252] and denies any "sharp break" in the statutory and precedential reasoning, for "there remains at the core the same common-law process of discerning and applying the purpose of the law."[253] Other arguments in favor of treating statutes like precedents have gestured at a similar interchangeability between the two modes of law, with a similarly central role for the jurist.[254]

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249. *See* Heydon's Case, (1584) 76 Eng. Rep. 637 (K.B.) 638, 3 Co. Rep. 7a, 7b (announcing that statutes shall be interpreted in light of the mischief they sought to remedy); DWORKIN, *supra* note 229, at 337 (contending that statutes must be read in a way that best interprets the legislative purpose as a whole).

250. *See* James McCauley Landis, *Statutes and the Sources of Law*, *in* HARVARD LEGAL ESSAYS 213, 215 (1934) (discussing judges' use of the doctrine of equity to conform statutes to generally recognized aims of the law); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 614 (1908) (acknowledging that common law has failed to properly address certain modern issues and should draw on legislation for fresh principles of growth); Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12–14 (1936) (describing the treatment of statutes as sources of law which judicial decisions can extend).

251. William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 GEO. WASH. L. REV. 1731, 1734–35 (1993).

252. Kaye, *supra* note 43, at 5.

253. *Id.* at 25.

254. *See generally* Traynor, *Statutes Revolving*, *supra* note 120, at 405, 425 (comparing the similarities between judicial interpretation of statutes and judicial interpretation of common law); Robert F. Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases*, 50 GEO. WASH. L. REV. 544, 556 (1982) (arguing that, because the underlying statutory policy likely has significance beyond its text, courts should use statutes as persuasive authority in cases where the statute does not apply directly).

Yet under this approach, the case for state–federal divergence is perhaps even weaker than under assumptions of semantic belief and common law skepticism. If statutory interpretation proceeds in the fashion of precedential reasoning, and if common law reasoning in the absence of statutes is not a form of judicial legislation, then a state court's apparently distinguishing feature of common law powers turns out to be redundant to the claim of interpretive freedom. Strongly purposive or dynamic reading of statutes follows irrespective of whether a court had jurisdiction over common law causes of action. An absence of general common law authority matters only if one conceives of common law powers as authority for judicial legislation—a premise this framework rejects. In this light, Dworkin's interchangeable treatment of statutory interpretation in the New York Court of Appeals and the U.S. Supreme Court is a logical outgrowth of his vision of law and interpretation, not an oversight.[255] Both state and federal courts, from this perspective, should reject textualism for the same reasons.

IV. A Tentative Case for Divergence

Parts II and III provide and apply frameworks for considering the difference common law powers may make for state interpretive method compared to that of the federal courts. A satisfactory resolution of the preliminary arguments for and against divergence will require more work than has been expended thus far. Nevertheless, this Part offers a tentative proposal that attempts to account for and reconcile the competing constitutional, institutional, and conceptual claims concerning the effect of state courts' common law powers on statutory interpretation. This proposal suggests that while constitutional concerns may preclude state courts from *narrowing* the semantic meaning of a statute to fit its background purpose, these courts retain discretion to *extend* a statute beyond its linguistic scope in pursuit of the statute's purpose or broader coherence in the legal fabric. This approach mirrors neither federal textualism nor its purposive or dynamic rivals, but it does account for aspects of state court interpretation that existing commentary cannot explain.

A. The Proposed Hybrid Model and Its Assumptions

Recalling the federal context will help to understand this argument for state court divergence in interpretation. As Professor Manning argues, the dividing line between federal textualism and purposivism is the choice between a statute's semantic meaning and its background purpose when the two conflict.[256] Semantic meaning and purpose can conflict in two ways. A

255. *See* DWORKIN, *supra* note 229, at 15–23 (comparing a New York Court of Appeals' decision that relied heavily on the legislative purpose of a wills statute with a U.S. Supreme Court decision based on a literalist reading of the statute in question).

256. Manning, *What Divides*, *supra* note 15, at 76.

statute's semantic meaning may be overinclusive, covering matters not within the statute's apparent purpose. Or the semantic scope may be underinclusive, such that it does not extend to matters that, in light of statutory purpose and policy, ideally should be covered.

The federal textualist would stick to semantic meaning in cases of overinclusion and underinclusion. The federal purposivist, by contrast, would privilege purpose in both circumstances. My argument is that a court's general common law powers open a third path. Under this approach, courts with these powers should refuse to narrow the semantic scope of a statute—in short, be "textualist" on semantic overbreadth—but retain discretion to broaden a statute's coverage beyond its semantic borders—to be "purposive" or arguably even "dynamic" on semantic underbreadth. Here, courts regard the legal landscape as a tract of common law that the legislature has a plenary right to displace or develop through statutes—or to create new "tracts" of law where no common law had before existed. The legislature can preempt judicial development of the law but, absent affirmative indicia to the contrary, legislative inaction permits activity by courts, including extension of rules and principles originating in legislation. In this respect, the relationship between the state courts and the state legislature would resemble that between federal courts and Congress in the context of enclaves of federal common law or the federal courts' inherent, defeasible powers to make procedural rules, though the conceded nature of state courts' common law powers would lessen concerns about the constitutional source of such judicial authority.[257]

For similar reasons, a state court's common law powers may also suggest a different approach to vague or ambiguous statutes. If internal "gaps" in a statute do not displace the common law backdrop, a court interpreting a vague statute might not be required to estimate legislative intent or purpose in filling out the details. Comity, statutory coherence, and judicial humility may recommend faithful agency, but in the common law zone other considerations legitimately compete with those reasons. With this sketch in mind, a return to the criteria of interpretive choice will help in understanding and evaluating this tentative proposal.

1. Constitutional Inferences.—In line with federal textualism, this approach prohibits a state court from narrowing the ordinary meaning of a statute to avoid an awkward application or to preserve common law prerogative. This limit on purposive or equitable interpretation follows from constitutional norms of legislative supremacy and separation of powers discussed above. Common law is defeasible law that must yield when

257. For an example of a textualist identifying and providing an originalist justification for federal courts' inherent powers to craft procedural common law, see generally Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813 (2008).

statutory law covers a particular point of decision.[258] A similar conclusion follows from constitutional norms respecting legislative compromise. In systems with bicameralism and presentment and other vetogates, the means a legislature chooses to accomplish an end are as important as the goal itself. Judicial fine-tuning would upset those compromises. This result, it seems, can pertain whether we think of "common law" as positivist judicial legislation or in the nonpositivist terms of custom or reason. Statutes are jurisprudentially "solid" such that common law reasoning cannot justifiably chip away at their scope.

It is less clear, by contrast, that legislative supremacy and compromise prohibit judicial extension or supplementation of statutes by common law courts. The question is what default rule common law courts should use in cases of legislative silence. Does a statute's treatment of matter x in a situation preclude a court from treating analogous matter y the same way in the same situation?[259] For federal textualists, the answer is yes, in part to protect legislative compromise as discussed above.[260] But even those textualists will allow common law-like development when the legislature delegates such authority to courts.[261] This affirmative requirement of legislative delegation—and the corresponding negative inference from silence on judicial lawmaking—fall away when the legal backdrop assumes an interpreter with general, defeasible power to develop law where the legislature has not. In this context, silence alone is insufficient to raise the federal textualist's negative inference, though statutory text or other constitutional norms may do so expressly or through strong implication.[262]

This approach respects and reflects many differences between state and federal constitutions in terms of structure and lawmaking authority. State constitutions give courts more substantive lawmaking powers than their federal counterparts while embracing structural norms of separation of powers and legislative supremacy that are stricter than those contemplated by Madison.[263] These features of state separation of powers push in opposite

258. Farber & Frickey, *supra* note 5, at 888.

259. *See* Traynor, *Statutes Revolving*, *supra* note 120, at 405 (seeming to answer "yes" by arguing that judges can reason by analogy to extend the application of a statute to a circumstance not covered by its plain meaning).

260. *See generally* Easterbrook, *supra* note 109 (suggesting that unless the statute clearly gives courts the power to develop interstitial common law, judges should restrict the statute to situations clearly anticipated by its framers as expressed in the legislative process).

261. *Id.* at 544–45.

262. For example, statutory language indicating a legislative remedy was exclusive would prohibit extension, and due process notice norms would likely prohibit the purposive extension of criminal statutes.

263. *Cf.* WILLIAMS, *supra* note 129, at 313 (observing that because "state constitutions are different in a number of ways from the more-familiar federal Constitution . . . judicial interpretation of state constitutions can be quite different"); *see also* G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 857–58 (1991) (exploring how state constitutional interpretation may differ).

directions, but the hybrid approach respects both the judicial prerogative and legislative supremacy.

Overall, this approach resembles the arrangement arising in England with the ascent of Parliament, the separation of the courts from the Crown, and the consequent waning of equitable interpretation. There, too, common law courts, operating in the shadow of a supreme parliament, privileged text in statutory interpretation while assuming that common law governed on all matters of legislation left uncovered.[264] This approach continued into the twentieth century, with courts respecting legislation overturning particular decisions, while still treating the underlying principles as valid in other doctrinal pockets not addressed by the statute.[265] A similar approach was arguably held in Australia prior to the legislative codification of purposive interpretation.[266] Under their pre-statutory "common law" of interpretation, Australian courts would rely on purpose only when the text was ambiguous or inconsistent.[267] These commonwealth courts differed from my tentative proposal, however, in their hesitance to apply statutory rules beyond their scope and the courts' proclivity for overly narrow reading of statutes.[268] These practices, however, seem as much a product of distaste for statutes as respect for the legislature. Common law courts could give statutes "reasonable" rather than "strict" constructions[269] while also realizing that a legislature's failure to address one matter by statute does not always preclude a court from addressing it on its own. The familial resemblance between the proposed approach and English or Australian practice may not be a constitutional coincidence. Like state courts, the highest courts of appeal in commonwealth nations like the United Kingdom and Australia traditionally had to reconcile their undisputedly general common law powers with a system of legislative supremacy.

2. Institutional Competence.—Considerations of institutional competence suggest one threshold qualification to the hybrid model proposed above. When a statute addresses a subject not traditionally covered by the common law, courts should be more concerned about exercising their

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264. *See* Baade, *supra* note 121, at 90–91 (discussing the interplay between rules of statutory construction and the common law).

265. *See* P.S. Atiyah, *Common Law and Statute Law*, 48 MOD. L. REV. 1, 12 (1985) (noting that courts tend to view the legislative reversal of judicial decisions as "not affecting the underlying principles of those decisions").

266. *See* D.C. PEARCE & R.S. GEDDES, STATUTORY INTERPRETATION IN AUSTRALIA 24–30 (5th ed. 2001) (discussing codified methodology).

267. *Id.* at 22 (citing *Mills v Meeking* (1990) 169 CLR 214, 235 (Austl.)). Australian courts traditionally allowed departure from text in cases of absurdity, although this exception appeared to be limited to drafting mistakes. *See id.* at 21–22.

268. *See* Atiyah, *supra* note 265, at 8–9 (observing the historical reluctance of British courts to fill in statutory gaps).

269. *Cf.* Scalia, *supra* note 142, at 23 (differentiating between reasonable textualism and strict constructionism).

inherent constitutional authority to extend statutory scope. The metaphor about statutes displacing a common law backdrop arguably breaks down when the legislature breaks new ground and, for example, enacts a comprehensive scheme regulating public utilities. At that point, judicial prudence may prioritize the search for legislative intent.[270]

Setting this qualifier aside, advocates of strong-form textualism or purposivism on institutional grounds are likely to be unhappy with this hybrid model. For them, there is no obvious reason why courts are more likely to be better or worse at discerning historical intent or purpose, identifying existing preferences, or making good policy when they *extend* rather than *narrow* the linguistic scope of a statute.[271] In that light, my tentative proposal is an arbitrary half measure in the eyes of institutional purists of all stripes. It is fair to ask whether considerations of institutional competence do any work in this model.

Against claims of across-the-board purposivism on institutional grounds, this model reflects an admittedly controversial prioritization of constitutional norms and structures over concerns for institutional competence. Even if courts are good at narrowing statutes to fit background purposes, constitutional inferences limiting what courts can do with statutes when the legislature has issued authoritative text may preclude this appeal to expediency. Such institutional considerations, however, could be germane when a legislature instructs or permits the court to consider purpose across the board, a point I bracket given the constitutional disputes surrounding such legislation.[272]

The answer to the institutional textualist must be different, for the proposed model presumes that extension of statutes is generally within constitutional bounds. Accordingly, any limits here will turn on prudential decisions in which competence considerations play a central role. I can only sketch the beginning of a response here, but it seems much will turn on the subject matter of the statute. As noted, in areas where a statute comprehensively supplants the common law or resolves problems

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270. This is not to say such statutes completely displace the common law. For example, even complex regulatory regimes governing power rates will require courts to repair to common law principles governing contracts. *See* Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regulatory Comm'n, 811 F.2d 1563, 1569 (D.C. Cir. 1987) (giving deference to the agency's interpretation of a contract when the issue is the simple construction of language); Pojanowski, *supra* note 205, at 808–09 (noting the difficulty that arises when common law rules are ambiguous and reviewing courts must decide between the agency's interpretation and the court's).

271. One may argue extension is less risky as a matter of policy because the legislature has chosen to act and selected the policy vehicle that the court applies elsewhere. That argument falsely presumes that using a good tool more often will lead to better solutions. More pulleying will not get the job done when you need a block and tackle.

272. *See, e.g.*, TEX. GOV'T CODE ANN. § 311.023 (West 2004) (instructing courts to engage in purposive interpretation of unambiguous statutes); Gluck, *Laboratories*, *supra* note 6, at 1771 (cataloging state courts' resistance to legislation governing interpretive method); Manning, *Absurdity Doctrine*, *supra* note 19, at 2441–45 (arguing that federal legislation requiring the absurdity doctrine would be unconstitutional self-delegation by the legislature).

surrounded by little common law precedent, hesitancy to expand statutory scope is understandable. Where a statute touches on or mingles with common law doctrine, such a presumption makes less sense. This occurs not only because a court's grasp of a statute's legal and practical context may improve its search for intent, purpose, current preferences, or good policy.[273] State courts are also better positioned to cultivate coherence where common law and statute overlap. The legislature's presumptive awareness of existing law may be a benevolent fiction in statutory interpretation, but it reflects the reality of a court approaching legislation interwoven with a broader body of common law. Courts are thus well positioned to decide whether it makes sense to extend a statute's scope in the name of coherence and consistency with existing common law.[274]

3. Common Law and Concepts of Legal Interpretation.—At the threshold, this proposal assumes the cogency of meaningfully separating expressed semantic meaning from background purpose. This assumption is controversial and its full defense is the work of a productive scholarly career, not the subsection of an article. Nevertheless, the rise of textualism in state court jurisprudence that Professor Gluck chronicles suggests that many common law jurists share this assumption with the increasingly textualist Supreme Court of the United States.[275]

A theorist who limits the concept of interpretation to understanding semantic meaning or intent of a text will also object that extension of a statute beyond its linguistic scope is not an act of "interpretation," but is rather legislation or something else.[276] For my purposes, little turns on the label. The primary inquiry here is whether a court should be allowed to narrow or extend the semantic scope of a statute, whatever you may call such tailoring. As a person with a restrictive understanding of "interpretation" would agree, this question concerns matters of constitutional law or practical consequences, not a debate about the definition of interpretation.[277]

This proposal is also agnostic about the nature of the common law. It is amenable to one who thinks of common law precedent as a form of posited law crafted by judges and defeasible by legislation.[278] It is also amenable to

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273. *Compare supra* section II(C)(2), *with* subpart III(B).

274. *See, e.g.*, Traynor, *Statutes Revolving*, *supra* note 120, at 417–18 (discussing the example of *In re* Mason's Estate, 397 P.2d 1005 (Cal. 1965), involving the California Supreme Court's analogical extension of a probate code provision to a similar instance in the common law of guardianship not covered by statute).

275. Gluck, *Laboratories*, *supra* note 6, at 1775–811.

276. *See* Alexander & Prakash, *supra* note 96, at 98–99 (arguing that courts move beyond the realm of interpretation when they decline to follow statutory language).

277. Perhaps the danger of infelicitously labeling an activity "interpretation" is to load the rhetorical dice in favor of legitimacy. Judges are on safer ground if they are "interpreting" statutes than when they are making law or consulting the brooding omnipresence.

278. To believe this, one need not hold that common law is strictly analogous to legislation. *See* John Gardner, *Some Types of Law*, *in* COMMON LAW THEORY, *supra* note 125, at 51, 67–71

one who views the common law as a body of custom or principle that is distinct from legislative-type rules. One only needs to concede that common law, whatever its nature, must yield on matters that statutes expressly resolve. In other words, constitutional norms (and perhaps by extension nonposited norms of political morality) can require preexisting, nonposited common law to yield to authoritative legislative commands.

That said, there is an appealing jurisprudential ambidexterity in this model absent in other approaches that either understand all forms of law and interpretation in the statutory positivist idiom or submerge both statutes and precedent in a framework of purposive or moral reading. It permits an interpreter to embrace a principle-based theory of common law that does not reduce adjudication to interstitial legislation while also treating statutes in the fashion of posited rules that preempt judicial judgment with their scope. This dualist understanding of law's domains coheres with the intuitions of many thoughtful lawyers, including jurists in commonwealth countries who must integrate general common law powers with legislative supremacy.[279] Nor, more importantly, is it unprecedented in American jurisdictions that recognize general common law.[280] The intersection of two such domains marks a plausible point of differentiation for state and federal interpretation, and while negotiating this overlap poses challenges, theoretical complexity is not always a sign of error.

B. Explaining State Practice

This proposed model, however tentative, advances inquiry and understanding in the developing field of state statutory interpretation. This Article's work on the effect of common law powers explains features of state jurisprudence that existing scholarship does not. This is particularly so regarding one of Professor Gluck's most significant contributions—her identification of a state court interpretative method she calls "modified textualism."[281] In these "modified textualist" jurisdictions, one finds courts flouting textualism (modified or otherwise) in a manner Gluck has not

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(arguing that although case law constitutes positive law, it differs from legislation because it is not expressly made and is the work of an individual agent, not an institutionalized group).

279. *See, e.g.*, *Brennan v Comcare* (1994) 50 FCR 555, 572 (Austl.) ("The judicial technique involved in constructing a statutory text is different from that required in applying previous decisions expounding the common law.").

280. As Professor Nelson explains, in the pre-*Erie* era, federal courts sitting in diversity would exercise independent judgment on matters of general law but not on state court interpretations of statutes. This deference extended to state legislation codifying or displacing what was previously within the realm of general law. *See* Nelson, *supra* note 242, at 3–4. To this date, Georgia still treats common law in the manner of *Swift v. Tyson*. *See* Green, *supra* note 98, at 1134–35. Even if Georgia is an outlier, Professor Green notes how the choice-of-law rules in every state today are *Swift*-ian in character. *See id.* at 1162–67. Nor do state courts appear to conceive of federal common law in terms of post-*Erie* positivism. *See* Bellia, *supra* note 67, at 1540–41.

281. Gluck, *Laboratories*, *supra* note 6, at 1758.

identified,[282] namely at the crucial intersection of common law and statutes. This Article's proposed model explains these deviations from textualism and provides a fuller understanding of state courts' treatment of statutes.

Under Gluck's "modified textualism," a court first considers statutory text, second considers legislative history, and third looks to background norms. Because such courts only take incremental steps when an earlier one does not decide the question, they resolve many cases on textualist grounds alone.[283] The model for "modified textualism" is the three-step inquiry the Oregon Supreme Court announced in *PGE v. Bureau of Labor & Industries*.[284] Gluck argues that this new approach is textualist, notwithstanding its use of legislative history.[285] Moreover, because it restricts the use of substantive canons like the absurdity doctrine, Gluck argues that the method can be more textualist than federal approaches, which allow for such correction.[286]

But even textualists with tolerance for legislative history may raise their eyebrows when they look closer at the law in "modified textualist" jurisdictions. Consider the Supreme Court of Oregon's decision in *Scovill v. City of Astoria*.[287] There, a woman's estate sued the city, claiming that its police department's failure to follow a statute requiring the officers to take her to a detoxification facility caused her death.[288] Invoking *PGE*, the city moved to dismiss because the statute provided no explicit private right of action or enforcement provision of any kind.[289] This strategy was understandable: the primacy of text over background norms in *PGE* recommends a similar refusal to supply a private right of action in statutory silence.[290] Hornbook textualism, at least in federal scholarship, holds that a legislative choice about textual means—here, no private right of action—

282. Gluck anticipates criticism from orthodox textualists regarding modified textualists' use of legislative history. *Id.* at 1758–59. This is not my concern and the "modified textualist" practice of using legislative history parallels the moderate use of such sources in federal practice. *See* Manning, *Second-Generation*, *supra* note 12, at 1288 (noting the "longstanding practice of using unenacted legislative history as authoritative evidence").

283. Gluck, *Laboratories*, *supra* note 6, at 1836–37.

284. 859 P.2d 1143, 1146–47 (Or. 1993); *see* Abbe R. Gluck, *Statutory Interpretation Methodology as "Law": Oregon's Path-Breaking Interpretive Framework and Its Lesson for the Nation*, 47 WILLAMETTE L. REV. 539, 540–41 (2011) (explaining the significance of the new test).

285. Gluck, *Laboratories*, *supra* note 6, at 1834–35.

286. *See id.* at 1758–59, 1851–52 (discussing modified textualism and federal courts' lack of a consistent methodological approach in use of substantive canons).

287. 921 P.2d 1312 (Or. 1996).

288. *Id.* at 1314.

289. *Id.* at 1318.

290. *Compare* J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (holding courts should provide remedies to promote legislative purpose), *with* Alexander v. Sandoval, 532 U.S. 275, 288 (2001) ("We therefore begin (and find that we can end) our search for Congress's intent [to provide a private remedy] with the text and structure of Title VI.").

shows how the legislature values a goal vis-à-vis other considerations.[291] One would think "modified textualism" step one—taking clear text as broad or as narrow as drafted—would respect this choice.

Nevertheless, the *Scovill* court rejected the city's argument, but not because it rejected *PGE* and not because the statute's text and history were unclear enough to allow purposive interpretation. Instead, the court deemed *PGE* irrelevant because its framework concerned statutory interpretation, "not a change in substantive tort law."[292] Under tort law, *Scovill* explained, a *court* decides whether to create a private right of action for a statutory violation.[293] The court concluded that a tort action would promote the legislative purpose, particularly because the statute "does not specify other means for its enforcement."[294] Despite Oregon's purportedly textualist methodology and despite the plaintiff's reliance on a statute, the court invoked its inherent common law power to supply a remedy in the absence of an explicit prohibition.

Scovill is not an outlier. Consider the tort doctrine of negligence per se. There, a court uses a statutory rule to define the breach element in a negligence claim. This common law practice, which is embraced by the majority of jurisdictions, three of Gluck's four "modified textualist" states, and the current *Restatement of Torts*, looks puzzling through federal textualist eyes. A legislator willing to criminalize conduct at the cost of a minor fine may feel differently about a plaintiff using the statute to collect a substantial tort judgment.[295] Thus, the first problem for a textualist is the court's decision that the statute is relevant at all given the absence of any private right of action. This is similar to the worry the textualist has about *Scovill*, as evidenced by the *Third Restatement*'s recognition that negligence per se "reduces the significance" of inquiries about "implied statutory cause[s] of action."[296]

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291. *See, e.g.*, Easterbrook, *supra* note 109, at 546 (arguing that courts should respect the particular means legislatures have chosen to pursue a given goal).

292. *Scovill*, 921 P.2d at 1318 n.8.

293. *Id.* at 1318; *see also id.* at 1319 (quoting RESTATEMENT (SECOND) OF TORTS § 874A cmt. c (1979)) (explaining that courts may create a tort remedy if doing so is "in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision").

294. *Id.* at 1319.

295. This worry is not new. *See* Charles L.B. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361, 364 (1932) ("[I]t savors of absurdity to impute to the legislature an intention to create a civil liability, where it has manifested no intention of creating a civil remedy.").

296. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. b (2010); *accord* Lowndes, *supra* note 295, at 365 ("The difference between [the approaches of negligence per se and an implied cause of action] in a given case may be one of technique rather than result . . . ."); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 865 n.19 (1996) ("Although . . . negligence per se . . . is not the same as an implied cause of action . . . the two claims get the plaintiff to the same place.").

A court that decides the statute is in play—textualist departure number one—then affirms a second textualist heresy: a purposive inquiry asking (a) whether the statute protects a defined class of people; (b) whether the plaintiff is in the protected class of people; (c) whether the injury was the kind of injury contemplated by the statute; and (d) whether the injury occurred in the way contemplated by the statute.[297] The resemblance to the "mischief rule" of purposive interpretation is unmistakable.[298] The fact that the proper-class and proper-injury tests are functional equivalents to the duty and proximate cause elements of the negligence tort further demonstrates that the court's primary concern is not the statute's semantic meaning.

From the perspective of orthodox textualism, both decisions (i) to create or infer from silence a private right to enforce a regulatory statute and (ii) to mold the scope of the statute in common law fashion are problematic. One can make similar arguments regarding state courts' treatment of statutes in other common law doctrines, such as the rule voiding the entirety of an otherwise valid contract if one term requires a party to violate a statute.[299] Oregon courts use the *PGE* method to determine if the contract calls for a statutory violation, but do not pause to ask whether the statute permits its use in such a broad fashion.[300] This juxtaposition of modern textualism with a classical common law extension of statutes[301] suggests that state court textualism is more modified than Gluck's work suggests.

Under the hybrid parliamentary/common law method of interpretation proposed here, however, the judicial supplementation of statutes in the face of silence that flouts federal textualism may be legitimate for state courts. Recall that one claimed difference that common law powers make is disabling the federal textualist's default rule against judicial lawmaking when a statute is silent about a matter within its orbit.[302] When the legislative backdrop encompasses common law courts, the potential "domain" of the statute may expand through judicial action absent contrary indicia in

297. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14, § 14 cmt. f (2010).

298. *See* Heydon's Case, (1584) 76 Eng. Rep. 637 (K.B.) 638, 3 Co. Rep. 7a, 7b (announcing the mischief rule).

299. *See, e.g.*, Staffordshire Invs., Inc. v. Cal-Western Reconveyance Corp., 149 P.3d 150, 156–57 (Or. Ct. App. 2006) (applying the *PGE* approach in the illegal contract context).

300. *Id.* at 157 (citing PGE v. Bureau of Labor & Indus., 859 P.2d 1143, 1146–47 (Or. 1993)).

301. *Id.* at 156–57 (analyzing enforceability of contract under *Uhlmann v. Kin Daw*, 193 P. 435 (Or. 1920)).

302. *See* Caroline Forell, *Statutory Torts, Statutory Duty Actions, and Negligence Per Se: What's the Difference?*, 77 OR. L. REV. 497, 514–15 (1998) (criticizing *Scovill* for failing to acknowledge that the court, not the legislature, created the tort action); *cf.* Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39–40 (1916) (citing 1 Comyn's Digest tit. (F)) (allowing a private damages suit for a violation of the federal act "according to a doctrine of the common law . . . . *Ubi jus ibi remedium*"); Harvey S. Perlman, *Thoughts on the Role of Legislation in Tort Cases*, 36 WILLAMETTE L. REV. 813, 834 (2000) ("The early common-law rule that every right deserves a remedy was not based on a finding of legislative intent; it was a common-law rule even when applied to protect a right created by statute.").

legislative text. For this reason, Ezra Ripley Thayer, the early twentieth-century tort theorist and son of noted constitutional formalist James Bradley Thayer, accepted the doctrine of negligence per se even though as a matter of statutory interpretation he was inclined to draw negative inferences from statutory omission of remedies.[303]

Now compare this judicial freedom in *broadening* statutes with the hybrid model's prohibition, articulated above, on common law courts *narrowing* statutes. We can now see why Oregon's *PGE* methodology allows for actions like judicial creation of private remedies or contract voidance while also joining academic textualists in rejecting the absurdity doctrine. The difference common law powers make dissolves this apparent tension in "modified" textualism and offers a more complete picture of state court interpretation. This framework's ability to explain Oregon's textualist/common law hybrid suggests that the structural differences between federal and state court textualism are even more significant than Gluck's work appreciates.[304]

C. *Avenues for Further Inquiry*

The preceding discussion argues that a court's inherent common law authority may sanction some departure from federal textualism, but it does not necessarily entail the wholesale purposivism advanced by federal scholars and some of their state counterparts. Actual state court practice, moreover, supports these theoretical arguments and in turn appears more comprehensible in light of these insights. At the very least, this analysis suggests caution before assuming that federal and state interpretive methods must walk in lockstep. Nor should advocates of interpretive divergence assume that the menu of options available to state courts is the same as those available to federal courts. That said, this model and its assumptions require further consideration, elaboration, and defense. A complete answer will depend on how the questioner regards the institutional, constitutional, and jurisprudential variables in interpretive choice—as well as the subquestions under each category. The remainder of this Part flags further lines of inquiry on state court interpretation arising from this Article's contribution so far.

First, the three-part framework in Part III can aid comparative analysis beyond the particular matter of common law powers. This analytical framework separates interpretive choice along three axes: constitutional,

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303. *See* Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 320 (1914). Thayer's work on negligence per se and remedies anticipates by seventy years arguments offered by textualists like Judge Easterbrook. *See id.* ("Proper regard for the legislature includes the duty both to give full effect to its expressed purpose, and also to go no further. . . . Its omission [of a civil remedy] must therefore be treated as the deliberate choice of the legislature, and the court has no right to disregard it.").

304. *See* Gluck, *Laboratories*, *supra* note 6, at 1858–61 (noting differences between state and federal courts but arguing that federal law and scholarship can nevertheless draw broader lessons from state practice).

institutional, and conceptual criteria. Different theorists will include, exclude, and prioritize the three criteria differently, but considering those aspects directly can clarify these commitments and help indicate whether, why, and how a particular difference between court systems could translate into a different approach to statutes. In the state–federal context, for example, this framework can structure many inquiries, whether the points of differences concern methods of judicial selection,[305] judicial background, caseload and subject matter, or judges' quasi-legislative or executive duties. Accordingly, the work thus far has sought not only to build and apply a comparative framework for evaluating common law difference, but also to offer an analytical structure for an emerging yet undertheorized area of inquiry. Nor is its payoff limited to state–federal comparisons. The framework can also clarify questions of interpretive divergence *within* a given legal system[306] and between nations.

This latter point brings us to the second line of further inquiry, which flows from the recognition that interpretive theory concerning state courts may profit more from increased focus on the high courts of our commonwealth cousins and less on the U.S. Supreme Court. Although questions about the nature and extent of general federal common law powers may make reliance on the interpretive practice of commonwealth courts controversial, for state courts, the constitutional analogy is cleaner. As noted, both state and many commonwealth courts retain inherent common law powers despite the presence of a legislature supreme in its ability to trump judge-made law. In this respect, a rich vein of decisional law and scholarship sits unmined by American scholars.

That said, scholars and jurists interested in pursuing this line should note that the contextual translation may not be seamless. American states have written constitutions with judicially enforceable limits on legislative power. The United Kingdom famously does not,[307] leading many jurists there to regard the common law as the guarantor of rights. Thus, parliamentary supremacy has long dueled with a tradition of unwritten constitutionalism rooted in the common law.[308] Common law constitutionalism may partially explain these high courts' stinting construction of statutes even after parliamentary supremacy.[309] This faith in common law reason may also drive the broadly purposive statutory

305. *See generally* Bruhl & Leib, *supra* note 79.

306. *See generally* Bruhl, *supra* note 5 (comparing federal district and appellate courts).

307. *But see* Human Rights Act, 1998, c. 42, §§ 3, 8 (U.K.) (providing a judicial remedy for violations of the European Convention of Human Rights and requiring judges to interpret statutes, to the extent possible, to be compatible with the convention).

308. For a helpful overview of current debates on common law constitutionalism in the United Kingdom, see Thomas Poole, *Back to the Future? Unearthing the Theory of Common Law Constitutionalism*, 23 OXFORD J. LEGAL STUD. 435 (2003).

309. *See* Baade, *supra* note 121, at 90–91 (discussing how acts of Parliament that changed the common law became interpreted restrictively and led to an era of strict construction).

interpretation advocated by contemporary common law constitutionalists.[310] To the extent that the impulse to privilege common law is a substitute for written constitutional rights—as opposed to a thesis about the nature of the judicial function—this strand of thought may have less relevance to statutory interpretation in American states.

A closer analogue may lie even farther abroad. The High Court of Australia authoritatively interprets the nation's statutes and promotes and develops a unified, national system of common law.[311] Australia's "Washminster" form of government, which combines a written constitution and bicameralism with a parliamentary government,[312] suggests further parallels with American state constitutional structure.[313] Furthermore, as in many American states, the Australian parliament has partially codified a preferred method for statutory interpretation.[314] Unlike in many American states, the High Court also appears to take these statutes seriously.[315] Thus, while much federal jurisprudence on the relationship between statutes and common law debates the latter's legitimacy, Australian jurists are free to probe the deeper questions without threshold doubts about the enterprise.[316] Whatever the other differences in constitutional contexts, these more detailed Australian discussions seem more promising for a state judge than, say, arguments about *Erie*'s implications for federal common law.

In that vein, for state courts seeking federal guidance on statutory interpretation, particularly at the intersection of the common law, the most promising sources likely predate *Erie* and the lessons the Supreme Court has drawn from it in the past thirty years. For example, a state court's approach to the intersection of tort law and statutes might properly resemble the

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310. *See, e.g.*, T.R.S. Allan, *Text, Context, and Constitution: The Common Law as Public Reason*, *in* COMMON LAW THEORY, *supra* note 125, at 190 ("The better attainment of the statute's general purposes is a good reason for its extension to the doubtful case.").

311. *See* JAMES CRAWFORD & BRIAN OPESKIN, AUSTRALIAN COURTS OF LAW 196–97 (4th ed. 1996) (detailing the Australian High Court's functions as a final appellate court).

312. *See, e.g.*, Elaine Thompson, *The Constitution and the Australian System of Limited Government, Responsible Government and Representative Democracy: Revisiting the Washminster Mutation*, 24 U. NEW S. WALES L.J. 657, 657–58 (2001) (outlining the structure of the Australian government). Despite Australia's federal system, its High Court is more analogous to state supreme courts than to the U.S. Supreme Court. The Commonwealth's integrated judicial system makes the High Court the court of final appeal for both federal and state questions. *See* CRAWFORD & OPESKIN, *supra* note 311, at 42 (outlining the Australian High Court's appellate jurisdiction).

313. American state governments are not parliamentary, as the executive branch is separate from the legislature. Nevertheless, state governments traditionally have had strong legislatures and weak or fragmented executives. WILLIAMS, *supra* note 129, at 247, 303.

314. *See Acts Interpretation Act 1901* (Cth) s 15AA (Austl.) (giving preference to interpretations that "best achieve the purpose or object of the Act"); *id.* s 15AB (codifying the permitted use and sources of legislative history).

315. *See* PEARCE & GEDDES, *supra* note 266, at 25–28, 63 (describing the High Court's implementation of its provisions); *cf.* Gluck, *Laboratories*, *supra* note 6, at 1755–56, 1785–98 (describing state court resistance to codified methods of statutory interpretation).

316. *See, e.g.*, *Brennan v Comcare* (1994) 122 ALR 555, 572 (Austl.) (analyzing the differences between interpreting statutes and common law precedents).

federal inquiry on private rights of action prior to the advent of increased restrictions.[317] Before then, the absence of an express provision of any right of private enforcement was not enough to stay the court's common law powers.[318] Nor did a court supplying a private action always understand its act as implementing legislative intent.[319] By contrast, courts would not recognize private rights when statutory text, fairly read, contradicted such a right or suggested a right would disturb a legislative scheme.[320] It is telling that this approach thrived in federal courts before *Erie*,[321] which challenged the legitimacy of federal common law and undermined this more liberal approach to private rights of action.[322]

One final point in further need of exploration is precisely how to negotiate the overlap between preexisting common law doctrine and legislation. The Article's proposal treats the state legal landscape as a tract of common law that the legislature has a plenary right to displace or modify through statutes. Assuming statutes can displace common law, the most challenging questions concern the borderland of a statute's domain. This Article presents an approach analogous to "conflict preemption" in federal law, allowing judicial development of law adjacent to legislation so long as the two are not in direct conflict.[323] Federal textualist assumptions, by contrast, would require a model akin to "field" or "obstacle" preemption in federal law: once a statute touches on a subject, concerns of institutional competence or constitutional compromise militate against extending the statute's norms beyond its semantic scope or otherwise supplementing the regime in common law fashion.[324]

The presence of common law powers softens the constitutional case for a broader preemptive approach in the state context, but does not settle the

317. *See* Alexander v. Sandoval, 532 U.S. 275, 291–93 (2001) (denying private right of action absent explicit textual provision).

318. *See* H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 548 (1986) (stating that "[t]he plaintiff was entitled to an adequate remedy for legal wrongs, including wrongs defined by legislation").

319. *Id.*

320. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 426 (1964) ("Federal courts will provide the remedies required to carry out the congressional purpose of protecting federal rights.").

321. *See, e.g.*, Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39–40 (1916) (allowing for a private right of action because it was clearly implied in the context of the intended legislative scheme).

322. *See Sandoval*, 532 U.S. at 287 ("'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'" (citation omitted)).

323. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 260 (2000) (stating that state law is only preempted when it "contradicts a rule validly established by federal law"); *cf.* Williams, *supra* note 254, at 554, 563 (arguing that a statute's failure to cover an area should not raise a "negative preemption" inference concerning common law extension of that statute by analogy).

324. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 424–25 (2003) (invoking the doctrine of "obstacle" preemption to override state law which frustrates, but does not formally conflict with, federal law or policy); English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (discussing the doctrine of field preemption).

issue. A particular theory about the nature of certain common law doctrines, for example, may decide the practical wisdom of allowing judicial elaboration in the statutory periphery. If, as many contend or assume, private law subjects like torts, contracts, or property are merely "public law in disguise,"[325] the institutional competence objections to judicial supplementation of legislative policy through case-by-case adjudication could be substantial.[326] By contrast, if there is warrant for the traditional conception of private law as reasonably autonomous from public law, internally coherent, and normatively appealing—points reasserted by a number of recent theorists[327]—the case against displacing swaths of common law by negative implication is stronger. Ironically, it is private-law instrumentalists who have argued for broad judicial license with respect to legislation,[328] while those who defend the autonomy of private law have shown little theoretical interest in statutes.[329] The strongest case against broad statutory preemption of common law will need to attract the attention and draw on the resources of the right private law theorists.

V. Looking Beyond State Courts

A. Federal Courts

This Article's first contribution to federal interpretation is its suggestion that the relationship between textualism, purposivism, and the common law is more complex than those debates often assume. In the federal context, skepticism of federal common law runs in tandem with misgivings about

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325. Leon Green, *Tort Law Public Law in Disguise*, 38 TEXAS L. REV. 1 (1959); *see also* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 71–72 (1972) (arguing that the purpose of tort law is to create incentives for efficient precaution); Fleming James, Jr., *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFF. L. REV. 315, 334–37 (1959) (encouraging tort doctrine to spread the cost of accidents through enterprise liability).

326. *See* Sunstein & Vermeule, *supra* note 148, at 886 (arguing that statutory interpretation would be aided by a closer examination of institutional capacities and dynamic effects).

327. *See generally* WEINRIB, *supra* note 168, at 206 (arguing that private law is autonomous because of the self-regulative nature of its immanent rationality); Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1873–74 (2011) (arguing that private law is best understood as a means for individuals to exercise their moral enforcement rights); John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1661 (2012) (rejecting the theory that the norms of private law reduce to norms of public law).

328. *Compare* Traynor, *Reasoning in a Circle*, *supra* note 240, at 751 ("[Judging entails] the recurring choice of one policy over another [in the formulation of new rules]."), *with* Traynor, *Statutes Revolving*, *supra* note 120, at 401–03 (arguing for judicial freedom to narrow and extend statutes in light of common sense and sound policy); *see also* Robert E. Keeton, *Statutes, Gaps, and Values in Tort Law*, 44 J. AIR L. & COM. 1, 19 (1978) (arguing for policy-oriented interpretation of statutes intersecting with tort law).

329. Professor Zipursky, however, recently has demonstrated how non-instrumental private law theory can shed light on public law questions concerning constitutional limits on punitive damages and federal preemption of state law. *See* Benjamin C. Zipursky, Palsgraf*, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757 (2012).

purposivism.[330] By contrast, belief in broad federal common law powers often runs with purposivist or dynamic interpretation.[331] The shared premise upon which these factions differ is that a grant of common law powers is an on–off switch between thoroughgoing purposivism and formalist approaches like textualism. Yet some plausible institutional or jurisprudential approaches discussed in Part III indicate that the connection between common law powers and purposive interpretation may be fragile or contingent. Indeed, given the tendency for many purposivist or dynamic theorists to blur the lines between interpretation of precedent and interpretation of statutes, a grant of common law powers may be redundant in the argument against textualist interpretation. Even if common law powers do make some difference, the proposal in subpart IV(A) also underlines how they may not entail thoroughgoing purposivism. A court's defeasible authority to make law on its own may be irrelevant when a superior legislator has spoken clearly. Accordingly, broad common law powers may only give federal courts the ability to extend a statute's coverage in the face of silence, and not the ability to contradict clear text. This is more than an orthodox federal textualist would allow, but less than a purposivist or dynamic interpreter would seek.

Second, this Article's analysis may inform federal courts' approach to statutes that intersect with federal common law. In particular, courts could modulate their approach depending on whether they are operating in a traditional enclave of residual common law powers—such as admiralty or interstate disputes—or making interstitial common law to protect federal interests.[332] Even for an orthodox federal textualist, subpart IV(A)'s proposed approach for state courts could apply for statutes intersecting with traditional enclaves, while the usual textualist worries about federal common lawmaking would pertain in the interstitial setting.[333]

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330. *See, e.g.*, Merrill, *supra* note 113, at 352 n.92 (critiquing expansive approaches to federal common law that "would provide virtually no constraint on federal judicial lawmaking" and would impose "little more than a pleading barrier before federal courts could take off on an unguided exercise formulating new rules of decision based on perceptions of utility"); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 768–69 (1989) (critiquing judicial policy choices where a legislature has already indicated its own choice on the same subject).

331. *See, e.g.*, Field, *supra* note 140, at 317 (arguing that the creation of federal common law does not violate separation of powers principles); Weinberg, *supra* note 140, at 846–47 (celebrating living common law as "more closely in touch with the current political will than is the dead hand of an old code").

332. *See, e.g.*, Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (holding that in such cases, it "is for the federal courts to fashion the governing rule of law according to their own standards" in the absence of statutes).

333. This analysis would be similarly applicable to questions at the intersection of legislated rules of procedure and federal courts' inherent powers to craft procedural common law. *See generally* Barrett, *supra* note 257 (describing the procedural common law powers of federal courts).

We can understand this point by examining two controversial federal common law cases. In *Moragne v. States Marine Lines, Inc.*,[334] the Supreme Court modified its common law of admiralty to allow for a wrongful death action.[335] It did so in part to advance what it saw as a congressional policy in favor of such recoveries, as evidenced by federal legislation on maritime accidents that concededly did not govern the case.[336] Even Judge Posner, an avowed purposivist, has criticized *Moragne*'s modification of the common law for functionally amending the relevant legislation and making it harder for Congress to strike legislative bargains on maritime legislation in the future.[337] Next, in *Boyle v. United Technologies Corp.*,[338] the Court crafted a federal common law defense for military contractors facing state tort suits for injuries caused by allegedly defective products sold to the government.[339] There could be no liability when the equipment conformed to government-approved specifications and the supplier warned the government of known risks.[340] This defense for contractors was necessary, *Boyle* explained, in part to protect a federal interest, namely the government's "discretionary function" statutory defense to negligence claims under the Federal Tort Claims Act.[341] Dissenters and commentators criticized this holding on separation of powers grounds, arguing that the Court created a defense where the statutory text plainly had not.[342]

From the perspective of federal separation of powers textualism, both decisions are problematic. *Moragne*'s revision of maritime doctrine effectively expanded the scope of the Death on the High Seas Act and *Boyle* preempted state law because a dispute between two *private* parties might indirectly frustrate the aims of a *government* immunity statute not involved in the litigation. The proposed approach for state courts in subpart IV(A), however, suggests that criticism of *Moragne* is misplaced. Residual pockets of common law, like admiralty law, resemble state court realities more than the post-*Erie* federal universe of limited jurisdiction. For this reason, *Moragne*'s development of admiralty law to reflect the Court's—and Congress's—preferred policy on wrongful death suits is no more problematic

334. 398 U.S. 375 (1970).

335. *Id.* at 409.

336. *Id.* at 408–09.

337. Posner, *supra* note 156, at 203.

338. 487 U.S. 500 (1988).

339. *Id.* at 511–12.

340. *Id.* at 512.

341. *Id.* at 511; 28 U.S.C. § 2680(a) (2006).

342. *See Boyle*, 487 U.S. at 515–16, 526–29 (Brennan, J., dissenting) (arguing that the majority took on a legislative role when it created the government contractor defense in disregard of Congress's prior refusal to create a similar defense); *see also* Larry J. Gusman, Note, *Rethinking* Boyle v. United Technologies Corp. *Government Contractor Defense: Judicial Preemption of the Doctrine of Separation of Powers?*, 39 AM. U. L. REV. 391, 395 (1990) (asserting that the Court, in barring recovery for individuals harmed by a product designed by a government contractor, "functioned as the writer of laws, rather than the interpreter of laws").

than, for example, negligence per se in state courts. Given the Court's defeasible power to make maritime law, Congress's silence in this enclave of common law does not raise the negative inference it might in the run-of-the-mill federal setting. Matters appear differently outside of residual enclaves, leaving *Boyle* and other attempts to protect federal interests still vulnerable to the separation of powers criticism that the courts leaped from statutory interpretation to illicit statutory extension.[343]

B. Intersystemic Interpretation

Comparative statutory interpretation raises the question—posed by Gluck in recent work on state–federal statutory interpretation—of whether a court interpreting a statute from another jurisdiction should follow the interpretive method of the other jurisdiction's courts.[344] According to Gluck, this question also requires us to ask whether statutory interpretive methodology is "law."[345] Gluck answers both questions in the affirmative, pointing to (1) state courts' regard of their own interpretive methods as binding, (2) analogies to law governing other kinds of "interpretation," and (3) the post-*Erie*, positivist understanding of law.[346] The three-pronged analysis of interpretive choice described in Part III indicates that the answers to these questions turn on one's criteria for interpretive choice. In short, Gluck's answers may or may not be correct, but we cannot know without further inquiry.

For the institutional interpreter, wondering whether interpretation is "law" is not a particularly helpful exercise. Whatever "law" is, the central question is what approach to intersystemic interpretation fits the competences of the interpreter. For example, an institutionalist may conclude that a state court should be purposivist in interpreting state statutes and that a federal court should be textualist in interpreting federal statutes.[347] The analysis may further suggest, however, that a federal court's institutional limits are such that adopting the state court's purposivist stance in diversity cases may do more harm than good.[348]

Similar caution may also apply to interpretation across states lines. Institutional analysis could indicate that courts in State A should read State A's statutes purposively, that courts in State B should read State B's statutes purposively, but that courts in State A and State B may best promote relevant values by reading each other's statutes through a textualist lens. Or,

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343. *Cf.* Merrill, *supra* note 113, at 347 ("The use of federal common law in admiralty cases and interstate disputes is harder to reconcile with an anti-prerogative framework.").

344. Gluck, *Intersystemic*, *supra* note 9, at 1903.

345. *Id.* at 1902.

346. *Id.* at 1972, 1976–77, 1988–89.

347. *Cf.* Sunstein & Vermeule, *supra* note 148, at 928 (suggesting that institutional considerations can illustrate why certain entities, such as agencies, should be either bound to a textualist approach to statutory interpretation or given the authority to abandon textualism).

348. VERMEULE, *supra* note 112, at 282–83.

as Bruhl and Leib have suggested, given the empirical uncertainty and the decision costs of trying to resolve this question, courts may be better off not even asking whether interpretive method should travel with the statute.[349] Under institutional analysis, the intersystemic decision is contingent on facts and capacities, which possibly does not allow for any ready, global solution.

Although constitutional regimes are also contingent, the constitutions that the federal government and the states already have may lead to a more fixed approach to methodological translation. Beyond the requirements that states have a republican form of government and forbid bills of attainder, the federal Constitution has little to say about particular separation of powers arrangements in the states. Constitutional values of federalism and state sovereignty, then, could suggest that federal courts should strive to apply state methodology in diversity cases, just as they would strive to follow the dictates of other forms of state law.[350] This appears to be so even if it requires federal courts to apply to state statutes methods that would violate federal separation of powers if applied to federal law. If a federal court can sometimes hear a case that would be justiciable under state, but not federal, law,[351] perhaps it can also apply interpretive methods derived from other constitutions. Thus, if the "law" of statutory interpretation is a refraction of constitutional law, federal courts under our constitutional order may have an obligation to respect methodological differences.

Finally, the intersystemic question may turn on the theorist's standpoint regarding the nature of interpretation and law. Echoing Gluck's approach, an interpreter who understands all law as posited law can treat another jurisdiction's interpretive method as binding doctrine that supervenes upon substantive rules of decision.[352] By contrast, a theorist like Dworkin may argue that a faithful interpreter has no choice but to read any statute in light of background purposes and the best reading of that community's principles of political morality.[353] Or, following Alexander, the theorist may limit "interpretation" to identifying legislative intent. If that task is harder for a

349. *See* Bruhl & Leib, *supra* note 79, at 1269 ("[T]hese challenging questions may very well generate good reasons to reject interpretive divergence."); Bruhl, *supra* note 5, at 494–95 (noting that differences in competence can militate against adoption of methodology across systems).

350. Gluck, *Intersystemic*, *supra* note 9, at 1990–91 (arguing that state and federal courts should engage in a "dialectical federalism" for statutory interpretation).

351. *Cf.* Asarco Inc. v. Kadish, 490 U.S. 605, 623–24 (1989) (applying Arizona standing principles to hear a controversy even if it would have been nonjusticiable under federal justiciability doctrine).

352. *Cf.* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 112–13 ("Substance and process are intimately related. The procedures one uses determine how much substance is achieved, and by whom. Procedural rules usually are just a measure of how much the substantive entitlements are worth, of what we are willing to sacrifice to see a given goal attained."); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2108 (2002) ("Interpretive rules are substantive law, and they go hand in hand with the substantive statutes of the legislatures that create them.").

353. DWORKIN, *supra* note 229, at 87–88.

court to do from afar, the court will have to engage in more guesswork, or lawmaking and less interpretation. But the "interpretation" portion of decision making will be the same in substance—the distance works a difference of degree, not kind. Despite their differences, Alexander and Dworkin would agree that jurisdictional boundaries are irrelevant to the nature of interpretation. For them, treating interpretive method as "law" in the post-*Erie* sense is like trying to promulgate binding rules of grammar and syntax, or to amend our background principles of political morality. It is to take a metaphor too far.

In sum, the framework deployed in this Article suggests that the answer to the question of whether interpretive methodology is statute-trailing "law" turns on what you mean by "law." The answer varies depending on whether we conceive of the law of statutory interpretation as the product of pragmatic considerations, constitutional law, the concept of legal interpretation itself, or some combination of the three. Or perhaps this broader inquiry—identifying, prioritizing, or reconciling these three aspects—is itself the "law" of statutory interpretation.[354] Given this complexity within and among these aspects of interpretive choice, we should not be surprised that we find confusion and inconsistency in the courts' approaches to interpretation across legal systems. Appreciating this dynamic may be the beginning of wisdom.

Conclusion

A good way to gain new appreciation of your first language is to learn a second one. A good way to find something you have misplaced is to stand on a chair and view the room from another angle. Working through the interpretive implications of differences between state and federal courts is important in its own right. In doing so, we also rotate a crystal whose refractions cast federal and general interpretation in a different light. At a time when debate regarding interpretation in the federal context seems locked at a stalemate, fresh perspective is all the more welcome. This Article helps discern the effects of common law powers on a court's treatment of statutes, while also advancing the theory of intersystemic interpretation. It is not the last word on either, but it points the way forward to an improved understanding of state, federal, and general interpretation alike.

354. *See* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 8 (1983) ("The law contains within itself a legal science, a meta-law, by which it can be both analyzed and evaluated.").

* * *

The New General Common Law of Severability

Ryan Scoville*

The doctrine of "severability" permits a court to excise the unconstitutional portion of a partially unconstitutional statute in order to preserve the operation of any uncontested or valid remainder. Severability figures centrally in a broad array of constitutional litigation, including recent litigation over the "individual mandate" provision of the Patient Protection and Affordable Care Act. Nevertheless, the doctrine remains underexplored. In particular, no commentator has thoroughly examined choice-of-law rules pertaining to its application. This Article aims to fill that void. The Article contends that in recent decisions the Supreme Court has quietly established the severability of state statutes in federal court to be a matter of general federal common law, and that this doctrine is not only inconsistent with dozens of cases decided since Erie Railroad Co. v. Tompkins, *but also displaces a large body of diverse state law without constitutional authorization or a supporting federal interest. The new doctrine thus challenges standard accounts of the limits of federal common law and calls into question the contemporary vitality of* Erie*'s principle of judicial federalism. The Article closes by proposing an alternative that would harmonize the precedent, help to revitalize* Erie, *and honor the bounds of Article III judicial power.*

I. Introduction

Consider the following problem: A federal court has declared a single provision in a large state statute to be facially unconstitutional, and must decide what effect that declaration has on the rest of the statute. If it is possible to excise and discard the unconstitutional part, then the declaration's effect will be limited and the remainder will continue in force. If excision is not possible, however, the unconstitutional part will in effect bring down the entire statute with it. The stakes may be high. But under whose law should the court decide whether to engage in this form of statutory surgery? Is it the federal law of the reviewing court? Or is it the potentially different law of the state whose enactment is under review? The question is one of vertical choice of law with respect to the doctrine of "severability." And within the last few years the Supreme Court has quietly developed a surprising answer—an answer that has general federal common law partially displace a large body of what can be materially different state common law, without specific constitutional authorization or any supporting federal interest. It is

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an answer that is reminiscent of the era of *Swift v. Tyson*,[1] and that calls into question the traditional limits of federal common law and the contemporary meaning of *Erie Railroad Co. v. Tompkins*.[2]

The doctrine of severability holds that upon finding an application or textual component of a statute to be unconstitutional, a court may, in appropriate circumstances, excise the unconstitutional part rather than declare the entire statute invalid.[3] The basic rationales for severance are that it can minimize judicial interference with legislative lawmaking, honor legislative intent, and promote legislative innovation by lowering the stakes of a ruling of partial unconstitutionality.[4] The doctrine is frequently relevant because any holding that a statute is partially invalid will give rise to questions concerning what to do with the valid remainder. And the doctrine is powerful because the viability of large statutory schemes can hinge entirely on whether an unconstitutional component is severable.[5]

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1. 41 U.S. (16 Pet.) 1 (1842).

2. 304 U.S. 64 (1938).

3. *See* 2 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 44:8, at 585–90 (7th ed. 2009) (surveying the use of severability clauses). For significant academic commentary on severability doctrine, see generally Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495 (2011) (arguing for the abolition of severability doctrine); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994) (discussing constitutional limits on severability in the context of facial challenges); Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303 (2007) (evaluating severability as a form of "fallback law"); Michael C. Dorf, *The Heterogeneity of Rights*, 6 LEGAL THEORY 269 (2000) (arguing that severability should be a key determinant of the success of facial challenges); Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915 (2011) (discussing the role of severability in facial challenges); David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639 (2008) (proposing a doctrine that would make severance permissible where it does not require extensive judicial rewriting of a statute); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873 (2005) (discussing the role of severability in facial challenges); Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41 (1995) (comparing statutory and contract severability); John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993) (discussing severability jurisprudence and advocating several general principles to guide courts); Emily Sherwin, *Rules and Judicial Review*, 6 LEGAL THEORY 299 (2000) (examining the effects of statute-saving devices including severance); Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227 (2004) (critiquing the current doctrine and arguing that courts should sever partially unconstitutional statutes absent a clear congressional directive to the contrary); Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 79–82, 106–25 (1937) (providing a historical summary of severability doctrine and discussing problems with provision severability); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997) (discussing the tension between the avoidance and severability doctrines); *and* Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738 (2010) (advocating "displacement without inferred fallback law" as a new approach to severability).

4. Gans, *supra* note 3, at 653–54; Nagle, *supra* note 3, at 250–52.

5. Recent litigation over the constitutionality of the Patient Protection and Affordable Care Act offered a salient illustration of severability in action. A majority held that the "individual mandate," which requires qualifying individuals to purchase federally approved health insurance or pay a penalty, is constitutional as a valid exercise of Congress's power to tax. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594–601 (2012). This holding rendered unnecessary an analysis on severability. The Court also held, however, that the Constitution prohibits the federal government from applying the Act to withdraw existing Medicaid funds from states that fail to comply with new requirements for Medicaid expansion. *Id.* at 2601–07 (Roberts, Breyer, & Kagan, JJ.); *id.* at 2657–

The Supreme Court's severability jurisprudence spans from the late 1800s to the 2012 decision *National Federation of Independent Business v. Sebelius*.[6] As others have recounted in detail, the doctrine's content has varied significantly over time.[7] Whether statutes are to be presumed severable, for example, has changed repeatedly.[8] Whether the Court honors the plain text of severability clauses has varied.[9] And precedent has historically differed on whether the test for severability focuses on legislative intent alone, on the effect of severance on the functionality of the statute, or on some combination of both.[10] The Court has not explained most of these shifts.[11] The cases, moreover, have varied in the depth of treatment they give to severance questions, with some opinions deciding without reasoned analysis or citation to authority, and others providing such support.[12]

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66 (Scalia, Kennedy, Thomas, & Alito, JJ.). This holding required the Court to address the application's severability. Because a majority held that severance was appropriate, the rest of the Act survived. *Id.* at 2607–08 (Roberts, Breyer, and Kagan, JJ.); *id.* at 2641–42 (Ginsburg & Sotomayor, JJ., concurring). In dissent, Justices Scalia, Kennedy, Thomas, and Alito argued that both the individual mandate and Medicaid expansion were unconstitutional, and that severance was unavailable. *See id.* at 2668–77. If this view had prevailed, two provisions would have brought hundreds of others down with them. In this and many other cases, the question of severance can affect the enforceability of a challenged statute as significantly as the merits analysis itself.

6. 132 S. Ct. 2566 (2012).

7. *See* Stern, *supra* note 3, at 79–82, 106–25 (surveying the doctrinal history); Nagle, *supra* note 3, at 218–25 (same); Shumsky, *supra* note 3, at 232–45 (same); Walsh, *supra* note 3, at 755–76 (same).

8. *Compare* Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 234 (1932) ("Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."), *with* Williams v. Standard Oil Co., 278 U.S. 235, 241 (1929) ("In the absence of [a severability clause], the presumption is that the legislature intends an act to be effective as an entirety."), *and* Packet Co. v. Keokuk, 95 U.S. 80, 89 (1877) (failing to state a presumption).

9. *Compare* Hill v. Wallace, 259 U.S. 44, 70–72 (1922) (holding a statute unseverable notwithstanding the presence of a severability clause), *with* Ohio Tax Cases, 232 U.S. 576, 594 (1914) (holding a statute severable due to the presence of a severability clause).

10. *Compare* Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 395 (1894) (explaining that severance is permissible "if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the legislature would not have enacted that which is within, independently of that beyond its power"), *with* Supervisors v. Stanley, 105 U.S. 305, 312 (1881) (explaining that severance is appropriate if the constitutional provisions are "unaffected by" the unconstitutional provisions and "can stand without them"), *and* R.R. Cos. v. Schutte, 103 U.S. 118, 142 (1880) (explaining that severability "all depends on the intention of the legislature").

11. *See* Shumsky, *supra* note 3, at 243 (explaining that it was "typical" for the Court to "spen[d] little time justifying the severability tests it enunciated").

12. *E.g.*, Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 513 (1937); *Champlin Ref. Co.*, 286 U.S. at 238; Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 675 (1923); Int'l Bridge Co. v. New York, 254 U.S. 126, 130 (1920); *Ohio Tax Cases*, 232 U.S. at 594; Grand Trunk R.R. Co. v. Mich. R.R. Comm'n, 231 U.S. 457, 473 (1913); Louisville & Nashville R.R. Co. v. Garrett, 231 U.S. 298, 311 (1913); W. Union Tel. Co. v. City of Richmond, 224 U.S. 160, 172 (1912); Grenada Lumber Co. v. Mississippi, 217 U.S. 433, 443 (1910); Waters-Pierce Oil Co. v. Deselms, 212 U.S. 159, 174 (1909); Diamond Glue Co. v. U.S. Glue Co., 187 U.S. 611, 617 (1903); *Keokuk*, 95 U.S. at 89; *see also* Gans, *supra* note 3, at 652 (explaining that the Court has often "decide[d] questions of severability implicitly and on an ad hoc basis, sometimes choosing to sever and sometimes refusing to do so").

Compounding the doctrinal uncertainty, there is, as David Gans has explained, "a wide divide between the announced judicial doctrine of severability and the reality of what courts actually do. Severability doctrine's strictures are routinely ignored. Even courts that sever unconstitutional portions of a statute often do not mention, let alone apply, severability doctrine."[13] The state of the doctrine has prompted several proposals for reform.[14]

I aim to add a new element to this discussion by critiquing the Supreme Court's choice-of-law rules for severability from a historical and doctrinal perspective. Although a significant literature on severability has developed in recent years,[15] and although the choice-of-law question arises any time a federal court holds a state statute to be partially invalid, academic treatment has been sparse. Only two articles even mention the matter. One is a piece from 1937 by Robert Stern, who briefly described the doctrine of that era.[16] The other is a recent article by Abbe Gluck, who mentions severability in the course of exploring vertical choice of law for methods of statutory interpretation.[17] Given severability's importance, further work is needed to make sense of the doctrine's federal choice-of-law component as it has evolved to the present.

My thesis has three basic components. First, I argue that, historically, the U.S. Supreme Court had a generally coherent answer to the question of whether federal or state law governs for state statutes in federal court. From the 1940s to 2006 the Court explicitly and consistently followed a single rule: The law of the sovereign whose statute is at issue determines severability. While the doctrine certainly evolved over time, that evolution closely tracked the deeper, tectonic shifts in doctrine and theory that accompanied the Court's movement from *Swift v. Tyson* to *Erie Railroad Co. v. Tompkins*.

Second, I argue that the Supreme Court effectively rejected its post-*Erie* doctrine through a combination of recent cases—the 2006 decision of *Ayotte v. Planned Parenthood of Northern New England*,[18] the 2010 decision of

13. Gans, *supra* note 3, at 651.

14. *See, e.g.*, Gans, *supra* note 3, at 688–90 (urging adoption of a test focused on the extent to which rewriting is necessary to save the statute, rather than on legislative intent); Nagle, *supra* note 3, at 206 (proposing the resolution of severability questions in accordance with general rules of statutory construction); Shumsky, *supra* note 3, at 272 (arguing that courts should sever partially unconstitutional statutes absent a clear congressional directive to the contrary); Walsh, *supra* note 3, at 777–93 (advocating "displacement without inferred fallback law" as a new approach to severability).

15. *See supra* note 3.

16. Stern, *supra* note 3, at 107.

17. *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1950 & n.199 (2011) (suggesting that federal courts rarely consider state law in determining whether to sever state statutes).

18. 546 U.S. 320 (2006).

Free Enterprise Fund v. Public Co. Accounting Oversight Board,[19] and the 2012 decision in *National Federation of Independent Business v. Sebelius*.[20] In contravention of an overwhelming number of post-*Erie* severability decisions, *Ayotte* unmistakably created federal severance guidelines for state statutes in federal court.[21] And in tension with *Erie*'s declaration that there is no general federal common law, *Free Enterprise Fund* and *National Federation of Independent Business* applied *Ayotte* to sever parts of federal statutes.[22] Together, these decisions suggest that the state or federal nature of a statute under review is irrelevant to the source of severance doctrine in federal court, and that that source is always general federal common law. This choice-of-law rule raises serious questions about the extent to which there are consistent and discernable limits on federal courts' common lawmaking powers.

For a clearer view of these first two components of the thesis, it is helpful to view the history of the Court's severability jurisprudence as an evolution that breaks down into four stages. In Stage 1, which spanned from the late 1800s to the early 1900s, the Court adjudicated severance questions without regard to whether the underlying statute was state or federal, and without relying upon available state court precedent. In doing so, the Court operated on what I will call the "transcendence premise"[23]—the idea that judges did not make law, but instead discovered and applied broadly applicable a priori principles that transcended jurisdictional lines and thus obviated the need to examine and follow precedent from any particular state courts. In Stage 2, which spanned from the early 1900s to the Supreme Court's decision in *Erie*, the transcendence premise began to falter due to the increasing influence of positivism on the Court and the proliferation of severability clauses in state statutes.[24] The Court responded by beginning to treat the severability of these statutes as a question of state law. In Stage 3, which spanned from *Erie* to *Ayotte*, the Court generally adhered to *Erie*-inspired choice-of-law rules by applying a federal common law of severability to federal statutes, and applicable state rules to state statutes. Finally, Stage 4 begins with *Ayotte* and extends to the decision's recent

19. 130 S. Ct. 3138 (2010).

20. 132 S. Ct. 2566 (2012).

21. 546 U.S. at 329–30.

22. *Free Enter. Fund*, 130 S. Ct. at 3161; *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2607–08, 2641–42.

23. This premise was closely related to the so-called declaratory theory of the law, commonly associated with Blackstone. *See infra* notes 30–31 and accompanying text.

24. *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 67–68, 78–79 (2000) ("By the beginning of the twentieth century the jurisprudential assumptions underlying the declaratory theory of law and attributed to *Swift* were subject to intense theoretical criticism."). *See generally* William R. Casto, *The* Erie *Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907 (1988) (discussing the decline of the declaratory theory and its replacement by positivism).

consequences in the lower courts. In *Ayotte*, the Court suddenly reverted to its pre-*Erie* approach of supplying a single federal rule for federal and state statutes alike. Although few have noticed, a significant number of lower courts have begun to apply *Ayotte* to state statutes notwithstanding the widespread availability of competing state law doctrines. It is conceivable that the Court adopted this new doctrine to protect its stated preference for as-applied challenges. But whatever the rationale, the result has been quiet displacement of a traditional area of state common law with new federal common law.

As the last component of the thesis, I argue for an improvement upon the recent doctrine. The improvement is to hold that the severability of a state statute is a question of state law, subject to a potential Article III override reflecting inherent limits on federal courts' powers to engage in the legislative function of statutory revision. The override would displace an applicable state law severability test where application of the test would require statutory revision in a fashion that exceeds the bounds of federal judicial power. But where the override triggers, federal courts would have a specific mandate in enacted constitutional text, and thus justification under *Erie*, for declining to apply the relevant state law. Such an approach would reconcile the Stage 3 precedent, *Ayotte*'s apparent concern for limits on the remedial powers of federal courts, and the demands of judicial federalism.

This Article proceeds as follows. Part II lays out the historical evolution based on a comprehensive assessment of the decisions in which the Supreme Court explicitly decided the severability of a state statute. These decisions show that the choice-of-law component of the Court's severability doctrine was generally consistent with *Swift* and rules of federal equity during Stages 1 and 2, and with *Erie* in the post-*Erie* period of Stage 3. Part III argues that while the jurisprudence of prior stages was doctrinally justifiable in historical context, the Stage 4 cases of *Ayotte* and its progeny are not. Specifically, the new cases are inconsistent with the long line of Stage 3 precedent that held the severability of a state statute to be a matter of state law. And the new cases are hard to reconcile with standard accounts of *Erie*. Part IV then reflects on Stage 4's implications, which include the rise of a general common law of severability that applies broadly to both state and federal enactments; severability-based forum shopping; uncertainty for legislators about the standard that will govern the severability of state statutes, and in turn about how to craft severable statutes; and the possibility of a federal common law with few real limits. Part V describes and justifies the proposed alternative to the recent doctrine—the contingent Article III override.

II. Severability's Choice-of-Law Evolution

In this Part, I examine the historical development of choice-of-law rules for severability in the U.S. Supreme Court. This history shows that the

Court's contemporary approach of deciding the severability of state statutes as a matter of federal common law is new in its departure from decades of post-*Erie* precedent, but also old in its similarity to a method of common lawmaking under *Swift*.

A. Stage 1: Severability Under the Transcendence Premise

Stage 1 begins in the era of *Swift* itself, which was decided in 1842.[25] In *Swift*, as one will recall, the Supreme Court held that a federal court sitting in diversity and adjudicating an action at law could announce "general" commercial law on subjects that were neither addressed by existing state statutes nor "local" in nature.[26] Otherwise, the court was to apply state law.[27] Some have argued that the original *Swift* decision empowered federal courts to "find" general law only in the limited sense that it empowered those courts to discern freely the agreements—and thus the legally binding obligations—of parties to commercial transactions.[28] But whatever its original scope, federal courts applied the decision in the ensuing decades to justify federal declarations of general principles on "most common law subjects."[29] In part because of the liberality of this application, *Swift* "has been regularly identified as expressing the so-called 'declaratory' theory of law."[30] According to this theory, commonly associated with Blackstone, the common law was a single body of freestanding and objectively discernable legal principles rather than the command of a sovereign, and the task of judges

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25. 41 U.S. (16 Pet.) 1 (1842).

26. *Id.* at 18–19; *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 245–52 (1977) (explaining *Swift* and its consequences); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 899–902 (1986) (same).

27. *Swift*, 41 U.S. (16 Pet.) at 18–19.

28. RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 1–6 (1977); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1400–02 (1997).

29. TONY ALLAN FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY 55–56, 111 (1979); PURCELL, *supra* note 24, at 51–52; Casto, *supra* note 24, at 914 ("*Swift* might have been restricted to matters of commercial law, but subsequent courts viewed the doctrine as virtually limitless."); *see also* TONY ALLAN FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM 47–58 (1981) (discussing the expansion of the *Swift* doctrine). Indeed, the breadth of *Swift*'s application was one of the focal points of the Court's critique of *Swift* in *Erie*. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 75–76 (1938) (criticizing *Swift* in part because of the "broad province accorded to the so-called 'general law' as to which federal courts exercised an independent judgment").

30. HORWITZ II, *supra* note 81, at 245. Whether *Swift* itself operated on the premise of the declaratory theory, or instead acquired that interpretation because of subsequent case law, has been a subject of debate. *Compare* PURCELL, *supra* note 24, at 51 ("*Swift* seemed to rely on what was called the 'declaratory' theory of law, the idea that the common law consisted of principles existing independently of judicial decisions. In that view, the role of judges was to find, declare, and apply those preexisting principles to new fact situations."), *and* Casto, *supra* note 24, at 912–14 ("*Swift*'s intellectual antecedents are easily traced to William Blackstone's *Commentaries*."), *with* BRIDWELL & WHITTEN, *supra* note 28, at 1–9 (acknowledging that the declaratory-theory interpretation of *Swift* was the interpretation that *Erie* overturned, but also arguing that that interpretation had been a product of decisions that extended *Swift* far beyond its original holding after approximately 1860).

was to discover and apply these principles to new contexts.[31] Because judges of different sovereigns were by presumption equally capable of making such discoveries, it followed that the pronouncements of state courts were not binding on federal courts.[32] The effect of the declaratory-theory interpretation of *Swift* was to empower federal courts to articulate transcendent principles of general law without regard to existing state common law.

In the late nineteenth century, during the middle of the *Swift* era, and as cases explicitly addressing severability began to emerge,[33] the Supreme Court approached the topic as a subject of general common law in numerous cases addressing the validity of state statutes and local ordinances. *Packet Company v. Keokuk*[34] provides an early illustration. There, the issue was whether a provision in a Keokuk, Iowa ordinance unconstitutionally restrained interstate commerce by imposing fees on steamboats for use of the town's wharves on the Mississippi River.[35] The Court concluded that although a party might justifiably challenge the constitutionality of other parts of the ordinance in subsequent litigation, the fees were constitutional.[36] The likely unconstitutionality of the other parts, moreover, posed no risk to the fees provision because they were severable: "Statutes that are constitutional in part only, will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable. We think a severance is possible in this case."[37] While it seems premature for the Court to have addressed severability without having held any part of the ordinance unconstitutional, the important point is that the Court articulated a severability doctrine for a local ordinance, and did so only by reference to general principles. And *Keokuk* was not an outlier in this regard. In several subsequent cases, the Court relied upon *Keokuk* as establishing a general doctrine applicable to state statutes.[38]

Supervisors v. Stanley,[39] decided four years after *Keokuk* in 1881, offers another example. There, the issue was whether a New York statute was void in its entirety, given that one of its applications taxed shares of national banks at a higher rate than other capital of citizens of the state in violation of

31. *See* ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 23–30 (1998).

32. Casto, *supra* note 24, at 912–13.

33. The Court began to explicitly address severability questions at a time when legislation was emerging as an important source of law in America, with questions of statutory interpretation receiving greater attention than ever before from treatises and courts. *Cf.* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 59–63 (1999) (describing the emerging importance of state and federal legislation in the late nineteenth century).

34. 95 U.S. 80 (1877).

35. *Id.* at 84.

36. *Id.* at 88–89.

37. *Id.* at 89.

38. For examples of this trend, see Kimmish v. Ball, 129 U.S. 217, 222 (1889); Presser v. Illinois, 116 U.S. 252, 263 (1886); and Penniman's Case, 103 U.S. 714, 716–17 (1880).

39. 105 U.S. 305 (1881).

an act of Congress.[40] By 1881, New York courts had already issued a series of opinions on severance.[41] But the Court ignored this precedent. Instead, *Stanley* cited exclusively to the Court's own decisions in concluding that the invalid application did not undermine the validity of the rest of the statute.[42] The Supreme Court followed the same approach to severability questions involving state statutes in multiple other cases around this time,[43] and the effect was to limit the ability of states to dictate the principles by which courts would evaluate state enactments.

On top of declining to apply state law, the Court showed little solicitude for state sovereignty or federalism in declaring the content of the general doctrine. The Court applied the same test to federal and state statutes alike. In addressing the severability of part of a Virginia statute in *Poindexter v. Greenhow*,[44] for example, the Court relied upon the *Trade-Mark Cases*,[45] which addressed the severability of certain provisions of the federal Patent Act of 1870.[46] And in addressing the severability of part of a federal criminal statute in *Baldwin v. Franks*,[47] the Court relied in part upon *Poindexter* and *Allen v. Louisiana*,[48] both of which concerned state statutes.[49]

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40. *Id.* at 311.

41. *See, e.g.*, *In re* Roberts, 81 N.Y. 62, 68 (1880) (severing part of an 1861 statute establishing the New York Board of Revision and Assessment); *In re* Ryers, 72 N.Y. 1, 6 (1878) (severing part of the General Drainage Act); Wynehamer v. People, 13 N.Y. 378, 440 (1856) (Selden, J., concurring) (declining to sever provisions of an "act for prevention of intemperance, pauperism and crime"); *In re* De Vaucene, 31 How. Pr. (n.s.) 289, 343–45 (1866) (severing part of a New York statute related to the sale of liquor without a license).

42. *Stanley*, 105 U.S. at 312–15.

43. *See, e.g.*, Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 395–96 (1894) (severing a portion of a state statute without citing to state case law); Little Rock & Fort Smith Ry. v. Worthen, 120 U.S. 97, 102 (1887) (same); Spraigue v. Thompson, 118 U.S. 90, 94–95 (1886) (declining to sever a portion of a state statute without citing to state case law); Poindexter v. Greenhow, 114 U.S. 270, 304–06 (1885) (declining to sever a portion of a state statute while citing only federal case law); Supervisors v. Stanley, 105 U.S. 305, 312–15 (1881) (severing a portion of a state statute while primarily citing to federal case law); R.R. Cos. v. Schutte, 103 U.S. 118, 142 (1880) (severing a portion of a state statute without citing to state case law); Allen v. Louisiana, 103 U.S. 80, 83–84 (1880) (discussing the severability of part of the Missouri city charter while citing to Massachusetts case law). In this regard, the Court's method of deciding severability appears to have mirrored its methods for deciding many other legal questions at the time. *See* Louise Weinberg, *Back to the Future: The New General Common Law*, 35 J. MAR. L. & COM. 523, 529 (2004) (describing the period as one where federal judges "ignor[ed] the case law of relevant states . . . upon such questions as the validity of a common contract or even a local mortgage").

44. 114 U.S. 270, 304–06 (1885).

45. 100 U.S. 82 (1879).

46. *Id.* at 92, 99.

47. 120 U.S. 678 (1887).

48. 103 U.S. 80 (1880).

49. *Baldwin*, 120 U.S. at 688–89 (referring to *Poindexter* as the *"Virginia Coupon Cases"*); *Poindexter*, 114 U.S. at 274 (reviewing the constitutionality of a Virginia statute); *Allen*, 103 U.S. at 83 (reviewing the constitutionality of a Missouri statute).

Perhaps the most extreme precedent was *Spraigue v. Thompson*,[50] where the Court went so far as to reverse a state ruling on the severability of a state statute. The case concerned the validity of a Georgia statute that imposed piloting fees upon ship commanders who traveled to Georgia from any state other than South Carolina or Florida.[51] Having been assessed the fee, the *Spraigue* defendants argued that its authorizing provision discriminated between ports in violation of an act of Congress and was therefore invalid.[52] The Georgia Supreme Court agreed, severed the discriminatory provision, and concluded that the defendants were still liable for payment.[53] But *Spraigue* in turn reversed this decision and held that the entire statute must fall because the discriminatory provision was not severable.[54] *Spraigue* did so, moreover, without citation to supporting authority and based upon a unique federal doctrine.[55] Whereas the Georgia court had granted severance primarily based on the separability of the invalid text from the rest of the statute,[56] *Spraigue* denied severability by focusing exclusively on legislative intent.[57]

To be clear, state court precedent was not completely irrelevant. Early on, the Court relied upon a severability test articulated by the Massachusetts Supreme Court in *Warren v. Mayor & Aldermen of Charlestown*[58] to formulate its own doctrine.[59] Not once, however, did the Court defer to a state rule. In establishing the basic contours of the general doctrine, the Court reserved for itself the role of final arbiter.

The primary effect of the Court's early cases was to create a substantial federal overlap of existing state common law severability rules. This overlap appears to have influenced the manner in which state courts understood and applied their own doctrines. In many cases, the influence took the form of state courts citing to U.S. Supreme Court precedent for support.[60] Less frequently, the Court's precedent displaced applicable state common law as

50. 118 U.S. 90 (1886).
51. *Id.* at 93–94.
52. *Id.* at 94.
53. *Id.*
54. *Id.* at 94–95.
55. *Id.* at 95.
56. Thompson v. Spraigue, Soulle & Co., 69 Ga. 409, 424 (1883).
57. 118 U.S. at 94–95.
58. 68 Mass. (2 Gray) 84 (1854).
59. *See id.* at 89–99 (articulating the test); Int'l Textbook Co. v. Pigg, 217 U.S. 91, 113 (1910) (citing to *Warren*); Berea Coll. v. Kentucky, 211 U.S. 45, 55 (1908) (same); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 635 (1895) (same); Allen v. Louisiana, 103 U.S. 80, 84 (1880) (same).
60. *See, e.g.*, City of Newport v. Horton, 47 A. 312, 312–13 (R.I. 1900) (citing to *Keokuk*); Gorman v. Bepler, 4 Ohio N.P. 241, 242–43 (Ohio Ct. Com. Pl. 1897) (citing to Supreme Court cases); State v. Gerhardt, 44 N.E. 469, 477 (Ind. 1896) (same); *In re* Wong Hane, 41 P. 693, 694 (Cal. 1895) (same); People *ex rel.* Carter v. Rice, 20 N.Y.S. 293, 295 (N.Y. 1892) (same); Rothermel v. Meyerle, 20 A. 583, 587–88 (Pa. 1890) (same); Lane v. Bd. of Cnty. Comm'rs, 13 P. 136, 140 (Mont. 1887) (citing to *Keokuk*).

the primary authority on which courts relied. In Rhode Island, for example, state courts had decided the severability of state statutes on several occasions before the U.S. Supreme Court developed any significant precedent on the issue.[61] And yet once the Court began to develop a general doctrine, Rhode Island courts relied upon the federal precedent.[62] In this sense, the overlap was significant because it gave the federal courts significant influence over the doctrine's ongoing evolution in state courts.

The overlap was also significant because it manifested in the lower federal courts. Unsurprisingly, these courts followed the Supreme Court's method for deciding severability questions pertaining to state statutes.[63] The effect was to limit further the influence of state doctrine and create the potential for divergent outcomes depending on whether litigants used a state or federal forum.

Given these effects, one might fairly wonder whether the Court was doctrinally justified in utilizing the Stage 1 method. For several reasons, I think the answer is yes. First, during this period, severability was the type of issue that the Court could, in at least some cases, decide as a matter of general common law pursuant to *Swift*.[64] State statutes on the subject were rare and did not become common until the early twentieth century, over a half century after *Swift* was decided.[65] The doctrine, moreover, was not a matter of "local"—as opposed to "general"—law. Whereas local law typically covered matters pertaining to real or personal property, severability concerned the unrelated question of how to remedy a statute's partial unconstitutionality.[66] Additionally, while *Swift* established a federal judicial power only to find general "commercial" law, subsequent reliance on the

61. *See* State v. Paul, 5 R.I. 185, 195 (1858) (severing an invalid provision from the remainder of a valid act); State v. Copeland, 3 R.I. 33, 36–37 (1854) (same); State v. Snow, 3 R.I. 64, 70 (1854) (same).

62. *See, e.g.*, *City of Newport*, 47 A. at 312–13 (citing only to *Penniman's Case* and *Keokuk* to decide the severability of part of a state statute).

63. *See, e.g.*, S. Pac. Co. v. Bd. of R.R. Comm'rs, 78 F. 236, 258 (N.D. Cal. 1896) (citing to Supreme Court precedent in holding an invalid part of the California constitution to be severable); Levis v. City of Newton, 75 F. 884, 895 (S.D. Iowa 1896) (citing Supreme Court precedent in holding the invalid portion of a local ordinance to be severable); *Ex parte* Kinnebrew, 35 F. 52, 56–57 (N.D. Ga. 1888) (following Supreme Court severability precedent in reviewing a Georgia state statute).

64. *Loeb v. Columbia Township Trustees* illustrates the type of analysis that *Swift* authorized. *See* 179 U.S. 472, 487–90 (1900) (deciding a severability question in a diversity suit seeking payment on municipal bonds).

65. Nagle, *supra* note 3, at 222 ("The first severability clauses appeared in the late nineteenth century, and they became much more common around 1910."); Note, *Effect of Separability Clauses in Statutes*, 40 HARV. L. REV. 626, 626 (1927) ("[Severability clauses] seem to have come into vogue about 1910 . . . .").

66. Comment, *What Is "General Law" Within the Doctrine of* Swift v. Tyson*?*, 38 YALE L.J. 88, 94 (1928) ("The only consistency to be found [regarding the distinction between general and local law] is in the field of real and personal property, so-called 'rules of property' being considered binding on the federal courts as local questions.").

decision as justification for general law in a variety of contexts[67] paved the way for a general law of severability. Further, severance questions could arise in diversity cases because the courts used diversity jurisdiction to decide federal constitutional questions prior to and shortly after the advent of federal question jurisdiction in 1875.[68] And federal courts could properly decide severance questions in cases at law or in equity: A court makes a finding for or against severability for the purpose of determining the scope of a declaration on a statute's invalidity. For this reason, a severability ruling often precedes declaratory judgment—a remedy that has historically been available in both types of civil proceedings.[69] Although *Swift* originally applied only to actions at law, the Court extended the doctrine to cases in equity only a few years later in 1851.[70]

In cases where the Court's Stage 1 doctrine was not justifiable even as a liberal application of *Swift*, it was alternatively permissible under then-current rules of equity. Prior to the promulgation of the Federal Rules of Civil Procedure in 1938, federal courts operated under a bifurcated procedural framework that permitted the adjudication of matters of law and equity only in separate actions.[71] If, for example, a plaintiff sought money damages and injunctive relief in a challenge to a statute's constitutionality, he or she would have had to file two separate federal actions—one at law for damages, and one in equity for the injunction. Under this framework, federal equity was "a 'special system' of federal jurisprudence" "wholly independent of state law" on matters such as remedies.[72] Federal courts would apply independent federal principles to decide the availability of injunctive relief,

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67. *See supra* note 29.

68. Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 89–92 (1997); *see also, e.g.*, *Loeb*, 179 U.S. at 477 (reviewing a constitutional challenge to an Ohio statute in a diversity suit).

69. *See, e.g.*, Liberty Warehouse Co. v. Grannis, 273 U.S. 70, 71 (1927) (discussing a Kentucky statute that provided for declaratory judgments "by means of a petition on the law or equity side of the court"); *see also* William H. Wicker, *Declaration of Rights Without Consequential Relief*, 11 TENN. L. REV. 217, 218–19 (1933) ("In 1883 a Supreme Court Rule adopted under the [English] Judicature Act of 1873 broadened the basis of declaratory relief by making it applicable to both equity and law courts . . . ."); Edson R. Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment*, 16 MICH. L. REV. 69, 75 (1917) ("For thirty-five years the English courts have exercised . . . jurisdiction, both at law and in equity, of advising parties as to their rights, with or without coercive relief at the option of the parties.").

70. *See, e.g.*, Russell v. Southard, 53 U.S. (12 How.) 139, 147–48 (1851) (extending the doctrine).

71. Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 42 (1951).

72. PURCELL, *supra* note 24, at 75; *see also* Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 274–80 (2010) (explaining the uniform system of federal equitable remedies); Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1138–40 (1969) (describing this jurisprudence as the "counterpart of the system of 'general law' that was administered in suits at common law in accordance with . . . *Swift*"); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 469–70 (2003) (discussing the development of the separate body of federal equity jurisprudence).

for example, even where cases arose in diversity, reviewed standard common law claims, and involved a state with a developed remedial standard of its own.[73]

Severability was an issue that federal courts could properly decide independently of state law within this separate system of equity.[74] Severance commonly preceded and informed the scope of a declaratory judgment,[75] a remedy that was, historically, more closely associated with courts of equity. The High Court of Chancery became the first English court to hold the power to issue declaratory judgments in the 1850s, and in ensuing decades decided requests for such relief in a large percentage of its cases.[76] In some of these the Chancery Court even issued declarations concerning the "validity or invalidity . . . of statutory and administrative rules and orders."[77] American commentators also frequently referred to declaratory relief as equitable in nature.[78]

Finally, regardless of whether *Swift* or rules of federal equity applied, the announcement and application of general severability principles drew support from the transcendence premise.[79] By the late 1800s, the declaratory theory was well past its heyday in America.[80] Many scholars and lawyers had long since rejected its assertion that the common law embodies natural law as an independent realm of a priori principles and logic.[81] The Court, however, did not necessarily accept these critiques. In fact, a fair reading of precedent from the period suggests that the Court continued to rely on some

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73. *See* Pa. R.R. Co. v. St. Louis, Alton & Terre Haute R.R. Co., 118 U.S. 290, 298–306 (1896) (deciding the availability of injunctive relief in a diversity action in equity without reference to state law); Baker v. Pottmeyer, 75 Ind. 451, 458 (1881) (declining to issue an injunction where a different remedy would have afforded "appropriate as well as prompt relief").

74. *Reagan v. Farmers' Loan & Trust Co.* illustrates this category of precedent. *See* 154 U.S. 362, 395–96 (1894) (holding, in an action in equity, that the unconstitutional portions of a Texas statute were severable).

75. *See supra* note 69 and accompanying text.

76. EDWIN BORCHARD, DECLARATORY JUDGMENTS 215–19 (2d ed. 1941); Edwin M. Borchard, *The Supreme Court and the Declaratory Judgment*, 14 A.B.A. J. 633, 634–35 (1928).

77. Borchard, *supra* note 76, at 635; *see also* Oleck, *supra* note 71, at 24 (noting that statutory interpretation was a matter of equity).

78. *E.g.*, Edwin M. Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 YALE L.J. 1, 30 (1918).

79. *See* PURCELL, *supra* note 24, at 52, 57–63 (illustrating how the concept of "general law" under *Swift* influenced the manner in which the Court interpreted the Constitution and enabled the Court to declare general principles in cases that did not arise out of federal diversity jurisdiction).

80. *See* Horwitz, *supra* note 26, at 30 ("By 1820 the legal landscape in America bore only the faintest resemblance to what existed forty years earlier. . . . Law was no longer conceived of as an eternal set of principles expressed in custom and derived from natural law.").

81. *See* HORWITZ, *supra* note 26, at 1–3 (explaining that the emergence of an instrumental concept of law in the early nineteenth century placed emphasis on law as a policy instrument and allowed judges to create legal doctrine with the goal of fostering social change); SEBOK, *supra* note 31, at 83–103 (discussing the rejection of Blackstonian transcendentalism by legal formalists). *But see* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 119 (1992) [hereinafter HORWITZ II] (explaining that, even in the late 1800s, a declaratory theory of law was still essential to "all orthodox defenses of the common law").

form of transcendence paradigm in a variety of contexts. In *Pana v. Bowler*,[82] for example, the Court rejected an Illinois state court decision that had held that, as a matter of state law, bonds issued pursuant to a procedurally irregular local election are void even in the hands of bona fide holders.[83] In refusing to follow the state decision, the Court explained that the bond question fell among the "general principles and doctrines of commercial jurisprudence, upon which it is our duty to form an independent judgment, and in respect of which we are under no obligation to follow implicitly the conclusions of any other court, however learned or able it may be."[84] In *Baltimore & Ohio Rail Co. v. Baugh*,[85] the Court addressed whether one employee was precluded on the basis of the fellow-servant rule from recovering from his employer for injuries caused by another employee's negligence.[86] Concluding that the question was one of general law because it "rest[ed] upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law,'"[87] the Court proceeded to reject the state court's fellow-servant rule and hold as a matter of general law that the injured employee could not recover.[88] In these cases, the Court appears to have been "finding" law, not in the limited sense of merely discerning the agreements and, in turn, the legally binding obligations of transacting parties, as *Swift* itself arguably did,[89] but rather in the more extraordinary sense of discerning general principles without reference to a particular positive source. The general law rested on "gathered" principles of "right and justice" because it was coincident with a preexisting natural law, and the federal judiciary possessed authority to exercise "independent judgment" in discerning them because the principles did not belong to any particular sovereign who could claim a unique capacity for their identification and exposition.[90] Other cases of the period similarly appear to have rested on this view.[91]

Given the Court's apparent embrace of this theory in these decisions, the contemporaneous announcement of a general law of severability is unsurprising. By characterizing common law principles as existing independent of the command of a federal or state sovereign, and by

82. 107 U.S. 529 (1882).
83. *Id.* at 540–41.
84. *Id.* at 541.
85. 149 U.S. 368 (1893).
86. *Id.* at 370.
87. *Id.* at 378.
88. *Id.* at 378–79, 389–90.
89. *See supra* note 28.
90. *Baugh*, 149 U.S. at 371, 378.
91. *See, e.g.*, Smith v. Alabama, 124 U.S. 465, 478 (1888) (describing the "independent though concurrent jurisdiction of federal courts," which requires them to "ascertain and declare the law according to their own judgment"); Burgess v. Seligman, 107 U.S. 20, 32–34 (1883) (declaring that federal courts are "bound to exercise their own judgment as to the meaning and effect of [state] laws"); *see also* Casto, *supra* note 24, at 912–18 (discussing the Blackstonian premise of *Swift*).

presuming the Supreme Court to be just as capable as any state court at discovering them, the transcendence premise would have rendered unnecessary any form of vertical choice-of-law analysis on the severability of state statutes. Citing to state courts would have been to rely upon tribunals with no greater authority or capacity for doctrinal discovery than the Court itself.

In summary, Stage 1, which ranged from the mid-1800s to approximately the turn of the century, was a period in which the Supreme Court uniformly treated severability doctrine as a matter of general common law. The evidence of this treatment is that the Court adjudicated the severability of dozens of state statutes in accordance with a uniform set of general principles that applied to federal and state statutes alike, and that the Court discerned without adherence to existing state precedent. The Supreme Court's cases created a substantial federal overlap that influenced the subsequent development of doctrine in the state courts while limiting the ability of states to control the severability of their own statutes. But the Court's methodology was not without justification, as *Swift v. Tyson*, rules of federal equity, and theory of a transcendent source of law each provided support.

B. Stage 2: Anti-Transcendence on the Court at the Turn of the Century

Stage 2 spans from approximately the start of the twentieth century to immediately before the Supreme Court's 1938 decision in *Erie*, and marks the beginning of the end for Stage 1's doctrinal and theoretical foundations. During this period, the Court continued to apply the Stage 1 methodology of adjudicating severability independent of state law in a majority of its cases, but also began to express deference to state law rules in a growing number of decisions. Stage 2 was thus a period of instability, during which the Court began to move away from its old jurisprudence. This instability corresponded with the increasing influence of legal positivism on the Court and the proliferation of severability clauses in state statutes, both of which made it difficult for the Court to continue its Stage 1 methods: Positivism began to close off the theoretical safe haven that the transcendence premise had created, and the rise of severability clauses—a form of state statutory law—precluded an application of general common law under the holding of *Swift* itself. Nascent respect for state law was the period's defining characteristic.

To say that Stage 2 was a period of instability is not to say that the Court immediately discarded its old methodology. A majority of Stage 2 cases continued Stage 1's tradition of deciding the severability of state statutes without reliance upon state law.[92]

92. *See* Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 513 (1937) (citing only federal precedent in deciding a severability question); Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 81 (1937) (same); Carter v. Carter Coal Co., 298 U.S. 238, 312–17, 320–23, 334–38 (1936) (same

What distinguished the period was that alongside these cases, the Court began to defer to state rules in limited circumstances. Two separate deference doctrines emerged. The first required deference to state court rulings on the severability of specific state statutes. In *Gatewood v. North Carolina*,[93] for example, the Court explained that the allegedly unconstitutional provisions of a North Carolina statute were severable because a prior North Carolina Supreme Court ruling to that effect was "conclusive."[94] In *Berea College v. Kentucky*,[95] the Court similarly held that a Kentucky statute was severable in part because a state court had interpreted the statute as such.[96] Other decisions also expressed this rule.[97] These cases extended specifically to severability a preexisting federal doctrine of deference to state court interpretations of state statutes,[98] and departed

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save one citation); R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 361–62 (1935) (same); Champlin Ref. Co. v. Corp. Comm'n, 286 U.S. 210, 238 (1932) (same); Williams v. Standard Oil Co., 278 U.S. 235, 241–45 (1929) (same save one citation), *overruled on other grounds by* Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, 313 U.S. 236 (1941); Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 675 (1923) (citing no authority); Lemke v. Farmers Grain Co., 258 U.S. 50, 60 (1922) (citing only federal precedent); Bowman v. Cont'l Oil Co., 256 U.S. 642, 647–48 (1921) (same); Int'l Bridge Co. v. New York, 254 U.S. 126, 134 (1920) (same); Okla. Operating Co. v. Love, 252 U.S. 331, 338 n.1 (1920) (same); McFarland v. Am. Sugar Ref. Co., 241 U.S. 79, 87 (1916) (citing no authority); Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 565 (1902) (citing only federal precedent), *overruled on other grounds by* Tigner v. Texas, 310 U.S. 141 (1940).

93. 203 U.S. 531 (1906).

94. *Id.* at 543.

95. 211 U.S. 45 (1908).

96. *Id.* at 54–56 ("[W]hen a state statute is [interpreted as severable by a state supreme court,] this court should hesitate before it holds that the Supreme Court of the State did not know what was the thought of the legislature in its enactment.").

97. *See, e.g.*, Charles Wolff Packing Co. v. Ct. of Indus. Relations, 267 U.S. 552, 562 (1925) (describing the state court's decision on the issue as "conclusive"); Dorchy v. Kansas, 264 U.S. 286, 290–91 (1924) (same); Hallanan v. Eureka Pipe Line Co., 261 U.S. 393, 397 (1923) (characterizing severability as a "state question"); Hampton v. St. Louis, Iron Mountain & S. Ry. Co., 227 U.S. 456, 465 (1913) (deferring to the state court's decision on severability); Ky. Union Co. v. Kentucky, 219 U.S. 140, 152 (1911) (same); King v. West Virginia, 216 U.S. 92, 101 (1910) (same); Hammond Packing Co. v. Arkansas, 212 U.S. 322, 344 (1909) (same); Olsen v. Smith, 195 U.S. 332, 342 (1904) (same); W.W. Cargill Co. v. Minnesota, 180 U.S. 452, 465–67 (1901) (same); Chesapeake & Ohio Ry. Co. v. Kentucky, 179 U.S. 388, 394 (1900) (same); Tullis v. Lake Erie & W. R.R. Co., 175 U.S. 348, 353 (1899) (same); Noble v. Mitchell, 164 U.S. 367, 372–73 (1896) (same). *Noble* and *Tullis* appear to have been the first decisions in which the Court expressly deferred to a state court decision on the severability of a state statute. Technically, the dates of those decisions place them in Stage 1. It remains the case, however, that the development of this form of deference was in essence a Stage 2 phenomenon. *Noble* and *Tullis* were right on the cusp of the 1900s, and the Court issued a majority of the decisions that utilized this form of deference in the first few decades after the nineteenth century.

98. *See, e.g.*, *Berea Coll.*, 211 U.S. at 56 (citing *Tullis*); *see also* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 611 (1874) (establishing more generally that state court rulings on matters of state law are authoritative). Even as early as *Swift*, however, the Court had viewed state court interpretations of state statutes as "rules of decision" in diversity actions at law. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (explaining that "the positive statutes of the state, and the construction thereof adopted by the local tribunals," are rules of decision). In my view, the Court's failure to follow this rule even occasionally in severability cases until Stage 2 shows that *Swift* receives more blame than it deserves for the rise of general common law.

significantly from the Court's Stage 1 decision in *Spraigue*, which had gone so far as to reverse the Georgia Supreme Court's decision regarding a Georgia enactment.[99]

The second deference doctrine required the Court to apply state law severability rules where available. The Court foreshadowed this doctrine in *Loeb* and *Hamilton v. Brown*,[100] both of which appear to have relied on a mixture of general principles and precedent from relevant state courts to determine the severability of state statutes.[101] The most influential case, however, seems to have been *Guinn & Beal v. United States*,[102] which evaluated whether the Fifteenth Amendment invalidated two provisions of the Oklahoma Constitution, one imposing a general voter-literacy test and the other waiving the test for descendants of individuals entitled to vote before 1866.[103] The Court held that while the provision imposing the literacy test was constitutional, the second provision selectively waiving the test was not, and that both were void because the latter was unseverable.[104] As in so many other cases of the time, the analysis relied exclusively upon the Court's own precedent.[105] But *Guinn & Beal* was unique because it explained that the severability of provisions within a state enactment is "really a question of state law," to be decided by the Court according to the general doctrine only "in the absence of any decision on the subject by the Supreme Court of the State."[106] Thus, although the Court applied a federal severability test, it did so simply because there was no Oklahoma alternative. For the first time, the Court explicitly framed severance as a question of state law.

Guinn & Beal thus marked an important shift. Before the decision, the Court had routinely followed the Stage 1 practice of applying a general federal rule even where the courts of the relevant state had developed a competing rule.[107] Afterward, the Court relied upon the new doctrine in a

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99. Spraigue v. Thompson, 118 U.S. 90, 94–95 (1886); *see also supra* notes 50–58 and accompanying text.

100. 161 U.S. 256 (1896).

101. *See* Loeb v. Columbia Twp. Trs., 179 U.S. 472, 489–90 (1900) (relying on general principles and Ohio Supreme Court precedent); *Hamilton*, 161 U.S. at 274 (citing to U.S. and Texas Supreme Court precedent).

102. 238 U.S. 347 (1915).

103. *Id.* at 357.

104. *Id.* at 366–67.

105. *See id.* (ruling on severability without relying upon state law).

106. *Id.* at 366.

107. *Compare, e.g.*, S. Covington & Cincinnati St. Ry. Co. v. City of Covington, 235 U.S. 537, 549 (1915) (not citing to Kentucky severability doctrine in deciding the severability of part of a Kentucky statute), *with* Brown v. Moss, 105 S.W. 139, 141 (Ky. 1907) (applying Kentucky's rule); *compare* Ohio Tax Cases, 232 U.S. 576, 594 (1914) (not citing to Ohio's rule), *with* Metropolis v. City of Elyria, 23 Ohio C.C. (n.s.) 544, 545–46 (Cir. Ct. 1912) (applying Ohio's rule); *compare* Louisville & Nashville R.R. Co. v. Garrett, 231 U.S. 298, 311 (1913) (not citing to Kentucky's rule) *with Moss*, 105 S.W. at 141 (applying Kentucky's rule); *compare* S. Pac. Co. v. Campbell, 230 U.S. 537, 553 (1913) (not citing to Oregon's rule), *with* Kiernan v. City of Portland, 111 P. 379, 382 (Or. 1910) (applying Oregon's rule); *compare* Minn. Rate Cases, 230 U.S. 352, 380 (1913) (not citing to

series of actions at law. *Myers v. Anderson*,[108] for example, applied a federal test to a state enactment, but only after applying the *Guinn & Beal* choice-of-law rule to determine that a federal test was in fact appropriate.[109] Other decisions cited to *Guinn & Beal* for similar purposes.[110]

The pro-state shift to which *Guinn & Beal* contributed, however, remained incomplete during Stage 2 because of the lingering independence of federal equity. Apparently relying on the circumstance that the *Guinn & Beal* cases all involved actions at law, the Court continued to apply general severability rules in equity cases throughout Stage 2 even when the relevant state had a competing rule.[111] In doing so, the Court implicitly cabined

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Minnesota's rule), *with* State v. Duluth Gas & Water Co., 78 N.W. 1032, 1034 (Minn. 1899) (applying Minnesota's rule); *compare* S. Pac. Co. v. City of Portland, 227 U.S. 559, 572–73 (1913) (not citing to Oregon's rule), *with Kiernan*, 111 P. at 382 (applying Oregon's rule); *compare* W. Union Tel. Co. v. City of Richmond, 224 U.S. 160, 172 (1912) (not citing to Virginia's rule), *with* Bertram v. Commonwealth, 62 S.E. 969, 971 (Va. 1908) (applying Virginia's rule); *compare* Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 65–67 (1910) (not citing to Minnesota's rule), *with Duluth Gas & Water Co.*, 78 N.W. at 1034 (applying Minnesota's rule); *compare* Grenada Lumber Co. v. Mississippi, 217 U.S. 433, 443 (1910) (not citing to Mississippi's rule), *with* State v. Jackson Cotton Oil Co., 48 So. 300, 301 (Miss. 1909) (applying Mississippi's rule); *compare* Sw. Oil Co. v. Texas, 217 U.S. 114, 120–21 (1910) (not citing to Texas's rule), *with* Proctor v. Blackburn, 67 S.W. 548, 550 (Tex. Civ. App. 1902) (describing the Texas rule); *compare* Int'l Textbook Co. v. Pigg, 217 U.S. 91, 113 (1910) (not citing to Kansas's rule), *with* Conklin v. City of Hutchinson, 70 P. 587, 588 (Kan. 1902) (applying Kansas's rule); *compare* Wilcox v. Consol. Gas Co., 212 U.S. 19, 53–54 (1909) (not citing to New York's rule), *with In re* De Vaucene, 31 How. Pr. (n.s.) 289, 344–45 (N.Y. Sup. Ct. 1866) (applying New York's rule). There appears to have been at least one decision before *Guinn & Beal* in which the Court applied its federal rule in the absence of a corresponding state rule, but such a practice was rare and, it seems, purely coincidental. *Compare* Diamond Glue Co. v. U.S. Glue Co., 187 U.S. 611, 617 (1903) (not citing to Wisconsin state law and instead applying a general rule), *with* State *ex rel.* Buell v. Frear, 131 N.W. 832, 836 (Wis. 1911) (describing a state rule for the first time in a reported decision by a Wisconsin court).

108. 238 U.S. 368 (1915).

109. *Id.* at 380–82.

110. *See, e.g.*, Dorchy v. Kansas, 264 U.S. 286, 289–91 (1924) (citing to *Guinn & Beal* for the proposition that a state court's decision on severability is conclusive); Schneider Granite Co. v. Gast Realty & Inv. Co., 245 U.S. 288, 290–91 (1917) (same). Still other decisions were consistent with *Guinn & Beal* even though they did not cite to the decision. *See, e.g.*, Liggett Co. v. Lee, 288 U.S. 517, 541 (1933) (remanding for a determination of severability by Florida state courts in accordance with Florida law); Weller v. New York, 268 U.S. 319, 325 (1925) (deciding the severability of a state statute without reference to state doctrine, where no such doctrine had been developed); Brazee v. Michigan, 241 U.S. 340, 344 (1916) (same).

111. *Compare* Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 513 (1937) (not applying Alabama's rule), *with* Yeilding v. State *ex rel.* Wilkinson, 167 So. 580, 594 (Ala. 1936) (applying Alabama's rule); *compare* Utah Power & Light Co. v. Pfost, 286 U.S. 165, 183–85 (1932) (not applying Idaho's rule), *with* Carlson v. Mullen, 162 P. 332, 333–34 (Idaho 1917) (explaining Idaho's rule); *compare* Williams v. Standard Oil Co., 278 U.S. 235, 241–43 (1929) (not applying Tennessee's rule), *with* Daniel v. Larsen, 12 S.W.2d 386, 387 (Tenn. 1928) (explaining Tennessee's rule); *compare* Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 675 (1923) (not citing to Rhode Island's rule), *with* State v. Copeland, 3 R.I. 33, 36–37 (1854) (explaining Rhode Island's rule); *compare* Lemke v. Farmers Grain Co., 258 U.S. 50, 60 (1922) (not citing to North Dakota's rule), *with* McDermont v. Dinnie, 69 N.W. 294, 296 (N.D. 1896) (explaining North Dakota's rule); *compare* Bowman v. Cont'l Oil Co., 256 U.S. 642, 647–48 (1921) (not citing New Mexico's rule), *with* State v. Brooken, 143 P. 479, 480 (N.M. 1914) (announcing New Mexico's rule); *compare* McFarland v. Am. Sugar Ref. Co., 241 U.S. 79, 87 (1916) (not citing to New Jersey's severability

Guinn & Beal and created a two-track approach of adherence and departure: (1) adhere to the Stage 1 jurisprudence by continuing to apply a general test in actions in federal equity regardless of whether there is a competing state test, and (2) depart from the Stage 1 jurisprudence by deferring to state court decisions on the severability of specific state statutes and, in actions at law, applying available state doctrine.

Two background changes correspond with this shift.[112] First, the transcendence premise that supported the Court's methodology during Stage 1 lost influence on the Court as Stage 2 progressed.[113] What we would now describe as "positivist" scholars and reformers had been criticizing the declaratory theory for a long time.[114] As early as the late eighteenth century, Austin and Bentham critiqued the theory's failure to recognize the potential for divergence between descriptive accounts of what the law is and prescriptive accounts of what it ought to be.[115] Later, in the nineteenth century, Holmes argued that any theory that failed to account for the contemporary policy decisions underlying most cases provided an inaccurate explanation of the process of judicial decision making.[116] And formalists such as Langdell and Beale rejected the notion of a transcendent source of law.[117]

But it was not until Stage 2, in decisions such as *Guinn & Beal*, that the Court began to operationalize these critiques in the context of severability. *Guinn & Beal* fit poorly with the notion of a transcendent, general law independently discernable by federal and state courts alike; if law were truly general in nature, there would have been no need for federal deference to the doctrines developed by courts from other jurisdictions, and the Court should have been able to disregard and even reject state court tests, as it had done in Stage 1. The decision fit better with a positivist paradigm: To conclude that

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rule), *with* Eastwood v. Russell, 81 A. 108, 110 (N.J. 1911) (applying New Jersey's rule); *compare* Phoenix Ry. Co. v. Geary, 239 U.S. 277, 282–83 (1915) (not applying Arizona's severability rule), *with* State ex rel. Gilmore v. High, 130 P. 611, 613 (Ariz. 1913) (explaining Arizona's rule).

112. To borrow Lawrence Lessig's taxonomy, the Court's response to these changes was an example of both nascent "structural translation" and "fact translation." Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 426–33 (1995).

113. *See* JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 47–50 (2010) (discussing the decline of the declaratory theory during the Progressive Era).

114. *See* Casto, *supra* note 24, at 922–25 (discussing nineteenth-century critiques of the declaratory theory by David Dudley Field, John Chipman Gray, and Holmes); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 596–98 (1958) (discussing nineteenth-century positivist critiques by Bentham and Austin).

115. *See* Hart, *supra* note 114, at 596–99 (discussing Austin's and Bentham's protests "against blurring the distinction between what law is and what it ought to be").

116. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 465–66 (1897) (arguing that behind the logic of a judicial decision "lies a judgment as to the relative worth and importance of competing legislative grounds" that is the "very root and nerve" of the decision).

117. SEBOK, *supra* note 31, at 83–103; *see also* Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2056–57 (1995) (explaining that "although legal positivism did not properly emerge as a major theory of law in America until . . . 1940, positivism had been playing a major role in shaping American jurisprudence since the late nineteenth century").

severability is "a question of state law" is to characterize that law as belonging to a particular sovereign, rather than existing independently, and to acknowledge that a choice of legal source must precede determination of the question itself.[118]

A likely explanation for the Court's nascent philosophical shift is a change in personnel. Several Justices with anti-transcendence views joined the Court during Stage 2. Most influential of these was Justice Holmes, who critiqued transcendence in a series of dissents following his appointment in 1902.[119] In *Kuhn v. Fairmont Coal Co.*,[120] he argued that *Swift* should be abandoned, and that state courts make rather than simply declare the law.[121] Later, in *Southern Pacific Co. v. Jensen*,[122] he famously asserted in a flair of positivism that the common law "is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified."[123] And in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,[124] he argued at length that the declaratory theory on which *Swift* was premised was a "fallacy and illusion," and that the common law does not exist apart from the rulings of state courts.[125] In each of these opinions, Justice Holmes was writing in dissent, but he was not alone. Justices White and McKenna concurred in the *Kuhn* dissent,[126] while Justices Brandeis and Clarke concurred in *Southern Pacific*,[127] and Justices Brandeis and Stone concurred in *Black & White Taxicab*.[128] Importantly, Holmes, Brandeis, Clarke, and Stone all joined the Court during Stage 2,[129] as did others with anti-transcendence inclinations.[130] Those inclinations complicated any continuation of the Stage 1 jurisprudence.[131]

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118. *See* James Audley McLaughlin, *Conflict of Laws: The New Approach to Choice of Law: Justice in Search of Certainty, Part Two*, 94 W. VA. L. REV. 73, 97 (1991) ("Choice of law presupposes legal positivism . . . .").

119. For a discussion of some of the nuances of Justice Holmes's positivism, see Patrick J. Kelley, *The Life of Oliver Wendell Holmes, Jr.*, 68 WASH. U. L.Q. 429, 437–39 (1990) (reviewing SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES (1989)).

120. 215 U.S. 349 (1910).

121. *Id.* at 370–71.

122. 244 U.S. 205 (1917).

123. *Id.* at 222.

124. 276 U.S. 518 (1928).

125. *Id.* at 532–35.

126. 215 U.S. at 372.

127. 244 U.S. at 255.

128. 276 U.S. at 536.

129. *See Members of the Supreme Court of the United States*, SUP. CT. U.S. (Oct. 10, 2012), http://www.supremecourt.gov/about/members_text.aspx (Holmes, 1902; Brandeis, 1916; Clarke, 1916; Stone, 1925).

130. *See, e.g.*, HORWITZ II, *supra* note 81, at 190 (discussing Cardozo's position that law "is not found, but made").

131. *Cf.* Casto, *supra* note 24, at 930 ("Although the error in *Swift* was perfectly obvious to legal positivists in 1885, 1893, 1910, and 1928, the profession in general, or at least a majority of the Supreme Court, adhered to the traditional doctrine. *Swift*'s dethronement did not take place until the Court's makeup became predominantly positivist.").

The second background shift was that states began to develop more substantial bodies of law on severability. State statutes with severance clauses began to proliferate.[132] Courts refined their common law tests.[133] Case law explaining severability principles was more voluminous, and judicial treatment of the topic was more thoughtful than ever before.[134] These developments corresponded with a rise in the importance of legislation generally—a change that included greater respect for statutory law and generated a substantial body of common law concerning statutory construction and application.[135] The effect was that cases before the Court were more likely to involve states with developed severability doctrines. Given an increasingly refined and codified alternative to general common law, the application of state law had become necessary even under *Swift* itself.

In sum, Stage 2 was a period of transition. The Court followed its Stage 1 method of applying general principles to decide the severability of state statutes in equity cases. In actions at law, however, it began to defer to specific state court severability rulings and to apply state law doctrines where available. This partial shift away from the Stage 1 methodology coincided with two background developments: personnel changes that placed several anti-transcendence Justices on the Court, and the development of more substantial bodies of relevant state law. These changes made it more likely

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132. *See* Nagle, *supra* note 3, at 222–23 ("The first severability clauses appeared late in the nineteenth century, and they became much more common around 1910."); Note, *Partial Unconstitutionality of Statutes—Effect of Saving Clause on General Rules of Construction*, 25 MICH. L. REV. 523, 523 (1927) ("In recent legislation it has become fairly common to incorporate so-called 'saving' clauses or sections."); Note, *Effect of Separability Clauses in Statutes*, *supra* note 65, at 626 ("[Severability clauses] seem to have come into vogue about 1910, and have been steadily increasing in popularity."). It appears that as a result of this proliferation, severability clauses became common features of legislation by at least the 1930s. *See, e.g.*, Colo. Nat'l Bank of Denver v. Bedford, 310 U.S. 41, 44 (1940) ("The usual separability clause is contained in the act."); Helvering v. Davis, 301 U.S. 619, 645 (1937) ("The usual separability clause is embodied in the act.").

133. *See, e.g.*, Castle v. Mason, 110 N.E. 463, 465 (Ohio 1915) ("It is impossible, therefore, to regard the act as a separate and distinct act and severable, and the inspection features must either fall or stand as a single pronouncement of legislative intent."); State *ex rel.* Monnett v. Buckeye Pipe-Line Co., 56 N.E. 464, 467 (Ohio 1900) ("It is quite familiar doctrine that in determining the constitutional validity of statutes their different provisions are not necessarily subject to the same conclusion."); Baltimore & Ohio R.R. Co. v. Kreager, 56 N.E. 203, 208 (Ohio 1899) ("[I]f that section should be held unconstitutional, it is distinct and severable from the other provisions of the act, and could not affect their validity."); State v. Sinks, 42 Ohio St. 345, 364–66 (Ohio 1884) ("[A]ssuming the proviso is void for that reason, 'it does not result from this that the whole statute is void: a part of a statute may be void from want of conformity with the constitution and the remainder valid.'"); City of Piqua v. Zimmerlin, 35 Ohio St. 507, 511–12 (Ohio 1880) ("If it be true that the second section, . . . is open to the objection stated, that circumstance does not affect the provisions of the first section, unless [they] are so connected . . . as to lead to the inference that the first section would not have been adopted without the second.").

134. For example, see the cases in the previous footnote.

135. *See* POPKIN, *supra* note 33, at 115–17 (explaining that "[t]wentieth-century legislation at both the state and federal levels had a vitality and scope that earlier legislation lacked" and that the early 1900s produced a "growing faith in a science of legislation").

that the Court would look to state law to determine severability by, respectively, favoring adjudication on the basis of a positive source of doctrine rather than general law, and making positive law more readily available and thus easy to apply in place of the general law.

C. *Stage 3: Severability After* Erie

Stage 3 spans from 1938 to immediately before the Court's 2006 decision in *Ayotte*.[136] During this period, the Court settled upon a single choice-of-law rule: The sovereign whose statute is at issue dictates the severability test.[137] Thus, where federal statutes were at issue, the Court applied a federal test,[138] and where state statutes were at issue the Court repeatedly treated severance as a question of state law.[139]

Leavitt v. Jane L.[140] stands out as the most robust illustration of the state law side of this approach. There, the Court reversed a Tenth Circuit decision that had held one portion of a Utah abortion statute to be unconstitutional and, under Utah law, unseverable.[141] Explaining that "[s]everability is of

136. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006).

137. *See* Dorf, *The Heterogeneity of Rights*, supra note 3, at 290–91 ("[S]everability is in turn a question of statutory construction, and in a challenge to a state law, state rather than federal principles of statutory construction govern.").

138. For examples of the Supreme Court's application of a federal test, see United States v. Booker, 543 U.S. 220, 246–48 (2005); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 190–92 (1999); Reno v. ACLU, 521 U.S. 844, 882–83 (1997); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 767–68 (1996); New York v. United States, 505 U.S. 144, 186–87 (1992); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 294 (1988); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685–86 (1987); Regan v. Time, Inc., 468 U.S. 641, 653 (1984); INS v. Chadha, 462 U.S. 919, 931–35 (1983); Buckley v. Valeo, 424 U.S. 1, 108–09 (1976); Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 136 (1974); Griffin v. Breckenridge, 403 U.S. 88, 104 (1971); Maryland v. Wirtz, 392 U.S. 183, 200 (1968); United States v. Jackson, 390 U.S. 570, 585–86 (1968); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 283 (1960); United States v. Harriss, 347 U.S. 612, 627 (1954); Lockerty v. Phillips, 319 U.S. 182, 189 (1943); Elec. Bond & Share Co. v. SEC, 303 U.S. 419, 438–39 (1938).

139. *See, e.g.*, Virginia v. Hicks, 539 U.S. 113, 121–22 (2003); Virginia v. Black, 538 U.S. 343, 367 (2003); Leavitt v. Jane L., 518 U.S. 137, 139 (1996); Fulton Corp. v. Faulkner, 516 U.S. 325, 347 (1996); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 785 n.1 (1995); U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 509 n.8 (1993); Wyoming v. Oklahoma, 502 U.S. 437, 459–61 (1992); Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 623–24 (1985); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 & n.15 (1985); Exxon Corp. v. Eagerton, 462 U.S. 176, 196–97 (1983); New York v. Ferber, 458 U.S. 747, 769 n.24 (1982); Zobel v. Williams, 457 U.S. 55, 64–65 (1982); City of New Orleans v. Dukes, 427 U.S. 297, 302 (1976); Sixty-Seventh Minn. State Senate v. Beens, 406 U.S. 187, 197–98 & n.9 (1972); Harrison v. NAACP, 360 U.S. 167, 178 (1959); Morey v. Doud, 354 U.S. 457, 469–70 & n.16 (1957), *overruled on other grounds by* City of New Orleans v. Dukes, 427 U.S. 297 (1976); Pollock v. Williams, 322 U.S. 4, 17 (1944); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 542–43 (1942); Allen-Bradley Local No. 1111, United Elec., Radio & Mach. Workers of Am. v. Wis. Emp't Relations Bd., 315 U.S. 740, 747–48 (1942); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); Watson v. Buck, 313 U.S. 387, 396–98 (1941); Reitz v. Mealey, 314 U.S. 33, 38–40 (1941), *overruled on other grounds by* Perez v. Campbell, 402 U.S. 637 (1971).

140. 518 U.S. 137 (1996).

141. *Id.* at 137–38.

course a matter of state law," the majority made clear that the Tenth Circuit had correctly looked to Utah law to decide severance.[142] But the Court also took the Tenth Circuit to task for misapplying Utah's doctrine, and then utilized that doctrine to hold that the statute was in fact severable.[143] In doing so, the Court demonstrated that it would apply state law to decide the severability of state statutes, as it had done several times before, and signaled a willingness to police the lower federal courts to ensure a correct application of that law.

The Stage 3 doctrine extended Stage 2's shift in favor of state law in several ways. First, while the Court had applied its own rules in federal equity cases during Stage 2, it began in Stage 3 to frame the severability of state statutes as a question of state law regardless of whether the underlying action was at law or in equity. In the 1941 case of *Watson v. Buck*,[144] for example, certain authors and publishers filed an action in federal district court to obtain an injunction against the enforcement of a Florida copyright statute.[145] A panel of district court judges held that part of the statute was invalid and unseverable, and that the entire statute must fall as a result, but the Court reversed this ruling.[146] Previously, because of the nature of the relief sought, the Court would have decided severance under its separate remedial rules for federal equity.[147] But rather than disregard state law, the Court in *Watson* reversed the district court entirely because the severability ruling misapplied Florida statutory and case law.[148] Far from irrelevant, state law was now determinative—even in federal equity.[149]

Second, in appeals from state courts, the Court extended the Stage 2 shift by developing a practice of remanding severability questions without any apparent regard for whether the state court had a pre-existing doctrine to apply.[150] The decision to remand in these cases not only declared, in effect,

142. *Id.* at 138–39.

143. *Id.* at 139–45.

144. 313 U.S. 387 (1941).

145. *Id.* at 394.

146. *Id.* at 395.

147. *See supra* notes 58–70 and accompanying text.

148. 313 U.S. at 395–97.

149. For other equity cases following the approach in *Watson*, see, for example, Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506–07 (1985) (reversing the Court of Appeals after determining that it did not follow Washington law on severability); Sixty-Seventh Minn. State Senate v. Beens, 406 U.S. 187, 197–98 & n.9 (1972) (concluding that the District Court erred in invalidating a reapportionment law in light of Minnesota's policy of statutory severability); and Reitz v. Mealey, 314 U.S. 33, 38–40 (1941) (affirming the District Court's interpretation of New York severability precedent), *overruled on other grounds by* Perez v. Campbell, 402 U.S. 637 (1971).

150. *See* Virginia v. Black, 538 U.S. 343, 363–67 (2003) (stating that the Virginia Supreme Court did not reach the issue of severability under Virginia law and leaving the question open for that court to decide); Davis v. Mich. Dep't of the Treasury, 489 U.S. 803, 818 (1989) ("The permissibility of either approach, moreover, depends in part on the severability of a portion of § 206.30(1)(f) from the remainder of the Michigan Income Tax Act, a question of state law within

that the severability of state statutes was a question of state law, but also that state courts were best equipped to decide the question. The decision to remand regardless of the preexistence or adequacy of state law further suggested that state courts were best equipped to decide even if they had never done so before.

Cases such as *Jane L.* and *Watson* illustrate the final way in which the Court extended the Stage 2 shift. Rather than merely defer to state court rulings on state statutes and apply state law where available, these decisions affirmatively enforced state law severability doctrines that had been, in the Court's view, misapplied by lower federal courts.[151] The Court would not only require the application of state law, but also ensure that the application was faithful.

These cases were a logical product of two important events in 1938: the Court's *Erie* decision[152] and the procedural merger of federal law and equity. In *Erie*, as one will recall, the Court overruled *Swift* on the ground that the Constitution does not authorize federal courts to exercise a general lawmaking authority, and held that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State," regardless of whether that law is statutory or judge made.[153] With the procedural merger of law and equity, federal courts began to adjudicate legal and equitable claims in single actions.[154]

Erie and the Stage 3 cases aligned in two ways. First, they aligned doctrinally. At the time, no precedent identified the severability of state statutes as a matter "governed by the Federal Constitution."[155] Nor was it a matter governed by "[a]cts of Congress."[156] Thus, under the understanding of *Erie* at the time, the severability of state statutes was to be a matter of state law in "any case."[157] The application of state law doctrines in federal equity cases, such as *Watson*, made sense under this framework because the distinction between law and equity no longer mattered to vertical choice-of-

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the special expertise of the Michigan courts."); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 772 (1988) ("Severability of a local ordinance is a question of state law .... Accordingly, we remand this cause to the Court of Appeals to decide whether the provisions of the ordinance we have declared unconstitutional are severable, and to take further action consistent with this opinion.").

151. *See Leavitt*, 518 U.S. at 139–45 (reversing the Court of Appeals for misapplying Utah state law); *Watson*, 313 U.S. at 395–97 (reversing the district court for overlooking the purpose of the Florida legislature, given that the Florida Supreme Court's severability doctrine seeks to honor legislative intent).

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

153. *Id.* at 78. For a classic discussion of *Erie* and some common misconceptions about the decision, see John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974).

154. *See* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1044 (3d ed. 2010) (discussing the effects of the merger of law and equity).

155. *Erie*, 304 U.S. at 78; *see* Stern, *supra* note 3, at 91–93 (citing Supreme Court precedent for the proposition that state courts alone have the duty of construing state statutes).

156. *Erie*, 304 U.S. at 78.

157. *Id.*

law determinations. The procedural merger of law and equity in the same year as *Erie* and the Court's explicit extension of *Erie* to federal equity in 1945[158] confirmed as much. The remand cases also made sense: Once state law had become the source of doctrine, it made sense to remand where possible so that state courts could decide the issue themselves. And what we might call the "affirmative enforcement" cases of *Jane L.* and *Watson* made sense as efforts to reinforce *Erie* by ensuring a faithful federal application of state law.

Second, *Erie* and the Stage 3 jurisprudence aligned philosophically. *Erie* is widely understood as an embrace of legal positivism.[159] Similarly, the Court's severability jurisprudence was uniquely positivist during Stage 3 because it reflected an acute awareness of vertical choice-of-law questions and the aptitude of state courts to decide matters of state law. Severability was no longer a matter of general, transcendent common law, but instead a doctrine emerging in varying forms from specific sovereigns within the federal system.

The tidiness of the Stage 3 precedent should not be overstated, however. Notwithstanding the consistency of an overwhelming majority of decisions, and the alignment of those cases with the major jurisprudential developments of the period, a small number of cases disregarded state rules in deciding the severability of state statutes. Two of them concerned Establishment Clause challenges. In *Sloan v. Lemon*,[160] the Court held that a Pennsylvania statute violated the Establishment Clause by providing tuition reimbursements to parents of children attending private school because the statute included reimbursements for religious schools.[161] Citing to its own precedent, rather than Pennsylvania law, the Court further held that statutory text and legislative history precluded severance of the part concerning nonreligious schools.[162] Two years later, *Meek v. Pittenger*[163] decided the severability of a similar statute by relying on federal precedent rather than available state

158. *See* Guar. Trust Co. v. York, 326 U.S. 99, 111 (1945) ("To make an exception to [*Erie*] on the equity side of a federal court is to reject the considerations of policy which, after long travail, led to that decision.").

159. *See, e.g.*, Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1479–81 (1997) (stating that *Erie* embraced the positivist position that law is the product of human will and consists exclusively of sovereign commands); Casto, *supra* note 24, at 921–30 (describing legal positivist attacks on *Swift* before *Erie* and how these ideas caused the Court to overturn *Swift*); Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655, 1677 (2002) (reviewing JULES COLEMAN, THE PRACTICE OF PRINCIPLE (2001)) (describing the time of the Court's decision in *Erie* as the "zenith of positivism's practical importance" in American jurisprudence). *But see* Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 680–94 (1998) (arguing that there is insufficient evidence of a historical connection between positivism and *Erie*).

160. 413 U.S. 825 (1973).

161. *Id.* at 827–28.

162. *Id.* at 834.

163. 421 U.S. 349 (1975).

law.[164] Three other cases adopted the same methodology in holding that invalid portions of certain state laws restricting reproductive rights were unseverable.[165]

It is hard to reconcile these decisions with the remainder of the Stage 3 jurisprudence. In over twenty cases from the period, the Court made clear that state law controls for state statutes.[166] Those decisions pre- and post-dated the outliers. Those decisions, moreover, deferred to state law without regard to statutory subject matter. And the Court never attempted to reconcile the outliers, or even explain them. One could conceivably rationalize some of the decisions on the ground that they applied severability tests no different than those established by the relevant state courts.[167] Other decisions, however, utilized tests that were materially different.[168] Although doctrinally unsatisfying, the inconsistency may simply reflect lack of consideration by the Court, perhaps due to inadequate briefing by the parties. Or it may reflect that the disputes in those cases over salient and politically charged social issues exerted, in the words of Justice Holmes, a "hydraulic pressure" that distorted the otherwise well-settled doctrine.[169]

In sum, Stage 3 was a period in which the Court generally settled upon the rule that the sovereign whose statute is at issue dictates the severance test.

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164. *Id.* at 371 n.21.

165. *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 764–65 (1986) (holding an abortion statute unseverable based on federal precedent); Carey v. Population Servs. Int'l, 431 U.S. 678, 708 n.2 (1977) (Powell, J., concurring) (contending, based on federal precedent, that a provision in a contraception statute was unseverable); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 83 (1976) (holding an abortion statute unseverable).

166. *See supra* note 139 and accompanying text.

167. *Compare Thornburgh*, 476 U.S. at 764–65 (holding a Pennsylvania statute unseverable because severance would have required a "radical dissection" and left the statute with "little resemblance to that intended by the Pennsylvania legislature"), *and Sloan*, 413 U.S. at 834 (holding a Pennsylvania statute unseverable because the text of the statute did not suggest that severance was possible and because severance would have "create[d] a program quite different from the one the legislature actually adopted"), *with* Saulsbury v. Bethlehem Steel Co., 196 A.2d 664, 667 (Pa. 1964) (establishing that severance is appropriate where (1) the legislature intended that the statute be severable and (2) the statute is in fact capable of separation); *compare Danforth*, 428 U.S. at 83 (holding a Missouri statute unseverable because its provisions were "inextricably bound together"), *with* State *ex rel.* Enright v. Connett, 475 S.W.2d 78, 81 (Mo. 1972) ("The test of the right to uphold a law . . . is whether . . . after separating that which is invalid, a law in all respects complete . . . is left, which the Legislature would have enacted . . . had [it] known that the exscinded portions were invalid." (quoting State *ex rel.* Audrain Cnty. v. Hackmann, 205 S.W. 12, 14 (Mo. 1918)).

168. *Compare Carey*, 431 U.S. at 708 n.2 (Powell, J., concurring) (contending that a New York statute was unseverable because severance would have created "a program quite different from the one the legislature actually adopted" (quoting *Sloan*, 413 U.S. at 834)), *with* People *ex rel.* Alpha Portland Cement Co. v. Knapp, 129 N.E. 202, 207 (N.Y. 1920) ("The question is in every case whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether."); *compare Meek*, 421 U.S. at 371 n.21 (holding a Pennsylvania statute unseverable because it could not be assumed "that the Pennsylvania General Assembly would have passed the law solely" to enact the valid portion), *with Saulsbury*, 196 A.2d at 667 (establishing that severance is appropriate when (1) the legislature intended that the statute be severable and (2) the statute is in fact capable of separation).

169. N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting).

The case law of the period completed the pro-state evolution that Stage 2 began. The Court applied state law without regard to whether the action was at law or in equity, and framed the severability of state statutes as a matter of state law without regard to whether the relevant state had developed any law on the matter. The Court also consistently remanded severability questions for state court adjudication and even reversed lower federal courts for incorrectly applying state law tests. These practices comported doctrinally and philosophically with *Erie* and the merger of law and equity.

D. Stage 4: Severability After Ayotte

Stage 4 completes the doctrinal evolution and spans from the Court's 2006 decision in *Ayotte v. Planned Parenthood of Northern New England*[170] to the present. Within this period, the Court has developed a new general common law of severability.

The analysis of the contemporary approach to severability begins with *Ayotte* itself. There, the Court reviewed a challenge to a New Hampshire statute that prohibited a physician from performing an abortion on a minor until 48 hours after written notice of the pending abortion had been delivered to her parent or guardian.[171] An exception to the notice requirement applied only if (1) abortion was necessary to save the minor's life and there was insufficient time to provide notice, (2) a person entitled to receive notice certified that he or she had already been notified, or (3) a judge concluded that the minor was mature and able to provide informed consent or that an abortion without notification was in the minor's best interests.[172] The First Circuit had held the statute partially unconstitutional because it did not contain an exception for the preservation of a minor's health, and because the life exception was too narrow, but then used those infirmities as justification for permanently enjoining enforcement of the entire statute.[173] Taking the First Circuit's adjudication of the merits as essentially correct, *Ayotte* focused on whether the broad remedy of wholesale invalidation was appropriate, given that only part of the statute was unconstitutional.[174]

The substance of the opinion was straightforward: *Ayotte* established that federal courts remedying a statute's partial unconstitutionality must follow three guidelines: (1) "try not to nullify more of a legislature's work than is necessary,"[175] (2) refrain "from 'rewrit[ing] state law to conform it to constitutional requirements' even [while] striv[ing] to salvage it,"[176] and (3) ask whether the "legislature [would] have preferred what is left of its

170. 546 U.S. 320 (2006).
171. *Id.* at 323–24.
172. *Id.* at 324.
173. *Id.* at 325–26.
174. *Id.* at 328–31.
175. *Id.* at 329.
176. *Id.* (quoting Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988)).

statute to no statute at all."[177] The Court then held that because "[o]nly a few applications of New Hampshire's parental notification statute would present a constitutional problem," the lower court had to reconsider the breadth of its equitable relief in light of whether application severance would be faithful to legislative intent.[178]

One might argue that *Ayotte* established a doctrine that applies only in the narrow context of abortion litigation. Some language in the opinion appeared to frame the basic issue in that manner.[179] Ultimately, however, such a narrow reading seems unpersuasive. The Court discussed the *Ayotte* guidelines in general terms[180] and justified them by reference to authorities that had nothing to do with abortion. The Court also utilized them in *Free Enterprise Fund* to decide whether to sever part of the Sarbanes-Oxley Act[181] and in *National Federation of Independent Business* to decide the severability of an application of the Affordable Care Act.[182] *Ayotte* thus supplies a set of substantive federal guidelines for evaluating a broad array of enacted law.

One might further argue that *Ayotte* did not in fact establish a severability test. For the most part, the Court announced the guidelines without specifically discussing severance,[183] and the parties apparently agreed on remand that New Hampshire law governed whether wholesale invalidation was appropriate.[184] This interpretation, however, also seems unpersuasive. Regardless of whether they are also applicable to other remedial questions, the guidelines plainly dictate whether severance is warranted. The *Ayotte* Court explicitly stated a preference for "*sever*[*ing* a statute's] problematic portions while leaving the remainder intact";[185] the opinion relies primarily upon severability precedents; and the third guideline's command to ask whether "the legislature would have preferred

177. *Id.* at 330.

178. *Id.* at 331.

179. *See id.* at 328 ("When a statute restricting access to abortion may be applied in a manner that harms women's health, what is the appropriate relief?").

180. *See id.* at 329–30 (discussing severability in terms of "nullify[ing] a legislature's work" and compliance with "legislative intent").

181. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010) (citing *Ayotte* in considering the severability of part of the Sarbanes-Oxley Act).

182. *See* 132 S. Ct. 2566, 2607–08 (2012) (Roberts, C.J., joined by a plurality) (citing *Ayotte* for the discussion on severability). Federal district courts addressing the severability of the individual mandate also cited *Ayotte*. Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1303–04 (N.D. Fla. 2011); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 789–90 (E.D. Va. 2010).

183. *See* 546 U.S. at 329–30 (discussing "remedies" for partial unconstitutionality).

184. Plaintiffs' Memorandum of Law in Support of Their Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Partial Summary Judgment at 1, Planned Parenthood of N. New Eng. v. Ayotte, 546 U.S. 320 (2006) (No. 03-491-JD). Notwithstanding this stated agreement, the plaintiff also cited to federal law in arguing against severance. *Id.* at 6 n.4.

185. 546 U.S. at 329 (emphasis added).

what is left of its statute to no statute at all"[186] is simply a reiteration of one of the Court's classic severability tests.[187] The authority for the third guideline, moreover, included *Champlin Refining Co.* and *Allen v. Louisiana*—two pre-*Erie* decisions that decided severance for state statutes without reliance upon applicable state law doctrines. And the focus on severability was not dicta; whether to sever the unconstitutional applications of the New Hampshire statute was the central question on remand.[188] Moreover, if the Court had intended for state law to apply, it would have been easy to instruct the lower courts accordingly. Other recent decisions seem to have confirmed this interpretation by explicitly relying upon *Ayotte* to decide a severance question,[189] and by adopting *Ayotte*'s method of deciding severance without following state law.[190] Prominent commentators have also interpreted *Ayotte* as a decision about severability.[191]

Ayotte's broad federalization is not a mere formality. A significant number of lower federal courts have begun to employ the guidelines to rule on a range of state statutes and local ordinances. Many have used the guidelines instead of available state law.[192] Others, perhaps confused about

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186. *Id.* at 330.

187. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191 (1999) (citing *Champlin Ref. Co.* for the "traditional test of severability," namely, "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law"); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (noting that "[t]he standard for determining the severability of an unconstitutional provision is well established," and quoting the above language from *Champlin*, as cited in *Buckley*).

188. *Ayotte*, 546 U.S. at 331; *see* Planned Parenthood of N. New Eng. v. Ayotte, 571 F. Supp. 2d 265, 268 (D.N.H. 2008) (explaining that the State requested severance in the event of partial unconstitutionality); *see also* Metzger, *supra* note 3, at 886 ("[T]he case law does not support drawing a strict distinction between text severability and application severability. The Court has applied severability in both contexts, and its inquiry in both is the same . . . .").

189. *E.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010).

190. *E.g.*, Randall v. Sorrell, 548 U.S. 230, 262 (2006). *Randall* cited to a Vermont severability statute, but only at the end of a string cite otherwise comprising only U.S. Supreme Court cases. *Id.* Moreover, the decision failed to apply the rule imposed by the state statute, and reached a conclusion opposed to that prescribed by the rule. *Compare id.* (declining to sever because of a contrary legislative intent) *with* VT. STAT. ANN. tit. 1, § 215 (2003) (requiring severance where valid provisions "can be given effect without the invalid provision or application"). *Randall* is thus consistent with *Ayotte* as a decision on severability that did not apply state law.

191. *See, e.g.*, Fallon, *supra* note 3, at 956 (analyzing *Ayotte* as illustrative of "the distinction between surgical severing and a presumption that some unspecified way of severing can be found in future cases"); Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 792 (2009) (observing that *Ayotte* "identified the principles that should guide courts in determining whether to sever").

192. *See, e.g.*, Antilles Cement Corp. v. Fortuño, 670 F.3d 310, 331–32 (1st Cir. 2012) (citing *Ayotte* in support of a decision to sever the unconstitutional provisions of a Puerto Rican statute); Kan. Judicial Review v. Stout, 519 F.3d 1107, 1122 (10th Cir. 2008) (citing *Ayotte* in support of a decision to enjoin only the unconstitutional provisions of a Kansas canon on judicial conduct); Northland Family Planning Clinic, Inc. v. Cox, 487 F.3d 323, 333–39 (6th Cir. 2007) (applying *Ayotte*'s severability principles in concluding that the district court had properly declared a

the state or federal law nature of the issue, have employed the guidelines alongside state law.[193] State courts have also cited to *Ayotte* to decide severability questions.[194] In these cases, the guidelines have, to varying degrees, displaced state law, and they will continue to do so.

This displacement matters in part because the guidelines materially differ from a number of state doctrines. For example, whereas *Ayotte* favors severance over wholesale invalidation, and requires courts to examine whether the "legislature [would] have preferred what is left of its statute to

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Michigan statute unconstitutional *in toto*); Asociación de Educación Privada de Puerto Rico, Inc. v. García-Padilla, 490 F.3d 1, 18 (1st Cir. 2007) (citing *Ayotte* in support of a decision to limit the application of a district court injunction to the unconstitutional provisions of a Puerto Rican statute); López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 204–08 (2d Cir. 2006) (applying *Ayotte*'s severability guidelines in affirming a district court injunction against a New York statute), *rev'd on other grounds*, 552 U.S. 196 (2008); Cam I, Inc. v. Louisville/Jefferson Cnty. Metro Gov't, 460 F.3d 717, 720–21 (6th Cir. 2006) (applying *Ayotte* in affirming a decision to sever the unconstitutional provisions of a city ordinance); Advantage Media, L.L.C. v. City of Eden Prairie, 456 F.3d 793, 800–01 (8th Cir. 2006) (relying upon *Ayotte* in affirming the severability of provisions in a city ordinance); Planned Parenthood Cincinnati Region v. Taft, 444 F.3d 502, 516–18 (6th Cir. 2006) (discussing *Ayotte*'s severability principles as justification for vacating in part an overbroad district court order that had enjoined all enforcement of an Ohio statute); Chase v. Town of Ocean City, 825 F. Supp. 2d 599, 626–27 (D.Md. 2011) (citing H.B. Rowe Co. v. Tippett, 615 F.3d 233, 257 (4th Cir. 2010), which quotes *Ayotte*, in support of a decision to enjoin the unconstitutional applications of certain town ordinances); Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858, 874–76 (N.D. Tex. 2008) (applying *Ayotte* in declining to enforce the savings clause in a partially unconstitutional city ordinance); Baude v. Heath, No. 1:05-cv-0735-JDT-TAB, 2007 WL 2479587, at *28–31 (S.D. Ind. Aug. 29, 2007) (applying *Ayotte* in deciding to strike only those provisions of an Indiana statute that violated the Commerce Clause), *aff'd in part and rev'd in part on other grounds*, 538 F.3d 608 (7th Cir. 2008); Jeffrey O. v. City of Boca Raton, 511 F. Supp. 2d 1339, 1359 (S.D. Fla. 2007) (applying *Ayotte* in deciding to enjoin the enforcement of the unconstitutional applications of a city ordinance).

193. *See, e.g.*, BellSouth Telecomms., Inc. v. Farris, 542 F.3d 499, 510 (6th Cir. 2008) (applying a Kentucky severability statute and simultaneously citing to *Ayotte*); Am. Bankers Ass'n v. Lockyer, 541 F.3d 1214, 1217 (9th Cir. 2008) (applying California's severability doctrine and citing to *Ayotte*); Frazier *ex rel.* Frazier v. Winn, 535 F.3d 1279, 1283 (11th Cir. 2008) (applying both the federal standard for severability, as articulated in *New York v. United States*, and Florida common law); Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 437–38 (4th Cir. 2007) (citing to both South Carolina common law and United States Supreme Court decisions on severance); Cincinnati Women's Servs., Inc. v. Taft, 468 F.3d 361, 371 (6th Cir. 2006) (applying *Ayotte* alongside an Ohio common law test for determining severability); Bench Billboard Co. v. City of Toledo, 690 F. Supp. 2d 651, 670–71 (N.D. Ohio 2010) (same); Tex. Midstream Gas Servs., L.L.C. v. City of Grand Prairie, No. 3:08-CV-1724-D, 2008 WL 5000038, at *14 & n.10 (N.D. Tex. Nov. 25, 2008) (citing to state common law on severability and discussing *Ayotte*); IMS Health Corp. v. Rowe, 532 F. Supp. 2d 183, 186 & n.1 (D. Me. 2008) (same); ACLU of N.M. v. Santillanes, 506 F. Supp. 2d 598, 644–45 (D.N.M. 2007) (applying *Ayotte* and noting that "similar considerations apply under state law").

194. *See, e.g.*, Dallman v. Ritter, 225 P.3d 610, 638 (Colo. 2010) (en banc) (citing *Ayotte* in attempting to "fix" a partially invalid Colorado statute while avoiding any attempt to "rewrite" it); People v. Taylor, 878 N.E.2d 969, 992 (N.Y. 2007) (citing *Ayotte* in enjoining only the unconstitutional applications of a New York statute); Sohigian v. City of Oakland, No. A10303, 2006 WL 763198, at *5 n.7 (Cal. Ct. App. Mar. 24, 2006) (same with respect to a California statute); Cravedi v. Houseman, No. 298594, 2006 WL 344962, at *9 (Mass. Land Ct. Feb. 15, 2006) (quoting *Ayotte* at length in considering a severability issue); Weinschenk v. State, 203 S.W.3d 201, 227 (Mo. 2006) (en banc) (Limbaugh, J., dissenting) (describing *Ayotte* as "perhaps the best recitation of the notion of severability").

no statute at all," Tennessee formally disfavors severance and permits the remedy only where it is "fairly clear" from the plain text that the legislature would have passed the statute without the invalid provision, and there will remain "enough of the act for a complete law capable of enforcement and fairly answering the object of its passage."[195] South Carolina has a presumption against severance in the absence of a statutory severability clause.[196] California and Washington permit severance only where an invalid provision is "grammatically, functionally, and volitionally separable" from the remainder.[197] And there is a split of authority on whether severance is appropriate in the event that logrolling may have secured passage of multisubject legislation, part of which is invalid.[198] The diversity of these authorities, moreover, is not unique. States throughout the country have developed varying and nuanced doctrines. *Ayotte* quietly papered over all of them with a uniform test for federal courts.[199]

It is not difficult to imagine how the state doctrines could produce outcomes different from those of *Ayotte* in any given case. As an illustration, imagine that State Statute A has three provisions—A1, A2, and A3. A3 alone is unconstitutional. There is no severability clause, but the legislative history clearly shows that the legislature would have passed A even without A3. What would be the result? Under *Ayotte*, it seems that A3 would be severable because *Ayotte*'s third guideline does not preclude ascertainment of legislative preference through an examination of legislative history—the guideline simply asks the reviewing court to determine whether the enacting legislature "[would] have preferred what is left of its statute to no statute at all."[200] Because the legislative history shows that the legislature would have passed A without A3, it would be appropriate to conclude that the legislature would prefer A as only A1 plus A2 over no A of any form, and accordingly

195. State v. Tester, 879 S.W.2d 823, 830 (Tenn. 1994) (quoting Gibson Cnty. Special Sch. Dist. v. Palmer, 691 S.W.2d 544 (Tenn. 1985)).

196. *See* S.C. Tax Comm'n v. United Oil Marketers, Inc., 412 S.E.2d 402, 405 (S.C. 1991) ("In the absence of a legislative declaration that invalidity of a portion of the statute shall not affect the remainder, the presumption is that the legislature intended the act to be effected as an entirety or not at all.").

197. Jevne v. Super. Ct., 111 P.3d 954, 971–72 (Cal. 2005) (internal quotations omitted); State v. Abrams, 178 P.3d 1021, 1025–27 (Wash. 2008) (same).

198. *See* Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 403–04 n.14 (Pa. 2005) (discussing the split).

199. Samuel Issacharoff and Catherine Sharkey have referred to the "quiet federalization" of various other areas historically governed by state law, such as punitive damages, as "backdoor federalization." Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1353–54 (2006). Barry Friedman has described several other precedents from the Court's 2006 term as examples of "stealth overruling." Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 6–8 (2010). I think both descriptions are appropriate here because *Ayotte* effectively overruled the Stage 3 doctrine and federalized severability without mentioning the choice-of-law question or acknowledging the prior doctrine.

200. *Ayotte*, 546 U.S. at 330.

that severance would be appropriate. The doctrine of Tennessee and perhaps South Carolina, by contrast, would likely hold A3 to be unseverable because, absent a severability clause, there is no textual evidence of a preference for severance.[201]

Additionally, even where state doctrine and *Ayotte* will generally produce similar outcomes, *Ayotte*'s federalization matters because it discourages future changes in state doctrine. Imagine, for example, that the doctrine of State B is a mirror image of *Ayotte*'s. As long as State B remains satisfied with that doctrine, no real problem will arise. But suppose that State B one day chooses, for example, to categorically prohibit severance. There are legitimate policy concerns that could support such a choice: State B might prohibit severance on the view that the doctrine encourages legislators to shirk a responsibility to carefully evaluate the constitutionality of proposed legislation.[202] Or State B might prohibit severance on the view that statutory revision of any kind is an exclusively legislative function. *Ayotte* discourages doctrinal change on the basis of such concerns by ensuring that the changes have no effect in federal court.

III. The Evolutionary Critique of the New Doctrine

In this Part, I critique the new general common law of severability. I conclude that the doctrine is flatly inconsistent with the Court's post-*Erie* precedent, and in serious tension with *Erie* itself.

A. A Stare Decisis Problem

In view of the Court's historical approach to severance, the new doctrine is hard to justify. As shown above, *Ayotte* contradicted nearly two dozen cases decided over the course of a century by creating a federal doctrine for state statutes.[203] Stages 2 and 3 in combination constituted a steady evolution toward increasingly robust statements about the state law

201. *Cf.* State v. Tester, 879 S.W.2d 823, 830 (Tenn. 1994) (stating that under Tennessee law, severance is only permissible if a supporting legislative intent is "fairly clear . . . from the face of the statute" (internal quotation omitted)); *United Oil Marketers, Inc.*, 412 S.E.2d at 404–05 (describing South Carolina's severability test as asking whether "that which remains is complete in itself, capable of being executed, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed that the Legislature would have passed it independently of that which is in conflict with the Constitution . . . ." (internal quotation omitted)).

202. *See* Dorf, *Fallback Law*, *supra* note 3, at 351 ("Severability, if improperly used, permits legislators to shirk [their legislative duty] . . . by enacting laws they regard as constitutionally dubious or worse, and leaving the courts to sort things out."); *see also* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 57–58 (1999) (arguing that judicial supremacy in constitutional interpretation promotes legislative "irresponsibility" by ensuring that the courts will "bail [legislators] out of any difficulties they get into"). Professor Tushnet's argument suggests that severability may be particularly problematic as an encouragement of legislative irresponsibility because it maintains judicial supremacy in the realm of constitutional interpretation while minimizing the consequences of a violation of judicially established constitutional limits.

203. *See supra* note 139.

nature of questions concerning the severability of state statutes, an evolution which culminated in *Leavitt v. Jane L.*'s declaration in 1996—repeated by *Virginia v. Hicks*[204] in 2003—that the matter is "of course" one of state law.[205] Because New Hampshire, like every other state, had developed a severability doctrine for its statutes,[206] the overwhelming majority of Stage 3 cases would have required application of that authority to the New Hampshire abortion statute. Nevertheless, *Ayotte* never mentioned New Hampshire's doctrine.

The Court, moreover, relied on a curious assortment of authorities for support. Most of the cases concerned federal statutes, and thus provided no support for the proposition that a federal test is appropriate for state statutes.[207] Several were from Stage 1 or early Stage 2, a time when the Court applied a general common law of severability in line with *Swift v. Tyson*, the independent system of federal equity, and pre-positivist notions about the source of law.[208] Another cited case, *Brockett v. Spokane Arcades, Inc.*,[209] contradicts *Ayotte* by plainly characterizing the issue as one of state law.[210] Still others simply do not address severability.[211] Notably missing was any discussion of Stage 3 precedent such as *Jane L.* The Court simply provided no authority for federalizing the issue.

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204. 539 U.S. 113, 121 (2003) ("Whether these provisions are severable is of course a matter of state law.").

205. 518 U.S. 137, 139 (1996).

206. *See, e.g.*, Associated Press v. State, 888 A.2d 1236, 1255 (N.H. 2005) (evaluating a severability argument under New Hampshire's doctrine); Claremont Sch. Dist. v. Governor, 744 A.2d 1107, 1112 (N.H. 1999) (same); *see also* Dorf, *Facial Challenges to State and Federal Statutes*, *supra* note 3, at 285 (explaining that in "forty-eight states, whether by judicial decision, statute, or both, courts presume statutes to be severable," and that in the two remaining statutes there is formally a presumption against severance).

207. *See* 546 U.S. at 329–30 (citing to United States v. Booker, 543 U.S. 220, 227–29 (2005); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191 (1999); United States v. Treasury Emp., 513 U.S. 454, 479 n.26 (1995); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987); Regan v. Time, Inc., 468 U.S. 641, 652 (1984); United States v. Grace, 461 U.S. 171, 180–83 (1983); Califano v. Westcott, 443 U.S. 76, 94 (1979); United States v. Raines, 362 U.S. 17, 20–22 (1960); Emp'rs' Liab. Cases, 207 U.S. 463, 501 (1908); Trade-Mark Cases, 100 U.S. 82, 97–98 (1879); United States v. Reese, 92 U.S. 214, 221 (1875)).

208. Cases in this category include *Emp'rs' Liab. Cases*, 207 U.S. at 501; Allen v. Louisiana, 103 U.S. 80, 83–84 (1880); *Trade-Mark Cases*, 100 U.S. at 98–99; and *Reese*, 92 U.S. at 221; *see also* Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 234–35 (1932) (applying Supreme Court precedent to decide the severability of an Oklahoma statute); and Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 289 (1921) (same with respect to a Kentucky statute).

209. 472 U.S. 491 (1985).

210. *See id.* at 506 & n.15 (interpreting a Washington state statute and applying Washington severability doctrine).

211. *See* Virginia v. Am. Booksellers Ass'n., 484 U.S. 383, 397 (1988) (discussing the propriety of applying a narrowing construction to a statute, but not mentioning severability); Tennessee v. Garner, 471 U.S. 1, 11–12 (1985) (finding a Tennessee statute constitutional as applied, and noting that the statute would be unconstitutional in other circumstances, but not expressly discussing severability).

It is also doubtful that the new doctrine can claim justification in the small number of aberrational cases involving religious education and reproductive rights. The argument in favor of such a justification would have to proceed as follows: The Establishment Clause and reproductive rights cases established that a federal test is appropriate for state statutes on those specific subjects; *Ayotte* concerned a state statute on abortion and thus involved a statute implicating reproductive rights; therefore, a federal severability test was appropriate in *Ayotte*. Such an argument seems obviously unpersuasive for several reasons. First, the Court did not cite to any of the aberrational cases, and thus appeared not to consider them significant.[212] Second, none of the principles discussed in the decision had anything to do with the subject matter of the statute at issue;[213] *Ayotte* thus framed itself more generally than would have been appropriate for a statutory subject-specific choice-of-law rule. Finally, it is difficult to conceive of an organizing principle that would have a federal rule control in the context of Establishment Clause and reproductive rights cases, but absolutely nowhere else.

Nor can broader contextual changes from Stage 3 to *Ayotte* satisfactorily explain the doctrinal change. The Court did not attempt such a justification under principles of stare decisis.[214] Nor, it seems, could such an attempt have succeeded. The Court has explained that departure from an existing rule may be permissible if the rule has proven unworkable or been abandoned, or if facts have changed in a way that negates the rule's original justification.[215] But none of these conditions were present. Far from proving unworkable, the Court had followed the Stage 3 rule with little difficulty in cases such as *Jane L.*[216] The Court's affirmation of the rule as recently as 2003 demonstrated that it had not been abandoned.[217] There were no apparent factual or doctrinal changes that negated the rule's rationale.[218] And there had been no major philosophical shift away from positivism.[219] In short,

212. *Ayotte*, 546 U.S. at 329–30.

213. *Id.*

214. *Compare* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (identifying factors that influence whether the Court must adhere to its precedent) *with Ayotte*, 546 U.S. at 329–31 (failing to explain, in terms of stare decisis, the refusal to treat severability as a matter of state law).

215. *Casey*, 505 U.S. at 854–55.

216. *See* Leavitt v. Jane L., 518 U.S. 137, 139 (1996) ("Severability is of course a matter of state law.").

217. Virginia v. Hicks, 539 U.S. 113, 121 (2003) ("Whether these provisions are severable is of course a matter of state law.").

218. *See, e.g.*, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2535–36 (2011) (applying *Erie* to determine whether a rule of federal common law was appropriate).

219. *See, e.g.*, Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1131 (2003) ("The dominant, contemporary position in analytical jurisprudence is positivism."); Abner S. Greene, *Can We Be Legal Positivists Without Being Constitutional Positivists?*, 73 FORDHAM L. REV. 1401, 1401 (2005) ("Most of us are, to one degree or another, legal positivists.").

nothing about the content or context of the Court's modern severability precedent justified the new doctrine.

To illustrate the precedential problem in a different way, the new doctrine's closest analogues come from Stage 1 cases such as *Keokuk*[220] and *Stanley*.[221] Now, as then, the Court substitutes the decisional law of states with a single, general common law that applies regardless of the type of statute under review.[222] Now, as then, the resolution of the choice-of-law question seems to happen without an acknowledgement that the question even exists. *Ayotte* is in this sense a throwback, an atavism at odds with the last century of doctrinal evolution. But the new general law is in a sense even more robust and problematic than its historical counterpart. More robust because, while federal courts under *Swift* still applied state statutory law, the logic of *Ayotte* requires federal courts to apply the guidelines even if the doctrinal alternative is embodied in a state statute.[223] And more problematic because, while the *Swift*-era decisions cohered with the transcendence premise, *Ayotte* and its progeny clash with the Court's modern positivism.

B. An Erie *Problem*

The new doctrine is also difficult to reconcile with *Erie*. The basic doctrine of *Erie* is that, where federal positive law does not impose a rule of decision, federal courts can develop the rule as a matter of federal common law rather than apply competing state law only if (1) there is a federal constitutional or statutory enactment that places the subject of the rule within the scope of federal power and (2) it is, on balance, appropriate to develop the rule upon consideration of the extent of the federal need for it and the extent to which it would interfere with state interests.[224] The second inquiry

220. Packet Co. v. Keokuk, 95 U.S. 80 (1877); *see supra* notes 34–37 and accompanying text.

221. Supervisors v. Stanley, 105 U.S. 305 (1881); *see supra* notes 39–49 and accompanying text.

222. *Cf.* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1267 (1996) (contending that the Supreme Court's creation of federal common law threatens state authority in areas where state and federal sovereignty overlap).

223. *See* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329–31 (2006) (developing a common law of severability for state statutes notwithstanding the availability of state law alternatives).

224. *See* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2535–36 (2011) (applying *Erie* in considering whether to develop a rule of federal common law); Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535–38 (1958) (detailing considerations that weigh on the determination whether federal law should apply in place of state law in diversity cases); *see also, e.g.*, Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (recognizing federal common law as appropriate when the two conditions are met); United States v. Kimbell Foods, Inc., 440 U.S. 715, 726–28 (1979) (describing the circumstances in which federal common law is warranted). For a discussion of these requirements, see Field, *supra* note 26, at 886–88 & n.12. Professor Field explains that the Court's "broad formulation of judicial power" has rendered the first requirement so permissive that the second is independently determinative, but still contends that a court must at least "point to a federal enactment, constitutional or statutory, that it interprets as authorizing the

often hinges on whether the application of state law will discourage forum shopping and avoid "inequitable administration of the laws,"[225] but other relevant factors have included whether there is a need for national uniformity, whether the United States is a party to the litigation, whether there is well-developed state law on the subject, whether there is a need for a uniform rule within a state, and a general presumption in favor of state over federal common law.[226] Where the power to create federal common law is absent, state law operates "of its own force," and decides the question at issue unless the state law is unconstitutional.[227]

1. The Question of Authorization in Enacted Text.—Beginning with the first requirement of *Erie*, is there a specific enactment that authorizes the creation of a federal common law of severability for state statutes? For the most part, no, there is not. Certainly, Congress has not specifically directed the application of a federal rule. The Court, moreover, did not attempt to ground any of the *Ayotte* guidelines in a specific federal statutory or constitutional provision.[228] There was simply no mention of enacted authority in the decision.

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federal common law rule." *Id.* at 887–88. Scholars have proposed a variety of alternative formulations. *See, e.g.*, Clark, *supra* note 222, at 1251 (arguing that "transactions governed by [a rule of federal common law] must fall beyond the legislative competence of the states" and "must operate to further some basic aspect of the constitutional scheme"); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 287 (1992) (arguing that "federal courts can make common law only in reference to a federal statute"); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 46–47 (1985) (arguing that a federal common law rule of decision is permissible if it can be "derived from conventional textual interpretation" of federal constitutional, treaty, or statutory law; if it is "necessary in order to preserve or effectuate some other federal policy that can be derived from the specific intentions of the draftsmen of an authoritative federal text"; or if there is evidence "that lawmaking power with respect to [the] issue has been delegated to federal courts in a reasonably circumscribed manner"); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 766–67 (1989) (arguing that all federal common law is illegitimate under the Rules of Decision Act); Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 646–47 (2006) (proposing that a court should choose to develop a rule of federal common law if "(1) states would be tempted to favor through their laws either themselves or their own citizens and (2) other compelling reasons . . . exist"); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 805 (1989) (arguing that "there are no fundamental constraints on the fashioning of federal rules of decision"). I have relied most heavily on Professor Field's analysis because it is one of the most permissive; if a general severability doctrine is invalid under her reading of *Erie*, it is also invalid under others that are more demanding.

225. Hanna v. Plumer, 380 U.S. 460, 468 (1965); *see also* Adam N. Steinman, *What is the* Erie *Doctrine? (And What Does it Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 265–67 (2008) (discussing *Erie*'s "twin aims" of discouraging forum shopping and avoiding inequitable administration of the laws).

226. *See* Field, *supra* note 26, at 953–62 (discussing these categories); *see also* Richard D. Freer, Erie*'s Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1107 (1989) (explaining that the Court has left unclear how *Erie*'s "twin aims are to be applied and how, if at all, [Byrd v. Blue Ridge Rural Elec. Coop.] continues to fit into the vertical choice of law equation").

227. Field, *supra* note 26, at 886–87 (internal quotation omitted).

228. *See Ayotte*, 546 U.S. at 328–30 (citing only case law in establishing the guidelines).

This omission does not end the analysis, however. Under a slightly more permissive approach to *Erie*, we might conclude that *Ayotte* is legitimate as long as it is possible to trace the decision's stated rationales to one or more authorizing texts. Begin, then, by considering those rationales: The first guideline was that federal courts should "try not to nullify more of a legislature's work than is necessary,"[229] and was based on the concern that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people."[230] The second guideline was that federal courts should "restrain [themselves] from 'rewrit[ing] state law to conform it to constitutional requirements' even as [they] strive to salvage it,"[231] and was based on the notion that judicial remedies must "not entail [the] quintessentially legislative work" of statutory revision.[232] The final guideline was that federal courts should determine whether to sever by asking whether the "legislature [would] have preferred what is left of its statute to no statute at all,"[233] and was premised on the idea that a "court cannot 'use its remedial powers to circumvent the intent of the legislature.'"[234]

With these in view, and considering that *Ayotte* involved a state statute, several potential authorizing texts emerge. We could view the first rationale as a way of tethering its corresponding guideline to state level majoritarianism, as protected by the Tenth Amendment[235] or perhaps the Guarantee Clause.[236] We could view the second as a way of tethering its corresponding guideline to inherent limits on the remedial powers of federal courts. Severance, in other words, would be inappropriate under Article III where it requires federal courts to make complex statutory revisions not suited to the judicial function.[237] Finally, we could view the third as having its basis in federalism. Under this view, severance consistent with legislative intent would be appropriate as a way of honoring the intent of a state

229. *Id.* at 329.

230. *Id.* (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion)) (internal quotation marks omitted).

231. *Id.* (quoting Virginia v. Am. Booksellers Ass'n., 484 U.S. 383, 397 (1988)).

232. *Id.*

233. *Id.* at 330.

234. *Id.* (quoting *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part)).

235. *See* U.S. CONST. amend. X (reserving to the states those powers that are not delegated to the United States or prohibited to the states by the Constitution); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1199–201 (1991) (discussing the Tenth Amendment's "popular sovereignty motif"); Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 913 (2008) (arguing that the Tenth Amendment refers to the "people's right . . . to reserve certain powers to the control of local majorities who may at their discretion assign them into the hands of their state governments").

236. *See* U.S. CONST. art. IV, § 4 (guaranteeing a "Republican Form of Government" to every state); *cf.* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 762 (1994) (arguing that the Guarantee Clause "reaffirms . . . the centrality of popular majority rule").

237. *See* U.S. CONST. art. III, § 2 (granting federal courts only "the judicial Power").

legislature as a component part of a state government whose authority the Tenth Amendment protects from federal encroachment.[238]

Most of these possibilities, however, do not hold up under scrutiny. Start with state majoritarianism and its corresponding textual embodiments. Here, two problems emerge: First, an attempt to serve that principle by means of a federal doctrine is largely self-defeating, for the doctrine inevitably displaces many state law severability rules that have been developed by popularly elected judges.[239] Second, the Guarantee Clause is simply a poor candidate for an authorizing text. The argument under the Clause would have to be that the Clause protects state-level majoritarianism; that state common laws that, for example, disfavor severance are anti-majoritarian because they yield excessive judicial interference with popular enactments; and that the Clause therefore calls for a federal override of such state common laws to assure to states a "Republican Form of Government." The argument's limitations are severe and numerous: The majoritarian interpretation of the Clause is contested.[240] The Court has historically held the Clause to be nonjusticiable.[241] And it is doubtful that state laws on severance could interfere with state majoritarianism so significantly as to necessitate a federal response, particularly given that most state doctrines reflect a majoritarian preference in favor of severance, and have been developed by popularly elected judges.[242] Finally, the Guarantee Clause does not regulate such a fine detail about the manner of state governance.[243]

Now consider federalism and the Tenth Amendment. Here, too, there is a problem of paradox. Imagine that a federal court finds part of a state act to

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238. *See id.* amend. X (limiting federal powers to those that the Constitution has delegated to the United States).

239. Thirty-eight states use some form of popular election system to select judges. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1813 n.237 (2010) (reporting that twenty-two states elect their judges and sixteen states "use a combination of initial appointment and retention elections").

240. *See, e.g.*, G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787, 798–802 (1994) (arguing that the Republican Government mentioned in the Guarantee Clause does not refer to a majoritarian democracy).

241. Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051, 1084, 1089 (2010); *see also, e.g.*, Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 151 (1912) (holding Guarantee Clause claims to be nonjusticiable). *But see* New York v. United States, 505 U.S. 144, 184–85 (1992) (explaining that the Clause has been treated as nonjusticiable for a long time, but also suggesting that that rule may not be categorical).

242. *See* Dorf, *Facial Challenges to State and Federal Statutes*, *supra* note 3, at 285 (explaining that in "forty-eight states, whether by judicial decision, statute, or both, courts presume statutes to be severable," and that in the two remaining states there is a formal presumption against severance); Gluck, *supra* note 239, at 1813 n.237 (noting that twenty-two states elect their judges and sixteen states combine initial appointment with retention elections).

243. *See* Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEXAS L. REV. 807, 830 (2002) ("The drafting history and subsequent debate on the Guarantee Clause shows that it was designed to allow the states great flexibility to alter their optional characteristics.").

be unconstitutional, that severance would be inappropriate under the applicable state law test, and that the court nevertheless severs after determining that doing so is appropriate under *Ayotte*. One could argue that federalism and the Tenth Amendment support this result as a way of minimizing federal judicial interference with the operation of the valid parts of the state act, notwithstanding the contrary state law result. But severance on such reasoning could come only through a simultaneous refusal to honor the state law doctrine—paradoxically, the court would refuse to follow state law in the name of federalism. With federalism-inspired severance and state law pushing in opposite directions, federalism and its corresponding text hardly provide a persuasive authorization for the new doctrine.

Moreover, putting aside whether the textual embodiments of state-level majoritarianism and federalism are *capable* of authorizing *Ayotte*, it does not even appear that the Court had them in mind. To understand why, it is important to recognize that there was a disconnection between the type of statute under review and the case authority from which the Court drew the guidelines' supporting principles. In establishing each guideline, the Court simultaneously relied upon some cases involving state statutes, and others involving federal statutes, as if there were no difference.[244] By relying equally upon both types of precedent, the Court implied that the justification for the guidelines does not depend on the sovereign source of the statute under review. The Court's recent use of *Ayotte* in *National Federation of Independent Business* and *Free Enterprise Fund* to decide the severability of parts of federal statutes seems to confirm this view.[245] And yet, the ability of state majoritarianism and federalism to serve as justifying principles *does* depend on statutory source, as neither is implicated in federal review of federal legislation, where questions about vertical allocation of power are absent. The disconnection shows that the guidelines' justification must lie elsewhere.

This leaves Article III limits on the remedial powers of federal courts—referenced as the justification for the second *Ayotte* guideline[246]—as the last potential basis for a rule of federal common law on the severability of state enactments. Unlike federal guidelines that might displace state law in attempts to serve principles of state majoritarianism and federalism, this guideline does not undermine Article III limits in attempting to reinforce them. There is, therefore, no problem of paradox. Interpreting the second guideline as a reflection of Article III limits, moreover, resolves the puzzle

244. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329–30.

245. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607–08, 2642 (2012) (citing *Ayotte* in determining the severability of a provision in the federal Patient Protection and Affordable Care Act); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010) (citing *Ayotte* in determining the severability of part of the federal Sarbanes-Oxley Act). Like *Ayotte*, both of these decisions cited to a mix of precedent involving federal and state laws.

246. *Ayotte*, 546 U.S. at 329–30.

presented by *Ayotte*'s mix of citations[247]: Because the limits apply regardless of the state or federal nature of a statute under review,[248] precedent involving either federal or state statutes could provide support.[249] Indeed, one can fairly interpret both of the key cases that *Ayotte* cited under the second guideline as having themselves relied upon Article III limits, even though one reviewed a state statute and the other a federal statute.[250] Article III is therefore a good candidate to be the second guideline's authorizing enactment.

Article III, however, does not justify the other guidelines. Consider the arguments for such a justification. One might be that the first and third guidelines simply reflect a different type of Article III limit on judicial power—not a limit that *disfavors* severance where it would require judicial exercise of legislative powers, as with the second guideline, but rather a limit that *favors* severance where it would help the federal judiciary constrain the sweep of declaratory and injunctive remedies that frustrate the intent of state legislators and the will of the people who have elected them.[251] Article III constraints, on this view, can either preclude or require severance of state statutes, depending on the circumstances. Notice, however, what this argument does—it incorporates principles of state majoritarianism and

247. *See supra* notes 207–11 and accompanying text.

248. *See, e.g.*, Rock Energy Coop. v. Village of Rockton, 614 F.3d 745, 747–50 (7th Cir. 2010) (holding that diversity jurisdiction was present but dismissing because the action was not ripe for review); Cleveland Hous. Renewal Project v. Deutsche Bank Trust Co., 621 F.3d 554, 560–61 (6th Cir. 2010) (holding that diversity jurisdiction was present and that the plaintiff had Article III standing).

249. The precise nature of the Article III prohibition morphs somewhat depending upon whether a federal or state statute is under review. Where a federal statute is involved, Article III operates in tandem with Article I to preclude the federal judiciary from exercising legislative powers and affirmatively to reserve those powers for Congress. *Compare* U.S. CONST. art. I, § 1 (allocating all legislative powers belong to Congress) *with id.* art. III, § 1 (vesting the judicial power in the Supreme Court and inferior courts established by Congress). Separation of powers, in other words, enters into the analysis, and the relevant constitutional limits are identifiable through a comparison of the scope of federal judicial and legislative powers. Where a state statute is involved, by contrast, the remedial limits must emerge from inherent, Article III limits on the federal judiciary because there is no question of intrusion upon the federal legislative domain. *See* Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988) (acknowledging Article III limits on the power of a federal court to change a state statute). Horizontal separation of powers ceases to be relevant, and the constitutional limits must be identifiable without reference to the powers of another federal branch. The contextually shifting nature of the limits and the means of their identification make it harder to conclude that the *Ayotte* Court had a specific constitutional enactment in mind as authorization for the second guideline. There is a good argument, however, that a morph of this kind is not significant enough to conclude that the second guideline lacks a supporting constitutional enactment. The shift from state to federal statutory review does not alter the fundamental inquiry, which is simply whether federal courts possess the power under Article III to engage in complex statutory revisions typically undertaken by legislatures.

250. *Cf. Am. Booksellers Ass'n*, 484 U.S. at 397 (noting that the Court cannot rewrite a state statute to make it constitutional); United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 479 (1995) (refusing to rewrite a federal statute in light of the Court's "obligation to avoid judicial legislation").

251. *Ayotte*, 546 U.S. at 329.

federalism into the Article III concept of judicial power. By doing so, it recreates the paradoxes that arose from attempts to serve textual embodiments of those very same principles in, respectively, the Guarantee Clause and Tenth Amendment. The paradox arises because the creation of mandatory federal guidelines in the name of these principles simultaneously undermines them. The guidelines undermine state majoritarianism by displacing many state law doctrines that have been developed by popularly elected state judges, and by limiting the significance of potential future developments in these doctrines, and they undermine federalism by displacing a traditional domain of state common law. Attempting to ground the principles in Article III does not ease the paradox.

Another possible interpretation also seems unpersuasive. Under this interpretation, the first and third guidelines reflect inherent limits on federal judicial power. The guidelines, in other words, favor severance not as a way to honor state majoritarianism and federalism that are incorporated into the Article III concept of judicial power, but rather because federal judicial power simply does not include the power to issue untailored equitable relief. The weakness of the argument is that it is inconsistent with the guidelines themselves. For if Article III mandates remedial tailoring, then Article III requires severance in every case of partial unconstitutionality in which severance is not prohibited—a view that *Ayotte* simply rejects. The first guideline is that courts should "*try* not to nullify more of a legislature's work than is necessary,"[252] not that they *must* tailor. And if Article III always requires or prohibits severance because of the nature of federal judicial power, then there is no room for the third guideline's instruction to sever only when doing so would be consistent with legislative intent.[253] We are left, therefore, with a precedent in which enacted text authorizes only a minority part of *Ayotte*'s announced decisional rule.

In summary, *Ayotte* operates in serious tension with the first requirement of *Erie*, at least as it has been traditionally understood. The Court did not point to any federal statute or constitutional provision as authorizing a federal common law for state statutes. For most of the guidelines, moreover, it is difficult even to imagine what such an enactment would be. The first guideline could conceivably have its basis in state-level majoritarianism, as embodied in the Tenth Amendment or perhaps the Guarantee Clause, but that principle weighs against a federal doctrine at least as much as it weighs in favor of it. Likewise, the third guideline could conceivably have its basis in federalism, as embodied in the Tenth Amendment, but federalism weighs against a federal rule that displaces state law. There is, however, a good argument that the Court relied upon Article III as the enacted authorization for the second guideline. But because Article III justifies only the second guideline, we are left with a situation in

252. *Id.* (emphasis added).

253. *Id.* at 330.

which enacted text supports only part of a multifaceted federal decisional rule. Part IV, below, discusses the implications of these conclusions for *Erie*. Part V in turn uses the Article III insight to propose an alternative approach to severability that reconciles *Ayotte*, *Erie*, and Article III.

2. The Question of Federal and State Interests.—Putting aside whether the new doctrine satisfies the first requirement of *Erie*, does it survive the second requirement? In other words, is a federal rule appropriate, given the extent of the federal need for it and the extent to which it would interfere with state interests?[254] Once again, the answer depends on the guideline under review. For the first and third guidelines, the answer is no, because every factor that courts typically consider as part of this inquiry weighs against those guidelines.[255] Those same factors also weigh against the second guideline, but that one holds a trump card because it furthers the supreme federal interest in honoring constitutional limits on federal judicial power.[256]

First consider forum shopping and inequitable administration of the law. *Ayotte* framed the guidelines specifically as limits on federal courts.[257] It did so in connection with the second guideline by referring to unique limits on federal courts' powers to engage in the types of statutory revisions that severance can entail.[258] It also did so with respect to the other guidelines by framing them as applicable to the Court itself, and by implication to other federal courts as well.[259] Notably, *Ayotte* never mentioned state courts.[260] By framing the doctrine in this manner, the decision has created the possibility that either of two different severability tests will apply in a challenge to a given state statute: In state court, a state test will apply because the constraints on federal courts that animate the guidelines will be inapplicable. In federal court, by contrast, *Ayotte*'s federal test will plainly apply. The availability of two severability doctrines could influence the choice of forum by generally encouraging defendants to pick the forum with the doctrine that most favors severance and by encouraging plaintiffs to pick the forum that is more hostile to it. To the extent that state and federal doctrines materially diverge, they could produce different severance outcomes depending only upon whether a federal or state court reviews a

254. *See supra* notes 185–87 and accompanying text.

255. *Cf.* Field, *supra* note 26, at 953–62 (summarizing the factors that the Court has applied in evaluating federal need).

256. *See infra* notes 273–74 and accompanying text.

257. *Ayotte*, 546 U.S. at 329–30.

258. *See id.* (discussing constitutional limits on the Court's power to engage in statutory revision).

259. *Id.*

260. *See Ayotte*, 546 U.S. at 329–31 (omitting any mention of the guidelines' applicability to state courts).

given statutory challenge. Thus, if anything, *Ayotte* encourages forum shopping and inequitable administration of the law.[261]

Other factors also fail to support, and even weigh against, *Ayotte*'s creation of federal guidelines. The Court has relied upon the participation of the United States as a party to litigation as a factor supporting a federal rule,[262] but the United States was not a party in *Ayotte*, and rarely would be in a case of that kind. The Court has suggested that the presence of well-developed state law can weigh against a federal rule,[263] but *Ayotte* developed a federal rule in spite of a significant body of severability precedent from New Hampshire and other state courts.[264]

The Court has further stated that the extent of need for national uniformity weighs in favor of federal common law,[265] but no such need appears to exist with respect to the severability of state statutes. To the extent that there is a federal legal interest in such enactments, it is with respect to their constitutionality. And as in *Ayotte*, substantive federal constitutional law will fulfill that interest by invalidating state statutes to the

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261. *See* Dorf, *Facial Challenges to State and Federal Statutes*, *supra* note 3, at 285 (suggesting that different approaches to severability in federal and state court encourage forum shopping); *see also* Gluck, *supra* note 17, at 1982–83 (discussing how differences in federal and state interpretive methodologies might encourage forum shopping). Even if it were appropriate to read *Ayotte* as dictating a severability test for state and federal courts alike, another problem would emerge: *Ayotte* would displace all state law severability doctrines, and state courts' broad and continuing tendency to apply their own state law tests would be unconstitutional. This displacement would occur because, as federal common law, the *Ayotte* guidelines constitute a form of federal law, backed by the Supremacy Clause. *See* Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964) (discussing the supreme status of federal common law).

262. *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 504–05 (1988) (explaining that contract "obligations to and rights of the United States" are governed by federal law); Clearfield Trust Co. v. United States, 318 U.S. 363, 366–67 (1943) (stating that federal law governs the rights and duties of the United States pertaining to the commercial paper it issues).

263. *E.g.*, De Sylva v. Ballentine, 351 U.S. 570, 580–81 (1956) (deciding the meaning of the word "children" for purposes of federal copyright law by reference to state law); United States v. Savin, 349 F.3d 27, 34 n.4 (2d Cir. 2003) (citing *De Sylva*); *see also* Field, *supra* note 26, at 958–59 (discussing the extent of state law's development on a given subject as a relevant factor for evaluating whether federal common law is appropriate).

264. *See, e.g.*, Associated Press v. New Hampshire, 888 A.2d 1236, 1255–56 (N.H. 2005) (holding that certain provisions of a state statute were severable); Claremont Sch. Dist. v. Governor, 744 A.2d 1107, 1112–13 (N.H. 1999) (holding that a state statute was severable in part); Heath v. Sears, Roebuck & Co., 464 A.2d 288, 297 (N.H. 1983) (holding that some provisions of a state products liability statute were not severable); Carson v. Maurer, 424 A.2d 825, 839 (N.H. 1980) (holding that the valid provisions of a state medical malpractice statute were not separable from the unconstitutional provisions); *see also* Dorf, *Facial Challenges to State and Federal Statutes*, *supra* note 3, at 285 (explaining that in "forty-eight states, whether by judicial decision, statute, or both, courts presume statutes to be severable" and that in the two remaining states there is a rebuttable presumption of nonseverability).

265. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421–27 (1964) (discussing whether state or federal law governs the question before the court); *see also* Field, *supra* note 26, at 953 (discussing need for national uniformity as a factor weighing in favor of a federal rule).

extent necessary.[266] What to do with the presumptively constitutional remainder of a state law—i.e., whether to keep it operational or start afresh—implicates purely state interests about how to carry out state legislative policies on matters of state or local concern. It is hard to imagine why federal uniformity on such matters would be necessary.

The Court has also suggested that there is a presumption in favor of the application of state law over federal common law,[267] but *Ayotte* seems to disregard that presumption. If anything, the liberality with which *Ayotte* developed a federal doctrine suggests a presumption in favor of federal common law over state law. This presumption seemingly permits federal courts to create rules of common law without reference to authorization from an enacted text, and without consideration of traditional concerns about the relative weight of federal and state interests.

Finally, the Court has stated that a need for a uniform rule within a state weighs against federal common law,[268] but *Ayotte* created a federal rule despite such a need: With respect to any given piece of legislation, state legislatures should be able to identify the severability test that will govern in the event of partial unconstitutionality so that statutory language can be drafted to guarantee or preclude severance under that test as desired. But because the *Ayotte* Court framed the guidelines specifically as limits on federal courts, and in doing so guaranteed that different severability laws will apply in state and federal court,[269] state legislatures may have a more difficult time anticipating whether constitutionally risky statutory provisions will prove severable. In theory, this uncertainty should simply influence the manner in which state legislation is drafted.[270] An enacting majority in favor of severance should draft in an effort to guarantee severance even under the state or federal doctrine that least favors that outcome. An enacting majority against severance, in contrast, should draft to ensure wholesale invalidation even under the state or federal doctrine that most favors severance. But busy drafters may simply fail to pay attention to vertical divergences in the doctrine.[271] Moreover, even assuming a legislature's attention to vertical

266. *See* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 326–28 (explaining that the Court's abortion jurisprudence would prohibit some applications of the New Hampshire statute).

267. *See, e.g.*, Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966) (explaining that normally there must be a significant conflict between federal and state law to justify the use of federal common law); *see also* Field, *supra* note 26, at 961–62 (discussing a "mild" presumption in favor of application of state law).

268. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); *see also* Field, *supra* note 26, at 959–60 (discussing *Klaxon*'s identification of intrastate uniformity as a relevant factor in evaluating whether to create federal common law).

269. *See supra* note 258.

270. *Cf.* Gluck, *supra* note 17, at 1981–82 (discussing how federal common law rules of statutory interpretation might affect legislative drafting practices).

271. As an example of legislative inattention, a drafter of the Affordable Care Act has described the omission of a severability clause as an "oversight." Kevin Sack & Robert Pear, *Health Law Faces Threat of Undercut from Courts*, N.Y. TIMES, Nov. 26, 2010, http://www.nytimes.com

choice of law, the potential for the application of either of two separate tests necessarily complicates the task of drafting text and anticipating outcomes. To that extent, statutes may turn out to be severable or unseverable despite a contrary legislative intent.[272]

This uncertainty raises an intriguing comparison with *Swift*. By permitting federal diversity courts to announce federal general law on non-local matters in the absence of a governing state statute, *Swift* created the possibility that different substantive rules would apply depending upon whether litigation happens in federal or state court.[273] By announcing a rule of federal common law that applies to state statutes but operates only on federal courts, *Ayotte* creates the possibility of federal or state doctrine applying, dependent only upon the vertical choice of forum.[274] Both, therefore, are responsible for generating rule uncertainty. And yet the cause of the uncertainty differs. With *Swift*, the uncertainty arose in part because federal courts inconsistently took advantage of their ability to decline to apply state decisional law.[275] Uncertainty also arose because the Supremacy Clause did not confer upon "general" federal common law the status of supreme federal law,[276] which meant that general federal common law could not displace state law in state court to create a uniform rule even if it purported to do so. With *Ayotte*, by contrast, the Supremacy Clause confers the status of supreme federal law upon the severability guidelines as a form of federal common law.[277] The guidelines, however, do not displace state severability law in state court because, by their own terms,[278] they operate only upon federal courts.

The above considerations weigh against all three of the *Ayotte* guidelines. There is one supreme federal interest, however, that supports the second guideline: adherence to constitutional constraints on federal judicial

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/2010/11/27/us/politics/27health.html?pagewanted=all&_r=0. If Congress is capable of overlooking severability altogether, one can easily imagine how legislatures might neglect choice-of-law rules and other doctrinal nuances in the drafting process.

272. *See* Campbell, *supra* note 3, at 1521 (noting how courts occasionally ignore inseverability clauses, which are generally considered legislatures' explicit instructions on the matter).

273. *See* Field, *supra* note 26, at 899–900 (describing how *Swift* led federal and state courts at times to apply different substantive rules).

274. *See supra* notes 220–24 and accompanying text.

275. *See* Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1242 n.25 (1999) (noting that the *Erie* Court overruled *Swift* in part because "state courts' persistence in adhering to their own views of common law issues prevented uniformity[,] the absence of clear distinctions between issues of 'general law' and of 'local law' created yet another level of uncertainty," and the *Swift* doctrine "prevented uniformity in the administration of the state's laws").

276. Craig Green, Erie *and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661, 665 (2008).

277. *See* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 321, 329–30 (establishing guidelines that federal courts should use in determining the severability of a statute); *see also* Friendly, *supra* note 261, at 405 (discussing the supreme status of federal common law).

278. *See supra* notes 220–24 and accompanying text.

power. The second guideline serves this interest by discouraging severance that exceeds Article III limits.[279] A federal interest of this nature is sufficient under *Erie* to outweigh competing state interests in the application of their own laws,[280] and therefore justifies a refusal to apply them.

Once again, however, we have completed a step in the *Erie* analysis under which the new doctrine makes only partial sense. The overriding Article III interest supports the second guideline, but neither of the others. Indeed, if anything, Article III operates in tension with the other guidelines by precluding some types of severance that they would encourage.[281] And the risks of forum shopping and inequitable administration of law, in addition to several other factors, also weigh against those guidelines. We are thus left with a set of three guidelines, of which only one can draw support from any federal interest commonly recognized under *Erie*. The rest operate without a comparable supporting interest, and against a current of considerations that strongly favor the application of state law. As with the first stage of the *Erie* analysis, we must conclude that only a minority part of *Ayotte* is justifiable under traditional principles of judicial federalism.

C. *Other Explanations*

The new doctrine's tension with other severability precedents and *Erie* gives rise to questions about why the Court adopted it. Here, I consider two potential unstated explanations: (1) mistake and (2) the Roberts Court's stated preference for as-applied challenges. While the latter is an intriguing possibility, I conclude that it fails to alleviate the problems created by the new doctrine.

The first hypothesis is that the new doctrine is simply a mistake. The Court, in other words, did not mean to federalize the severability of state statutes, or at least did not recognize that doing so would directly conflict with the Stage 3 precedent. The primary evidence in support of this view is *Ayotte*'s failure even to acknowledge the prior doctrine—if the intent had been to federalize severability, then surely the Court would have stated as much.

There is substantial evidence, however, that the Court must have been aware of the old doctrine when it adopted the new. *Ayotte* cited to nearly twenty decisions dating back to 1875,[282] including multiple Stage 3 decisions, some of which explicitly framed the severability of state statutes

279. *See Ayotte*, 546 U.S. at 329–30 (discussing how it is not the federal judiciary's place to perform the legislative task of rewriting state law to conform to constitutional limits).

280. *See, e.g.*, Bauer, *supra* note 275, at 1248 ("[I]f the federal rule is a product of constitutional command, federal law will always prevail, since the Constitution is the supreme law of the land."); Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in its* Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 971 (1998) ("If the federal rule is one of constitutional law, it governs, period.").

281. *Ayotte*, 546 U.S. at 329–30.

282. *Ayotte*, 546 U.S. at 329–30.

as a matter of state law.[283] The question of remedy was the decision's sole focus.[284] A state statute was obviously under review. One of the attorneys mentioned at oral argument that New Hampshire had a law of severability.[285] And several briefs filed with the Court, including the Petitioner's, explicitly argued that severability was a matter of state law, and in turn argued for or against that relief under New Hampshire law.[286] Given this context, it is hard to believe that the Court was simply unaware of the post-*Erie* rule.[287] And the Court has not since suggested that *Ayotte* was in any way mistaken.

The second hypothesis is that the Court federalized the severability of state statutes to alleviate a tension between the Stage 3 precedent and the Court's stated preference for as-applied challenges. The story here goes like this: The Roberts Court has repeatedly expressed a preference for as-applied challenges over facial challenges.[288] The distinction between the two, and thus the justification for the preference, requires a liberal severability doctrine—if the law disfavors or prohibits severance, the result of a successful as-applied challenge will tend to mirror that of successful facial challenges by dictating total invalidation of the statute.[289] This follows from the so-called valid-rule requirement, which holds that partially invalid statutes cannot remain operative because litigants have a "right to be judged in accordance with a constitutionally valid rule of law."[290] By contrast, if

283. *See id.* (citing Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985) and Dorchy v. Kansas, 264 U.S. 286, 289–90 (1924)) (discussing the role of state courts in ascertaining legislative intent and application of state law).

284. *Id.* at 323.

285. Transcript of Oral Argument at 26, *Ayotte*, 546 U.S. 320 (No. 04-1144).

286. *See* Brief for Petitioner at 43–46, *Ayotte*, 546 U.S. 320 (No. 04-1144) (citing Leavitt v. Jane L., 518 U.S. 137, 139 (1996) (per curiam), for the proposition that severability "is a state law issue," and arguing that the New Hampshire abortion statute's contested applications were severable under New Hampshire law); Brief *Amicus Curiae* of the Thomas More Society in Support of Petitioner at 3, 23–25, *Ayotte*, 546 U.S. 320 (No. 04-1144) (same). *But see* Brief for Amici Curiae New Hampshire State Rep. Terie Norelli & Over One Hundred Other State Legislators Supporting Respondents at 11–16, *Ayotte*, 546 U.S. 320 (No. 04-1144) (arguing the contested applications were not severable under New Hampshire law); Brief of *Amici Curiae* NARAL Pro-Choice America Foundation, et al., in Support of Respondents at 13, *Ayotte*, 546 U.S. 320 (No. 04-1144) (discussing a prohibition on judicial rewriting of statutes under New Hampshire law).

287. Stephen Gilles has suggested that *Ayotte* reflected a "compromise in which the liberal Justices agreed to follow the Court's normal remedial practices, and the conservative Justices agreed to let the lower courts apply the 'significant health risks' test as described and applied in *Stenberg*." Stephen G. Gilles, Roe*'s Life-or-Health Exception: Self-Defense or Relative-Safety?*, 85 NOTRE DAME L. REV. 525, 609 (2010). Political compromise of some sort may have indeed played a role in the decision, but my view is that *Ayotte*'s approach to remedy was not "normal," at least in view of the Court's historical approach to severability post-*Erie*. *See supra* subpart I(C).

288. *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449–50 (2008) (disfavoring facial challenges because they require speculation, run counter to judicial restraint, and threaten the democratic process); Gonzales v. Carhart, 550 U.S. 124, 167–68 (2007) (stating that the Court should never have considered facial attacks to the Partial-Birth Abortion Ban Act, but that the Act "is open to a proper as-applied challenge in a discrete case").

289. Metzger, *supra* note 3, at 887–88; Fallon, *supra* note 3, at 953.

290. Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3.

severance is easy to obtain, the result of successful as-applied challenges will often be partial invalidation, as the Court's preference intends. The Stage 3 choice-of-law rule, however, required courts to apply state law. Because the law of some states treats severance with disfavor, the Stage 3 rule created a risk that federal courts would have to declare statutes entirely void even in cases involving only as-applied challenges. To this extent, the Stage 3 rule worked against the Court's preference for tailored equitable relief. The hypothesis here is that the Court recognized this tension and adopted the new, liberal severability doctrine for state and federal statutes to ensure that its stated preference for as-applied challenges is a meaningful one. *Ayotte* buttressed the distinction between facial and as-applied challenges by increasing the likelihood that the latter will yield only partial, rather than wholesale, statutory invalidation.

Yet there are reasons to question whether this was the true rationale for the Court's decision. First, the Court did not clearly state a position on the relationship between as-applied challenges and severability under the Stage 3 rule. Second, *Ayotte* was a unanimous decision, but as Gillian Metzger has pointed out, the Justices are not all equally fond of the preference for as-applied challenges.[291] That being the case, it is doubtful that each Justice joined the majority opinion to protect the distinction between facial and as-applied challenges, and the preference is at most a partial explanation for the new general common law.

Moreover, even assuming that the second hypothesis identifies the actual rationale for the new general common law, that rationale seems to fail to resolve the new law's *Erie* problem. If the Court's preference for as-applied challenges is to justify a federal doctrine for state statutes, then the preference must itself have a basis in constitutional text and federal need. As with severability, however, it is difficult to identify what this basis could be. If the constitutional justification for preferring as-applied challenges to state statutes is federalism or deference to state-level majoritarianism, then we once again encounter the problem of paradox, for the Court is federalizing a traditional domain of state common law to ensure that federal courts do not interfere with state statutes. The irony is that the seemingly modest preference for as-applied challenges may have driven some members of the Court to wrest severability from the control of the states.

IV. Implications for *Erie*

The new general common law carries significant practical implications for litigants and legislators and significant doctrinal implications for *Erie*. I have already discussed the practical issues in arguing that the new doctrine

291. *See* Metzger, *supra* note 191, at 798 (explaining that Justices Roberts, Kennedy, and Alito "seem most enamored of the facial/as-applied distinction, while others are often far more skeptical").

creates a risk of forum shopping, inequitable administration of the law, and legislative uncertainty about how to draft severable statutes.[292] In this Part, I discuss the new doctrine's implications for judicial federalism.

To begin, it should be apparent by now that there is a tension between the new doctrine and its stated rationales. *Ayotte* reads as an exercise of judicial restraint, as an attempt to ensure that the federal judiciary does not interfere with the will of popular majorities, encroach upon legislative prerogatives, or flout the intent of Congress or state legislatures. But this restraint is deceiving. The decision deprives states of control over the doctrine that will apply to their statutes in federal court and in turn limits their ability to control the severability of existing state statutes. *Ayotte*, moreover, imposes these limits under what is in operation an extremely robust view of the common lawmaking authority of federal courts. Under *Ayotte*, it seems that federal common law is permissible even beyond the authorization of enacted text, even when stare decisis suggests otherwise, even when state law has historically covered a given subject, and even when in excess of federal need. If *Ayotte* carries a broader commentary on judicial federalism, it is that federal courts can create and apply federal common law in place of state law with almost no restrictions. Insofar as the *Ayotte* Court intended to reinforce principles of federalism or judicial restraint, it did so in self-defeating fashion.[293]

Putting aside the implausible view that *Ayotte* somehow invalidates *Erie*, I see two possible conclusions to draw from this analysis: (1) *Ayotte* violates *Erie* or (2) *Ayotte* is a valid exercise of federal common lawmaking that simply reshapes our understanding of *Erie*. Choosing between these options is difficult because the parties' briefing did not present an *Erie* analysis, and it seems that the Court simply did not have the doctrine in mind.[294] Both views, however, have some merit.

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292. *See supra* section II(B)(2).

293. For this reason, suggestions of a recent decline or restriction of federal common law seem exaggerated. *Compare* Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 899–900 (1996) (arguing that Kamen v. Kemper Financial Services, Inc., 500 U.S. 90 (1991), and O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994), suggest a shift toward "restricting the federal common law making powers of the federal courts"), *and* Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 758 (2010) ("The relatively freewheeling era of federal judicial lawmaking (akin to that of a state common law court) to 'fill in the gaps' in a federal statutory regime, sanctioned by such eminent figures as Justice Jackson and Judge Friendly, is long gone."), *with* Merrill, *supra* note 224, at 15–16 ("[W]hile federalism, at least as it was understood in *Erie*, may be 'dead,' what might be called 'judicial federalism' lives on."). If anything, there seems to be a trend *toward* federalization, including by means of a more expansive federal common law. *See, e.g.*, Issacharoff & Sharkey, *supra* note 199, at 1420–28, 1432 (describing a partial federalization of the law of punitive damages and, more generally, a "discernable trend toward federalization"); Tidmarsh & Murray, *supra* note 224, at 586 ("If anything, federal common law is expanding."); Freer, *supra* note 226, at 1090 (arguing that *Erie* is suffering a "mid-life crisis" because "federal courts are simply ignoring *Erie* either overtly, by failing to recognize obvious vertical choice of law issues, or covertly, by stacking the deck against the application of state law").

294. *See generally* Brief for Petitioner, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006) (No. 04-1144) (arguing the New Hampshire Parental Notification Act is constitutional

First consider the possibility that *Ayotte* violates *Erie*. The argument here should be clear by now: Although *Ayotte*'s second guideline reflects Article III limits on judicial power, neither of the other two guidelines can claim justification in an authorizing text or balance of interests, and *Ayotte* is invalid as a result. The argument rests on the premise that the Court's approach to *Erie* has not evolved significantly away from the standard, two-pronged analysis I employed above.[295] It also, however, rests on the notion that *Erie* requires a form of tailoring in the creation of federal common law. On this view, a decision announcing multiple rules or guidelines is permissible only to the extent that each is grounded in enacted authorization and a balance of interests. Any portions not independently grounded in their own enacted texts and federal interests would be impermissible.

I have mixed thoughts about this possibility. On one hand, *Erie* seems to have retained its historical requirement that there be a federal need for a federal decisional rule.[296] In *American Electric Power Co. v. Connecticut*, the Court explained that *Erie* requires "federal courts [to] follow state decisions on matters of substantive law appropriately cognizable by the states," but also permits "federal decisional law in areas of national concern."[297] Thus, the general absence of a federal need for a federal severability doctrine for state statutes suggests, at the very least, serious tension between *Ayotte* and *Erie*. Similar tension also arises from *Ayotte*'s general failure to ground its doctrine in enacted statutory or constitutional authority. On the other hand, *Ayotte*'s unanimity suggests that it is a robust precedent from which the Court is not inclined to distance itself. The idea that *Ayotte* is "wrong," moreover, conflicts with the tradition of construing common law precedents in harmony. And the concept of *Erie* tailoring does not specifically arise in the case law.

The alternative possibility—that *Ayotte* and *Erie* are both valid precedents, and that *Ayotte* simply reshapes our understanding of *Erie*—has both strengths and a weakness. The strengths are that, as a matter of fact, both cases remain binding precedent, and that harmonization is a standard aim of common law interpretation. The weakness is, as explained above, the absence of any indication that the Court meant for *Ayotte* to be a commentary on *Erie*—the parties never made an *Erie* argument and the Court never discussed the decision. In this sense, it seems premature to draw specific doctrinal conclusions about *Erie* based upon *Ayotte*.

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with no mention of *Erie*); Brief for Respondents, *Ayotte*, 546 U.S. 320 (No. 04-1144) (arguing the Act is facially invalid with no mention of *Erie*).

295. *See supra* notes 185–93 and accompanying text.

296. *See* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2535 (2011) (explaining that, under the modern understanding of *Erie*, federal common law "addresses 'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands").

297. *Id.* (quoting Friendly, *supra* note 261, at 405, 422).

It does seem fair, however, to view *Ayotte* as evidence that the Court is not particularly sensitive to *Erie* even when state law is obviously under review and available to decide a substantive legal question. Post-*Erie*, severance had been a matter of state law,[298] and yet the Court saw no need to consider whether *Erie* permitted displacement of that law with a federal rule. There was no apparent consideration of state interests in the application of state law, or apparent sense of need to ground the federal guidelines in specific enacted authorization.

Assume, however, that we can fairly view *Ayotte* as a gloss on the *Erie* doctrine. What conclusions might we draw? Primarily, we could conclude that there is no such thing as *Erie* tailoring. As I have shown, Article III justified only the second *Ayotte* guideline, but the Court saw fit to announce the two others as well, and neither of those had a basis in enacted text.[299] This could suggest that modern *Erie* doctrine wholly permits a rule of federal common law with multiple components, even where enacted text authorizes only a minority of the components—the rest are permissible as outgrowths of or supplements to the authorized part. There is no need, in other words, to match the scope of a rule of federal common law with any enacted authorization. Indeed, rule components not tethered to enacted text need not even be logically required by those that are.

The absence of a tailoring requirement would also extend to *Erie* balancing. In *Ayotte*, a federal interest in honoring Article III limits on judicial power supported the second guideline, but no such interest supported the federal nature of the others. Moreover, all of the other traditional balancing factors seemed to favor the application of state law.[300] Thus, we might fairly conclude that a federal interest in even just part of a federal decisional rule is enough to justify the rule as a whole, even if the accompaniments do not serve the identified federal need, and even if forum shopping and inequitable administration of the law will result.

In summary, *Ayotte* is in serious tension with the standard account of *Erie*. The relationship between the decisions, however, is somewhat uncertain because of the absence of any discussion of *Erie* in *Ayotte*. *Ayotte* might be an aberrational violation of *Erie*, or it might simply demonstrate a contemporary approach to *Erie* that is quite permissive. According to the latter, enacted authorization and federal need for a single element in a federal decisional rule are enough to justify other decisional rules that displace state law even if the latter are not grounded in their own enacted texts, and even if the balance of federal and state interests strongly favors the application of state law. The result of this interpretation would be to allow federal courts to disregard state law and create federal decisional law with few limits, in a fashion that is in some ways reminiscent of the *Swift* era.

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298. *See supra* notes 139–42 and accompanying text.

299. *See supra* section III(B)(1).

300. *See supra* subpart III(B).

V. An Article III Solution

Parts III and IV argued that *Ayotte* was a largely unsupported creation of federal common law, but also suggested that part of the decision can be reconciled with the traditional account of *Erie*. Here, I discuss how the reconciliation might work.

First, briefly recall the Part II argument: *Ayotte*'s first and third guidelines have no basis in enacted statutory or constitutional text, and run against a balance of interests that favor the application of state law. The second guideline, however, reflects Article III limits on federal judicial power, and overcomes the balance of interests in favor of state law by serving a supreme federal interest in ensuring that severance does not transgress constitutional limits. In short, only *Ayotte*'s second guideline comports with traditional *Erie*.

I believe this analysis suggests a means of correcting the *Ayotte* atavism: Abandon the first and third guidelines on the basis of *Erie*, but retain the second and Stage 3's choice-of-law rule. In short, hold that the severability of a state statute is a matter of state law, but also subject that rule to an Article III override in the event that application of the relevant state doctrine would require the completion of a severance that exceeds the limits of federal judicial power. Where the override applies, a federal court would have a specific constitutional basis for and powerful federal interest in declining to apply state law,[301] and for refusing to sever, and *Erie* would be satisfied.

Support for this proposal exists in constitutional text, precedent, and other academic analyses. Begin with text. Article III vests in the federal courts only the "judicial Power of the United States."[302] Thus, we should expect that severance requiring an exercise of powers that are not "judicial" would violate Article III. Precisely what this means in an individual case is unclear, but the Court has suggested that the definition of "judicial power" reflects both "common understanding of what activities are appropriate to legislatures, to executives, and to courts,"[303] and "the power to act in the manner traditional for English and American courts."[304] We can identify the limits of the Article III grant, in other words, by examining governmental

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301. *See, e.g.*, Bauer, *supra* note 275, at 1248 ("[I]f the federal rule is the product of constitutional command, federal law will always prevail, since the Constitution is the supreme law of the land."); Rowe, *supra* note 280, at 970–71 ("If the federal rule is one of constitutional law, it governs, period.").

302. U.S. CONST. art. III, § 1.

303. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992).

304. Vieth v. Jubelirer, 541 U.S. 267, 278 (2004); *see also* Raines v. Byrd, 521 U.S. 811, 840 (1997) (Breyer, J., dissenting) (suggesting that Article III's judicial power is coterminous with the traditional concerns of the courts at Westminster); Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting) ("Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'").

functions commonly or historically understood to be judicial, and inferring that functions not within those understandings fall outside the Article III grant.

The Supreme Court has not elaborated extensively on the common or historical understanding of "judicial power," and many of the cases discussing the subject offer little insight for severability.[305] A few precedents, however, are illuminating. A plurality in *Vieth v. Jubelirer*, for example, explained that "judicial power" permits only actions that are "principled, rational, and based upon reasoned distinctions."[306] *Freytag v. Commissioner of Internal Revenue*[307] concluded that the power excludes the authority to make political decisions.[308] Justice Kennedy's concurrence in *Stewart Organization, Inc. v. Ricoh Corp.*[309] further proposed that while "interpreting and applying substantive law is the essence of the 'judicial power' created under Article III of the Constitution, that power does not encompass the making of substantive law."[310] In line with these views, *Ayotte* suggested that severance is inappropriate for courts where there is "murky constitutional text, or where line-drawing is inherently complex."[311] And *Wyoming v. Oklahoma*[312] suggested that severance is inappropriate where it would require a federal court to ascribe non-ordinary meaning to statutory language.[313] We might conclude, therefore, that state law at odds with these instructions would call for the use of powers that fall outside of the Article III grant and thereby necessitate an override.

Michael Dorf has discussed a similar limit.[314] In his view, federal courts at times hesitate to sever unconstitutional statutory applications because of

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305. *See, e.g.*, Stern v. Marshall, 131 S. Ct. 2594, 2598 (2011) (explaining that entering a final judgment on a common tort claim is a use of the judicial power of the United States); Brown v. Plata, 131 S. Ct. 1910, 1953 (2011) (Scalia, J., dissenting) (arguing that the judicial power extends to injunctions requiring "a single simple act," but not structural injunctions that turn judges into "long-term administrators of complex social institutions"); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995) (explaining that the judicial power is "one to render dispositive judgments"); Missouri v. Jenkins, 495 U.S. 33, 55 (1990) (explaining that a court order directing a local government body to levy its own taxes is "a judicial act within the power of a federal court"); Morrison v. Olson, 487 U.S. 654, 677 n.15 (1988) (explaining that judicial power "does not extend to duties that are more properly performed by the Executive Branch"); Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 816–17 & n.2 (1987) (Scalia, J., concurring in judgment) (explaining that judicial power "is the power to decide, in accordance with law, who should prevail in a case or controversy," and "does not generally include the power to prosecute crimes"); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

306. 541 U.S. at 278.

307. 501 U.S. 868 (1991).

308. *Id.* at 891.

309. 487 U.S. 22 (1988).

310. *Id.* at 38 (Scalia, J., dissenting).

311. 546 U.S. at 330.

312. 502 U.S. 437 (1992).

313. *Id.* at 459–61.

314. Dorf, *Fallback Law*, *supra* note 3, at 326–27.

concerns that doing so "will require them to engage in lawmaking."[315] Indeed, he argues that this was the Court's primary concern in *Ayotte* itself, and concludes that severance can create a "delegation problem" when it requires courts to create wholly new statutory provisions,[316] or completely change the meaning of existing text.[317] The source of these limits, he concludes, is a constitutional prohibition on judicial lawmaking.[318]

I agree with Professor Dorf in part. I certainly agree that limits on federal judicial power require limits on severability, and that severance would generally transgress those limits where it would require a federal court to create statutory text or radically alter the meaning of existing text. My position is simply that such limits may at times justify a refusal specifically to apply state law, and that *Ayotte* is in serious tension with the traditional account of *Erie* to the extent it was not grounded in them.

I also think it is useful, however, to view these limits as reflective of the bounds of "judicial power" in Article III, rather than as a "delegation problem,"[319] for the latter accurately describes the issue in only a subset of cases—i.e., those in which a federal court reviews a federal statute with a severance clause. It does not, for example, comfortably describe the issue when a federal court decides whether to sever part of a state statute, as classic delegation questions involve the transfer of federal legislative power to other branches of the federal government.[320] Where a federal court reviews a state statute, any delegation moves upward rather than horizontally, and thus implicates different constitutional values. Nor does delegation accurately describe the issue when a court must decide whether to sever in the absence of a severability clause. In such cases, there will have been no legislative attempt to transfer lawmaking power to the reviewing court, and yet the concerns about judicial lawmaking seem to retain their force.

A focus on the limits of judicial power rather than on delegation is not a trivial shift—it clarifies that an Article III override must be available regardless of the type of statute under review. Because Article III limits federal judicial power in actions challenging either federal or state statutes, an override of the outcome dictated by an applicable severability doctrine may be necessary in either context. And because Article III limits federal

315. *Id.* at 326.

316. *Id.* at 326–27.

317. *See* Dorf, *The Heterogeneity of Rights*, *supra* note 3, at 280–81.

318. Dorf, *Fallback Law*, *supra* note 3, at 326–27.

319. *See id.* (discussing the delegation problem).

320. *See, e.g.*, Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 413 (2008) (discussing how Article I imposes constraints on "Congress's ability to transfer legislative power to other branches"); John C. Yoo, *Rejoinder: Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305, 1332 (2002) ("Delegations, when they occur, run in only one direction, from Congress to either the executive branch or, in limited circumstances, to the courts.").

judicial power regardless of the content of a statute under review, an override may be necessary even where a statute does not contain a severability clause.

Scholars who have explored original intent with respect to the Article III concept of "judicial power" corroborate in general terms the propriety of a broadly available override. Unsurprisingly, there is disagreement about precisely what the original intent was, and what it suggests about the bounds of judicial power.[321] There is no disagreement, however, that original intent supports limits of some form. On the side favoring a more expansive reading of judicial power, William Eskridge has argued that the Founders were "functionalist in their orientation" toward separation of powers, "emphasizing checks and balances more than stringent separation of functions," and expected the judiciary "to strike down unconstitutional laws, trim back unjust and partial statutes, and make legislation more coherent with fundamental law."[322] In support of this view, Professor Eskridge has found that state courts of the Founding Era engaged in practices such as extending slightly the reach of some statutory text, and, more commonly, narrowing the breadth of other text through "minor judicial surgery."[323] He has also concluded from the record of the debate at the Philadelphia Convention that the "strongest hypothesis is that the delegates both assumed and accepted the traditional rules and canons of statutory interpretation" employed in the state cases.[324] From his review, the "ratifying debates support, perhaps strongly, the proposition that federal courts would have" powers to narrow the reach of statutes to the extent they were unconstitutional and, in other cases, possibly to extend textual reach as well.[325]

Even under this account, the Founders envisioned a judicial power of statutory revision with limits. Professor Eskridge agrees that the "Framers' understanding of separation of powers cautions against judges' naked substitution of their own policy preferences for those of the legislature,"[326] concludes that the originalist case for a judicial power to supplement

321. For an analysis supporting a more expansive originalist conception of judicial power with respect to statutory interpretation, see William N. Eskridge, *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001). For more limited originalist accounts, see John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) and Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference With the Judiciary's Structural Role*, 53 STAN. L. REV. 1 (2000). For an analysis of original intent concerning judicial power to issue equitable remedies, see John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121 (1996).

322. Eskridge, *supra* note 321, at 994–95.

323. *Id.* at 1018–22.

324. *Id.* at 1036–37.

325. *Id.* at 1040–57.

326. *Id.* at 1039.

statutory text is weaker than the case for the power to narrow,[327] and finds, as noted above, that the revision power typically enabled only minor changes.[328] Historical analyses by other scholars suggest that the judicial power would permit revision only where principled and in accordance with canons of statutory interpretation,[329] or where faithful to legislative intent.[330] Although it is risky to draw firm conclusions about severability from these findings, it does seem safe to say that originalist accounts loosely align, even in their variety, with the notion of an Article III override. At most, those accounts would differ simply in their recommendations as to when the override should trigger, with the expansive accounts supporting a trigger that is less active.

My proposal is somewhat atypical insofar as it grounds the override in limits implicit in Article III's grant of judicial power. To the extent that the Court has found limits on such power, it has usually been by restricting the circumstances in which the power applies,[331] rather than by restricting the nature of the power itself. Doctrines such as standing, ripeness, and mootness, for example, elaborate on Article III's case-or-controversy requirement, but say little about the extent of a federal court's remedial powers once a case or controversy is present.[332] Similarly, Eleventh Amendment jurisprudence focuses on the circumstances in which federal judicial power may be used against states, rather than what that power enables where sovereign immunity has been abrogated or waived.[333] These tendencies reflect the text of the Constitution itself, which discusses federal judicial power by identifying the types of disputes to which it extends, rather than by explaining directly what it is.[334]

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327. *See, e.g.*, *id.* at 1057 ("If the ratifying debates are inconclusive as to any matter, it is the suppletive power. They are clear as to, and entirely supportive of, the ameliorative and voidance powers.").

328. *See id.* at 1018 (explaining that "judicial extensions of statutes were slight" in the cases Eskridge found); *id.* at 1022 (noting that "[m]inor judicial surgery was the norm").

329. *See, e.g.*, Molot, *supra* note 321, at 33–36 (explaining how Federalists eased Anti-Federalist concerns about judicial power over statutory interpretation by emphasizing that stare decisis and canons of construction would restrict the bounds of permissible interpretation).

330. *See, e.g.*, Manning, *supra* note 321, at 9.

331. *See, e.g.*, Summers v. Earth Island Inst., 129 S. Ct. 1142, 1148–49 (2009) (describing the doctrine of standing as one of several that limit the circumstances in which federal courts can exercise Article III power).

332. *See, e.g.*, Sprint Comms. Co. v. APCC Servs., Inc., 554 U.S. 269, 298–99 (2008) (Roberts, C.J., dissenting) (arguing that jurisdiction was absent because the respondents lacked standing).

333. *See, e.g.*, Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267–68 (1997) (discussing the scope of Eleventh Amendment immunity).

334. U.S. CONST. art. III, §§ 1 & 2; U.S. CONST. amend. XI; *see also* Yoo, *supra* note 321, at 1146 ("Sections 2 and 3 of Article III do nothing to define . . . what the Constitution means by the 'judicial Power.' Indeed, Section 2 only describes the classes of cases upon which the federal courts may exercise their judicial power. Section 2[] . . . presumes that the judicial power already exists."); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1176–77 (1992) ("The Vesting Clause of Article III must be read as a grant of power; indeed, it appears to be the only *explicit* constitutional source of the federal judiciary's authority to act.") (emphasis in original).

There is certainly no reason, however, why limits on severability cannot be grounded in the grant of judicial power. Plainly, the use of the adjective "judicial" qualifies the type of power conferred upon the federal judiciary in Article III.[335] The various precedents cited above also show that the Court has been willing to rely upon that text at times to avoid certain operations even in actions that have satisfied the case-or-controversy requirement.[336] And accounts of original intent corroborate that Article III, Section 1 simultaneously limits and grants power to federal courts.

The advantages of my proposal are threefold. First, the proposal eliminates a glaring inconsistency in the precedent on whether the severability of state statutes is a matter of state law. By answering that question affirmatively, the proposal harmonizes with the long line of post-*Erie* decisions that *Ayotte* failed even to recognize. Second, the proposal would do better than *Ayotte* at serving *Ayotte*'s animating principles. It would better serve state-level majoritarianism by generally requiring the application of state laws, many of which have been developed by popularly elected judges, rather than decisional law uniformly developed by unelected federal judges. It would honor Article III limits just as effectively as *Ayotte* by making those limits the basis for the override. And it would better serve federalism by preserving an established domain of state law. Finally, the proposal would produce these benefits while harmonizing with the standard account of *Erie*—it would, in other words, displace competing state law only where enacted text and federal interest truly require that result. The Court's mistake in *Ayotte* was not its conclusion that severance can raise problems for Article III, but rather its conclusion that those potential problems justify wholesale federalization of severability doctrine, rather than a merely occasional override of state doctrines.

One limitation of the suggested Article III override is that the possibility of its application will reproduce at least some of the uncertainty created by *Ayotte*. Because the precise point at which the override applies will be unclear *ex ante*, litigants and legislators may have a difficult time anticipating whether state law will decide severance, and in turn whether any given state statute will be severable. The problem exists in part because the Supreme Court has in many ways left unclear the precise extent of federal courts' remedial powers, and, more specifically, the precise point at which severance is too nonjudicial for a court to perform. The problem, however, seems not to be as significant as the one that presently exists. First, as the default source of law under my proposal, state law would typically govern. This tendency would make it easier for legislators and litigants to predict the source of law. Second, judicial elaboration on the Article III override's trigger over time would enhance its predictability. The precedent discussed above provides some guidance on how that elaboration might proceed.

335. U.S. CONST. art. III, § 1.

336. *See supra* notes 254–56.

VI. Conclusion

From the late nineteenth century to 2006, the Supreme Court's approach to the severability of state statutes evolved in a manner that increasingly framed the issue as one of state law. For the most part, this evolution tracked major American jurisprudential developments in the rise of positivism, the decision in *Erie*, and the merger of law and equity. But *Ayotte*, working in tandem with *National Federation of Independent Business* and *Free Enterprise Fund*, recently created a single federal rule of severability that applies in federal court regardless of the state or federal law nature of the statute under review. In many respects, this doctrine has effected an atavistic reversion to pre-*Erie* precedent in which the Court decided severability questions as a matter of general common law under the authority of *Swift v. Tyson*, the independent system of federal equity, and theory of a transcendent source of law. I have tried to show that this doctrine is unjustifiable historically, and a cause for vertical forum shopping and rule uncertainty. I have also argued that *Ayotte* is a setback for judicial federalism, and that the decision's tension with the traditional account of *Erie* raises uncertainty about whether *Ayotte* runs afoul of *Erie* or simply reshapes our understanding of *Erie*'s requirements. In these circumstances, we might justifiably wonder whether *Ayotte* has an *Erie* problem, or whether *Erie* instead has an *Ayotte* problem.

Book Reviews

When History Mattered

LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY. By David M. Rabban. New York, New York: Cambridge University Press, 2013. 564 pages. $85.00.

Reviewed by Alfred L. Brophy*

David Rabban's *Law's History: American Legal Thought and the Transatlantic Turn to History* is one of the finest works of legal history produced in recent memory and one of the finest works of the branch of legal history that deals with intellectual history of the last several decades. *Law's History* is a grand title, but appropriate for a work this capacious in execution and in subject matter. Rabban sweeps across European history from the Middle Ages through the early twentieth century and the United States as he discusses how legal theorists thought about history, about the sources of law, and about law's relationship to economy and society. The book centers on the question primarily of why jurisprudence in the United States took a supposed turn towards historicism in the post-Civil War era and secondarily why it stopped. To answer that, *Law's History* delves deeply into the history of the leading legal theorists of the nineteenth century in the United States and Europe. The major players range from Friedrich Savigny and Rudolf von Jhering in Germany to James Barr Ames, Melville Bigelow, James Coolidge Carter, Thomas M. Cooley, John Chipman Gray, Oliver Wendell Holmes, and James Bradley Thayer in the United States. Rabban concludes with two chapters that link his meticulous reconstruction of late-nineteenth-century historical jurisprudence and the early-twentieth-century turn to the social sciences. Rabban focuses first on Roscoe Pound and then on later legal historians who have assessed the nature of late-nineteenth-century jurisprudence and often found it the domain of rather uninteresting and narrow-minded thought, which was dismissively entitled "mechanical jurisprudence" by Pound[1] and formalism by later legal historians.[2]

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1. *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 607–08 (1908) (coining the term "mechanical jurisprudence" to refer to legal systems that have decayed into technicality).

2. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 16 (1992) (describing late-nineteenth-century legal thought as "formalistic"); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought*

Rabban is engaged in a deep reconstruction of ideas. Part of the mission is to show that late-nineteenth-century historical writers understood that legal doctrine and statutes were embedded in their social and economic context and evolved in reaction to surrounding changes. Relatedly, he critiques those who portray that jurisprudence as static, backwards, and disconnected from society. Perhaps he also hopes to re-establish for legal history a larger place in early-twenty-first-century jurisprudence. On that first mission, Rabban builds on some other very good work in late-nineteenth-century jurisprudence.[3] On the second, his findings correlate with some others about the nature of late-nineteenth-century jurisprudence, which see the labeling of Gilded Age jurisprudence as formalist as incorrect.[4] There is much to say about Rabban's methods, his findings, and his argument that we should think rather differently about Gilded Age legal thought and the transition to the Progressive Era than we have as we have followed the writings of Roscoe Pound.

Given the extraordinary number of themes running through this book and the attention it has already received,[5] I want to focus on three issues of particular interest to me. First, what accounts for the shift to historicism in American jurisprudence? In mapping the rise in historical jurisprudence there are issues in dating the shift and in explaining how and why it occurred. That is partly a methodological question about how change in legal thought occurs. I think that the shift began before the Civil War and was driven at least partly by the arguments for and against slavery. My second area of interest is the nature of historical jurisprudence itself. How did historical jurisprudence see the relationship between law and its surrounding culture? Between legal thought and legal doctrine? Rabban shows that the historical jurisprudence was quite varied, but presumably it is helpful in understanding

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in America, 1850–1940, 3 RES. L. & SOC. 3, 5 (1980) (rejecting the classification of late-nineteenth-century legal thought as "formalism," and instead preferring the term "Classical legal thought" to describe the period).

3. *See generally* KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900 (2011) (tracing the historical development of modernist legal thought in the late nineteenth century); Stephen A. Siegel, *Historism in Late-Nineteenth Century Constitutional Thought*, 1990 WIS. L. REV. 1431 [hereinafter Siegel, *Historism*] (exploring the relation of historism and laissez-faire constitutionalism in late-nineteenth-century constitutional thought); Stephen A. Siegel, *Joel Bishop's Orthodoxy*, 13 L. & HIST. REV. 215 (1995) (discussing the legal thought of Joel Bishop and his contribution to late-nineteenth-century jurisprudence); Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513 (2001) (discussing the writings of the late-nineteenth-century legal scholar John Chipman Gray and the moral basis of Classical legal thought); Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 L. & HIST. REV. 577 (2002) (discussing the jurisprudence of the late-nineteenth-century legal scholar James Coolidge Carter and the Mugwumps).

4. *See* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST–REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING ch. 4 (2010) (discussing commonly held beliefs about legal formalism).

5. *See generally* Ron Harris, *The Politics of Historical Narratives: Comment on David Rabban's* Law's History, 1 JERUSALEM REV. LEGAL STUD. 81 (2010) (commenting on Rabban's *Law's History*); Roy Kreitner, *Heroes, Anti-Heroes, and Villains*, 1 JERUSALEM REV. LEGAL STUD. 96 (2010) (same).

Gilded Age jurisprudence. While this historical jurisprudence varied in its understanding of the process of evolution and in the role that historical analysis played in understanding law, I believe that a central tendency of it was towards a jurisprudence of individualism and freedom of contract. My third area of interest is the transition from historical to sociological jurisprudence around the turn of the twentieth century. Rabban finds more points of connection between those two periods than we are used to hearing, and I wonder how much Rabban is successful in portraying continuity among those schools.

I. The Turn to History in American Jurisprudence

David Rabban locates the turn to history in American jurisprudence in the years following the American Civil War, in what is commonly thought of as the beginning point of American jurisprudence.[6] This was the era when Oliver Wendell Holmes was doing his work, when Christopher Columbus Langdell was teaching and writing, and when the great treatise writers like Thomas M. Cooley and James Coolidge Carter were preparing their work.[7] The typical story is that before the War, Americans were hopeless romantics (or fanatics), many of whom embraced the stifling and heartless labor system of slavery. It was the War that brought the massive and modern state with its huge changes in manufacturing, transportation, finance, technology, and constitutional and statutory law. That is, the War is often thought of—correctly—as a transformative and watershed moment in American thought.[8]

Rabban sees the postwar era as the time that historical thought came to American jurisprudence, and he ties this to a trend in Western thought towards history. Rabban depicts this process happening in two stages. First, German scholarship of the early nineteenth century, led by Savigny, turned to history to understand law. Savigny, like Edmund Burke, was responding to the excesses of the French Revolution and the Enlightenment theories of natural law that seemed not to work so well in practice.[9] That turn to history in Germany in the early eighteenth century worked its way to Great Britain, where people like Henry Maine applied it in *Ancient Law*, and then to the United States after the War, through people who studied in Germany in the postwar period.[10] Thus, Rabban's story is one of elite intellectual culture—of the transmission of

6. *See, e.g.*, NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 2 (1995) (locating the start of American jurisprudence at approximately 1870).

7. DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY 1, 15 (2013).

8. WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900, at 157 (1982) (identifying the Civil War as "the great watershed in the nineteenth century").

9. RABBAN, *supra* note 7, at 5, 70–71, 73–74, 78.

10. *Id.* at 4–5.

ideas from university settings in Europe to university settings in the United States.[11]

I suggest that the turn to historical thought in American jurisprudence occurred before the Civil War. Recall that the turn to historicism was well underway by the early nineteenth century—Savigny's major work appeared in the 1810s[12] and Henry Maine's *Ancient Law* was published in 1861.[13] So the historical school of jurisprudence was certainly well-established in Europe before the Civil War. The turn to historicism resulted at least partly from the debate over slavery because of the utility of arguments based on history made by people engaged in a very practical debate. What is the evidence that the historical school was established in the United States before the Civil War? One of the key pieces of evidence of historical thought in the pre-Civil War United States is Thomas R. Dew's 1852 *A Digest of the Laws, Customs, Manners, and Institutions of the Ancient and Modern Nations*, which was delivered first as lectures at William and Mary.[14] This was in essence a legal history of western civilization, stretching from ancient Egypt, Greece, and Rome through the French Revolution. A central theme is the role of property rights in leading to freedom in northern European countries.[15] Dew was an influential historian, whose 1832 booklet criticized the proposal of gradual abolition of slavery in Virginia in the wake of Nat Turner's rebellion by demonstrating the economic impracticality of abolition.[16] Dew turned to history, as had many conservatives in the wake of the French Revolution, to show that radical reform would likely lead to disastrous results.[17] History was not just something that was an intellectual fad; it was a science of truth. History was, as Thomas Carlyle said, "[p]hilosophy teaching by [e]xperience."[18] Or so conservatives thought.

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11. *Id.*

12. FRIEDRICH CARL VON SAVIGNY, VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT [THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE] (1814).

13. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTIONS WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS (John Murray 1920) (1861).

14. THOMAS DEW, A DIGEST OF THE LAWS, CUSTOMS, MANNERS, AND INSTITUTIONS OF THE ANCIENT AND MODERN NATIONS (1852). Herbert Hovenkamp traces some of the other roots of pre-Civil War evolutionary thought in Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEXAS L. REV. 645 (1985).

15. *See* Alfred L. Brophy, The Intersection of Property and Slavery in Southern Legal Thought: From Missouri Compromise Through Civil War (May 17, 2001) (unpublished Ph.D. dissertation, Harvard University) (on file with the Bell & Howell Information and Learning Co.).

16. *Id.* at 158–60.

17. *See* THOMAS R. DEW, REVIEW OF THE DEBATE IN THE VIRGINIA LEGISLATURE OF 1831 AND 1832, at 58–59 (1832) (arguing that the expulsions in European countries of people from different races had catastrophic effects on the economy and society).

18. Thomas Carlyle, *Parliamentary History of the French Revolution*, *in* 4 CRITICAL AND MISCELLANEOUS ESSAYS 163, 164 (1860).

The same year that Dew's *Laws, Customs, and Manners* came out, Little Brown—who would publish Holmes's *The Common Law* in 1881[19]—brought out a book with a very similar title, *The Theory of the Common Law*.[20] It was substantially more doctrinal than Holmes; it was history designed to teach what happened, rather than—as Holmes used history—as a shovel to clean up what had been left by the receding tide of history.

Six years later Thomas R.R. Cobb, a law professor at the Lumpkin Law School in Athens, Georgia, published an extended treatise on slave law that began with nearly two hundred pages of *An Historical Sketch of Negro Slavery*.[21] Cobb argued that slavery was nearly ubiquitous in human history and that recent emancipation in the West Indies and the Caribbean led to economic disaster[22] (for white people). He used this to argue that the common and international law preferred slavery to freedom.[23] This was applied history—a study of history that taught important proslavery lessons. And that was persuasive; it was cited in the southern courts more than twenty-five times from its publication through the end of the Civil War. In fact, it continued to be cited after the war. In an extraordinary twist of fate, Oliver Wendell Holmes cited Cobb's treatise in one of his final opinions while on the Massachusetts Supreme Judicial Court.[24] The case dealt with a claim by the child of a formerly enslaved man who had been born while the man was a slave in Virginia. The decedent had been married during his time as a slave.[25] Afterward he escaped to Massachusetts and remarried.[26] The question was whether the first child—born during the era of slavery—was the only legitimate heir.[27] Holmes distinguished Cobb's conclusion that slaves brought from a free state to a slave state continued as slaves (and thus could not marry), but concluded that certainly slaves who remained in Massachusetts were free and thus the second marriage was legitimate.[28]

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19. O.W. HOLMES, JR., THE COMMON LAW (1881).

20. JAMES M. WALKER, THE THEORY OF THE COMMON LAW (1852).

21. 1 THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA (1858).

22. *Id.* at cxcvi–cxcvii, 10.

23. *Id.* at cxcvii–cc, 50–51.

24. Irving v. Ford, 60 N.E. 491, 492–93 (Mass. 1901).

25. *Id.* at 492.

26. *Id.*

27. *Id.* at 493.

28. *Id.* at 492–93. Another prominent twentieth-century use came in *In re Campbell's Estate*, 108 P. 669, 673 (Cal. Dist. Ct. App. 1910) (citing *United States v. Roach*, 92 U.S. 27 (1875) (citing COBB, *supra* note 21)) (determining that slaves could not contract during the era of slavery). The California court went on to deny the right of children of such a marriage to inherit from their parents, because such children were illegitimate. *Id.* at 676. This is one example of post-Civil War reasoning, which effectively extended the disabilities of slavery for decades after slavery ended. Such reasoning, focusing on the nature of contract, looked narrowly at legal doctrine without looking at its social context or its likely consequences.

Reformers in the antebellum era like Ralph Waldo Emerson often argued that we should not believe the past,[29] while those who turned to history often did so for conservative motives.[30] This was part of the Romantic era's focus on context rather than grand Enlightenment-era universal truths.[31] The turn to context and the sense that the amount of freedom people are entitled to varies according to their status were responses to the notion born of the Revolutionary era that all people are created equal. In fact, as American jurisprudes turned towards history, they argued that people are not all entitled to or fit for freedom. That was a powerful argument restraining the move towards emancipation.[32]

A key part of Rabban's picture of historical jurisprudence is its acknowledgment of change. He uses Henry Maine's book *Ancient Law* as evidence that historical jurisprudence had a sense of evolution, from status to contract.[33] That sense of evolution was a key part of both pre- and post-Civil War American thought. The American progression was at one point cyclical (drawing on evidence of decline of classical republics); this is illustrated by Thomas Cole's series of five landscape paintings, *Course of Empire*. They depicted the same spot over eons, as the empire rose from the savage state to pastoral, consummation, destruction, and finally desolation. Yet, Americans in the 1840s and 1850s saw their trajectory as one of only upward progress. Justice Levi Woodbury commented about Cole's *Course of Empire* in discussing Americans' shift from a cyclical progression to a line pointing ever upward in an address entitled (of course) "Progress" at Dartmouth College in 1844.[34] Woodbury depicted progress by individuals and society, and thought it was modern society where "liberty and law, the arts and the securities of

29. *See* Ralph Waldo Emerson, *Literary Ethics*, *in* RALPH WALDO EMERSON: ESSAYS & LECTURES 93, 101 (Joel Porte ed., 1983) ("The perpetual admonition of nature to us, is, 'The world is new, untried. Do not believe the past. I give you the universe a virgin today.'").

30. DANIEL D. BARNARD, MAN AND THE STATE: SOCIAL AND POLITICAL: AN ADDRESS DELIVERED BEFORE THE CONNECTICUT ALPHA OF THE PHI BETA KAPPA 6 (1846) ("This is, with us, the age of reform, or, rather, of reformers, and if we do not look to it, there is some danger that we may, by and by, find our people reformed out of all just notions, and every sound principle, in social affairs, in matters of government, and in religion.").

31. *See, e.g.*, ALBERT TAYLOR BLEDSOE, AN ESSAY ON LIBERTY AND SLAVERY 274–83 (1856) (arguing that the "experiment" of freedom in St. Domingo led to revolt and a decline in industry, indicating that some people were not suited for freedom).

32. *See, e.g.*, James P. Holcombe, *Is Slavery Consistent with Natural Law?*, 27 S. LIT. MESSENGER 401, 408 (1858) (arguing that for certain inferior races, slavery prevents the enslaved from descending into "hopeless degradation" and is thus given both "the sanction of justice" and "the lustre of mercy").

33. RABBAN, *supra* note 7, at 70.

34. Levi Woodbury, On Progress, Address Before the Phi Beta Kappa Society of Dartmouth College (1844), *in* 3 WRITINGS OF LEVI WOODBURY, LL.D. POLITICAL, JUDICIAL AND LITERARY 75 (1852).

organized government, reign."[35] Woodbury embraced, as did Maine, a distinct preference for modern society over ancient.[36]

There were other pre-war origins of postwar thought—especially the turn towards empiricism as a way of countering historical arguments. Empirical arguments were used occasionally before the War by proslavery writers, for instance, to argue that slavery was better than freedom for the enslaved.[37] But much more frequently antislavery thinkers used empiricism to argue that slavery and slave law were inhumane. One of the best-known antislavery works of the 1850s was William Goodell's *The American Slave Code in Theory and Practice*.[38] It drew upon accounts in legal reporters and other sources discussing trials involving slaves to detail the inhumanity of the slave code and the way slavery operated.[39] This turn to empiricism was a direct challenge to the historical arguments advanced by proslavery writers. And the most famous of all antislavery works, Harriet Beecher Stowe's *Uncle Tom's Cabin*,[40] provides perhaps an important link to Oliver Wendell Holmes's later thinking. There is an uncanny parallel between *Uncle Tom's Cabin* and Holmes's imagery in *Southern Pacific Company v. Jensen*[41] that law was the command of the sovereign, not a "brooding omnipresence in the sky."[42] For at the beginning of the novel Stowe proclaimed that "over and above" the scene of the forced sale of slaves when their owners went into bankruptcy there "broods a portentous shadow—the shadow of law."[43] One wonders whether when Holmes saw law as the command of the sovereign, rather than ubiquitous custom, he had Stowe's compelling imagery in mind.

That is, American jurisprudence was both historical and empirical—or one might say sociological[44]—before the Civil War, though it was after the

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35. *Id.* at 78.

36. *See id.* This evolutionary picture of law that moves to a more sophisticated, commercial republic based on contract correlated with the era of freedom of contract and of individualism.

37. *See* GEORGE FITZHUGH, CANNIBALS ALL! OR SLAVES WITHOUT MASTERS 18 (C. Vann Woodward ed., Belknap Press of Harvard University 1988) (1857) (concluding, through observational evidence, that young, elderly, and female slaves "have all the comforts and necessaries of life provided for them" while the Northern "free laborer must work or starve").

38. WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE (1853).

39. *See, e.g.*, *id.* at 154–59 (detailing the account of a slave-owner who was acquitted of battery after shooting a slave following a minor offense, because, *inter alia*, the slave "must be made sensible that there is no appeal from his master").

40. 1 HARRIET BEECHER STOWE, UNCLE TOM'S CABIN; OR, LIFE AMONG THE LOWLY (1852).

41. 244 U.S. 205 (1917).

42. *Id.* at 222.

43. STOWE, *supra* note 40, at 24 ("So long as the law considers all these human beings, with beating hearts and living affections, only as so many *things* belonging to the master,—so long as the failure, or misfortune, or imprudence, or death of the kindest owner, may cause them any day to exchange a life of kind protection and indulgence for one of hopeless misery and toil,—so long it is impossible to make anything beautiful or desirable in the best regulated administration of slavery.").

44. For one might recall that the term sociology was employed by a pre-Civil War southerner writing about slavery. *See* GEORGE FITZHUGH, SOCIOLOGY FOR THE SOUTH, OR, THE FAILURE OF FREE SOCIETY v (1854) ("New exigencies in [society's] situation had given rise to new ideas, and to a new philosophy. This new philosophy must have a name, and as none could be found ready-made to

war that many of these elements appeared in greater amplitude. Thus, I see a different timing of the shift to historicism and also a different cause of that shift. Rabban sees the primary cause as a high-brow, intellectual movement. There may, of course, be rather distinct historical turns in American jurisprudence: the turn that Rabban describes may have been made separately (though to essentially the same place) and for different reasons from the one I describe.

II. The Nature of Historical Jurisprudence: The Age of Freedom of Contract

However and whenever historical jurisprudence came to the United States, there are important questions of its meaning, its breadth, and its central tendencies. Rabban argues that historical jurisprudence was not all about political conservatism based on a static vision of law;[45] that its adherents had a wide spectrum of ideas;[46] and that their ideas were not just doctrinal and internal, but widely focused on law's relationship to society and on how law responded to the social stimuli around it.[47] He succeeds in showing that historical jurisprudence dealt with all sorts of issues, some deeply conservative, others apolitical, and yet others more flexible and engaged with reform. And he shows that it was not narrowly focused on development of doctrine, but was attuned to custom and thus to surrounding culture.[48] Some of the historical jurisprudence was nationalistic, such as the "Teutonic germ theory," teaching that Anglo–American ideas of freedom—even the New England town meeting—emerged from the German forests.[49] Some of it was antiquarian; some taught the importance of stopping change through the power

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suit the occasion, the term Sociology was compounded . . . as the technical appellative of the new-born science.").

45. *See* RABBAN, *supra* note 7, at 71 ("In specific political views, as well as in general ideological orientations, the evolutionary historical thought of leading nineteenth-century scholars correlated with both conservative and liberal positions.").

46. *Id.*

47. *Id.* at 327–31 (noting that "[w]hile applying evolutionary thought to legal analysis, American legal scholars frequently emphasized that evolving custom is the source of law," and using historical scholarly opinions to show how "American legal scholars typically associated legal history with national history").

48. *Id.*

49. *Id.* at 69, 72 (citing RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 147 (1970); PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 87 (1988)); *id.* at 89 (citing Herbert B. Adams, *New Methods of Study in History*, *in* 2 JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE 25, 101 (Herbert B. Adams ed., 1884)).

of judicial review.[50] Holmes's legal historical scholarship, by contrast, made change possible by showing the artifacts left by a receding time of history.[51]

Rabban thus identifies a diversity of ideas among adherents of historical jurisprudence, and he has looked far deeper at that scholarship than anyone before him. That diversity of political ideologies of its adherents should not obscure two things. First, often the historical work's ideological orientation had little connection to present issues and the scholarship was ignored by courts.[52] Second, the central tendency of Gilded Age jurisprudence was towards classical liberalism and towards a sense of progress that moved, if anything, from collective to individual.

One of Rabban's points about the diversity of ideas—and an important rebuttal to the cardboard image of Gilded Age jurisprudence—is that historical jurisprudence demonstrated that law gradually evolved over generations.[53] The sense of evolution correlates with the shift that was taking place from a local economy to a transnational commercial law. Yet, the realization that law evolved gradually was consistent with conservative thinking. For instance, Christopher Tiedeman's *Law and the Unwritten Constitution* celebrated the conservative and liberty-loving aspects of Anglo–Americans that showed little tolerance for change.[54] Later Tiedeman attacked legislation as the product of socialism and communism and portrayed the unwritten constitution, which was based on the community's sense of history, as the defense against democracy.[55] Tiedeman recognized that there might be

50. For instance, Christopher Tiedeman's analysis in *The Unwritten Constitution of the United States*, of changes in the contracts clause, which Rabban reads as endorsing an evolutionary model of constitutional change, might also be read as saying that the evolution in constitutional law that permits the police power to restrict the protection the contracts clause provided to corporations is troublesome. *See* C.G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 54–57 (William S. Hein & Co., Inc. reprint ed. 1974) (1890); RABBAN, *supra* note 7, at 322–24.

51. RABBAN, *supra* note 7, at 238–40 (detailing Holmes's evolutionary theory of law, which traced primitive conceptions to current common law, and noted that sometimes precedents survive "long after the use they once served is at an end and the reason for them has been forgotten").

52. For those whose political message was at best hidden, the role of history in the pre-Civil War treatises was often substantially more attuned to the relationship between law and its surrounding culture than much of the postwar historical school that Rabban examines. One might, for instance, contrast Henry Cabot Lodge's essay with Dew, who sought to understand how the whole system fit together. *Compare* H. Cabot Lodge, *The Anglo-Saxon Land-Law*, *in* ESSAYS IN ANGLO-SAXON LAW 55, 56–57 (1876) (discussing the growth and sometimes decay of "certain strong conceptions" upon which Anglo-Saxon property law is based), *with* Dew, *supra* note 17, at 103 (describing various nonlegal factors, including "the rise of the towns, the springing up of a middle class, and a change of agriculture," to explain the gradual emancipation of slaves in western Europe). Lodge was concerned with narrow and internal questions about the doctrinal development in Anglo-Saxon land law. Lodge, *supra*, at 56–57.

53. *See* RABBAN, *supra* note 7, at 325–27 (describing historical jurisprudence's application of "evolutionary thought to legal analysis").

54. TIEDEMAN, *supra* note 50, at 20 ("It is not so much what is found in the written constitution, as the conservative, law-abiding, and yet liberty-loving character of the Anglo-Saxon, which guarantees a permanent free government to England and to the United States of America.").

55. *Id.* at 80–82.

changes but argued that history provided a stabilizing force amidst the change, and he was thankful for it.

The central tendency of the age of historical jurisprudence was towards conservative principles. Where legal history today so frequently serves to destabilize, because it shows alternative legal ideas or past inequities,[56] legal history in the Gilded Age sometimes—though not always, as Holmes demonstrates[57]—served to justify the present, to show that there was a reason for the often slow and almost imperceptible progression,[58] or to suggest modest reforms.[59] Jurisprudence in this era also taught that the natural order of things was towards respect for property rights and classical liberalism.

This was the era of contract, as Henry Maine told us in *Ancient Law*.[60] Thomas Cooley, James Coolidge Carter, and Christopher Tiedeman confirmed it.[61] One demonstration of this "age of freedom of contract" is the fact that the number of state court opinions in which the terms "freedom" and "contract" appeared within two words of each other increased in the decade of the 1890s.[62] Courts were influenced by—and adopted principles of—freedom of contract. The work of many historical jurisprudence scholars supported classical liberalism. Without stepping into the difficult questions of causation between legal literature and judicial outcomes, I note that judges were going in the direction of classical liberalism as well. To see the power of the appeal of classical liberalism in the Gilded Age, one might turn to *State*

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56. *See, e.g.*, William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1103 (1997) ("[T]he objective of . . . legal historians in particular should be to destabilize rather than reinforce Americans' nationalism and exceptionalism.").

57. RABBAN, *supra* note 7, at ch. 7.

58. JAMES C. CARTER, THE IDEAL AND THE ACTUAL IN THE LAW 26 (1890) ("[T]here is a gradual, insensible and unconscious progress in the law. We do not perceive the movement, but it becomes apparent by comparing its condition at different and widely separated periods of time. It is thus that the Common Law starting from rude beginnings has expanded itself into the vast and consistent scheme which affords a safe bulwark for all the great classes of rights.").

59. *See, e.g., id.* at 25–26 (arguing that while "the sole office of the judicial tribunals [is] to *find* existing customs," judges, who chiefly deal with "doubtful cases," can make slight improvements to the law by preferring "good customs to bad ones").

60. *See* MAINE, *supra* note 13, at 319 ("[T]he society of our day is mainly distinguished from that of preceding generations by the largeness of the sphere which is occupied in it by Contract.").

61. *See* CLYDE E. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW v–vi (2001) (concluding that "the works of Cooley and Tiedeman were instrumental in the formulation, development, and application of the liberty of contract principle as a limitation upon the police power of the states and the commerce power of the national government"); *id.* at 27–32 (discussing the importance of Cooley's treatise in the development of liberty of contract); *id.* at 58–63 (describing the importance of Tiedeman's work to the incorporation of laissez faire principles, including liberty of contract, as constitutional limitations on legislative power); HORWITZ, *supra* note 2, at 118–21 (describing Carter's leadership of the New York Bar's opposition to proposed codification of the common law).

62. The word "freedom" appears within two words of "contract" in the Westlaw allstates-old database 6 times from 1880 to 1889 and 39 times from 1890 to 1899.

v. Fire Creek Coal & Coke Co.,[63] which Roscoe Pound used as evidence of the focus on freedom of contract over community rights.[64] It held that a statute that prohibited mining companies from charging their employees more for goods than the companies charged nonemployees was an "unjust interference with the rights, privileges, and property of both the employer and the employee, and places upon both the badge of slavery, by denying to the one the right of managing his own private business, and assuming that the other has so little capacity and manhood as to be unable to protect himself, or manage his own private affairs."[65]

III. The Turn from History to Sociology

My final question relates to the turn that Rabban makes in the final two chapters to assess what happened when American jurisprudence moved out of its historical mode towards sociological and realist jurisprudence. One of Rabban's key points is that the changes from the historical school to the sociological school were not nearly so stark as those in the sociological school (or subsequent historians) have suggested.[66] Rabban suggests that the change was not so great as it has been portrayed, because the historical school was already engaging with issues of how law developed in conjunction with society.[67] American jurisprudence was already empirical.[68] Related to this, Rabban argues that the sociological school that came after created a false image of a static jurisprudence before it.[69]

Much of Rabban's connection of historical jurisprudence and sociological jurisprudence turns on his depiction of historical jurisprudence as empirical and evolutionary. But part of the distinction turns on the central tendencies of sociological jurisprudence. Here I would focus on Pound's critique of court cases that set up classical liberalism and restricted government regulation.[70] Moreover, Pound saw important distinctions between historical jurisprudence and sociological jurisprudence. One of the things that strikes me about Pound is how much he drew rigid lines between

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63. 10 S.E. 288 (W.Va. 1889).

64. Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339, 353 (1905) (quoting *Fire Creek Coal*, 10 S.E. 288).

65. *Fire Creek Coal*, 10 S.E. at 289.

66. RABBAN, *supra* note 7, at 512.

67. *See* RABBAN, *supra* note 7, at 430–31 (noting that legal historians recognized societal influences on the law).

68. *See id.* at 430 ("[The historical school] opposed deductive formalism while emphasizing their commitment to history as an inductive science . . . .").

69. *Id.* at 512.

70. *See, e.g.*, Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 32–33 (1910) (discussing Puritan ideas of individualism); Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 612 (1907) [hereinafter Pound, *Sociological Jurisprudence*] ("Legal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded, cannot shape practical principles to be applied to a restless world of flesh and blood.").

the philosophical, analytical, and historical schools.[71] Those lines did not exist in practice; they probably could not. Analytical jurisprudence draws on empirical evidence, for instance, to understand the values to plug into utilitarian calculations. This is partly an issue of the distance from the subject. Looked at closely, as Rabban does, there are shades of gray, midway points between the individualism of the Gilded Age and the world of the sociological jurisprudence of the early twentieth century.[72] All of this is part of the recent trends in the academy to see gradations, rather than the sharp distinctions that the actors themselves, such as Roscoe Pound, saw.

Yet, as with the turn to history, I believe that the turn away was due to a lot more than the work of legal thinkers such as Roscoe Pound. It was time for a jurisprudence of economics and sociology that looked to classes, government regulation, and protection of the workers. I think this is an important change in emphasis from the era of freedom of contract, individualism, and historicism[73] to the era of economics and sociology. The shift may have been to legitimize statutory law that moved in keeping with the political, economic, and social reality of the early twentieth century. The lessons, if any, about Teutonic germ theory, about the glacial adaption of the common law, and about the need for protections of corporations against the police power, were out of keeping with the early twentieth century.

There was a sense by Pound and others that courts should abandon doctrines like freedom of contract.[74] Pound argued for the need to look at effect on the community—not just individuals but the entire community.[75] That led scholars like Pound[76] to create what we might think of as the "*Lochner* image in the progressive legal mind." *Lochner* was, perhaps, more a creation of the Progressive-era scholars who sought to overturn it than it was

71. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591, 591–92 (1911) (discussing analytical, historical, and philosophical schools of jurisprudence).

72. *See, e.g.*, TAMANAHA, *supra* note 4, at 40–43 (arguing that the rapid social change that occurred between the 1870s and the 1930s led older, individualist-oriented judges to gradually move the common law in a more progressive, socially oriented direction); Siegel, *Historism*, *supra* note 3, at 1540–46 (advancing the position that the evolution of late-nineteenth-century legal thought is more fully understood as a process whereby modern historicism replaced historicism rather than as an abrupt change from one set of beliefs to another set of beliefs).

73. There are virtually no cases cited in the book up to the last two chapters. In the last two chapters, Rabban shifts attention to how jurisprudence engaged with the surrounding world and with cases. This shift in data sources may account for some of the changing picture of jurisprudence.

74. *See, e.g.*, Pound, *Sociological Jurisprudence*, *supra* note 70, at 607–08 (discussing the pervasive public sense that the law as it was did not guarantee a just outcome, and placing blame for this development squarely with the way law is discussed and taught).

75. *Id.* at 612–13.

76. *See, e.g.*, *Jetsam and Flotsam: Law in Books and Law in Action*, 69 CENT. L.J. 362, 362 (1909) (quoting a speech given by Pound at the Maryland State Bar Association in which he cited *Lochner v. New York*, 198 U.S. 45 (1905) as an example of an opinion in which "courts in practice tend to overturn all legislation which they deem unwise").

representative of the age.[77] Or so one might think. Sociological jurisprudence advocates wanted something very different from the central tendency of the era—they wanted calculations based on the impact of rules on the general public, rather than based on individual claims between two competing parties. They wanted courts and legislatures to make calculations based on their determination of the public good rather than classical liberalism. In the hands of sociological jurisprudence, "[l]aw is no longer . . . mysterious."[78] Law had lost its majesty; it was not a brooding omnipresence in the sky, but was subject to remaking by the legislature.

Conclusion

We have only begun to understand Rabban's reconstruction of the world of the late nineteenth century and its implications for legal thought in that time and in the decades following it. There are issues of methodology and interpretation that will take years to work through. For instance, the individualism of the late nineteenth century may be a product of the free labor ideology of the pre-Civil War Republican party.[79] How those ideas relate to the legal historical scholarship of people like Thayer, Ames, and the others Rabban talks about remains unclear. Moreover, one wonders if Rabban's meticulous reconstruction of the ideas of the historical school of jurisprudence has insight into the late-twentieth-century debate about the extent to which legal theory is concerned with politics, for it may tell us something about law's connections to politics in the nineteenth century.[80] Rabban has opened a world that we did not know existed and invited us to see how it relates to the world before, during, and afterwards in the academy and the judiciary.

Law's History comes amidst a resurgence in legal history, because it is increasingly seen as a method, much as law and economics is a method.[81] If that resurgence continues it will be because legal history scholarship continues to tell us something relevant about contemporary law, such as how legal doctrine and practice respond to changes in culture and what the context of a

77. Horwitz makes a similar point about the Progressive-era critique of *Lochner*, but sees the *Lochner* era as suspicious of corporations. *See* HORWITZ, *supra* note 2, at 7 (asserting that the *Lochner* Court viewed large corporations as "unnatural and illegitimate").

78. Pound, *Sociological Jurisprudence*, *supra* note 70, at 610.

79. Among the many places one might find these ideas are the writings of Republican economic and political thinkers. *See generally, e.g.*, ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1995) (discussing the melding of values and interests into early Republican ideology); HEATHER COX RICHARDSON, THE GREATEST NATION OF THE EARTH: REPUBLICAN ECONOMIC POLICIES DURING THE CIVIL WAR (1997) (arguing that wartime Republican economic policies were not "haphazard" responses to the exigencies of war, but rather part of a broader vision aimed at transforming the nation's economy in the long term).

80. *See, e.g.*, HORWITZ, *supra* note 2, at 193 ("The most important legacy of Realism therefore was its challenge to the orthodox claim that legal thought was separate and autonomous from moral and political discourse.").

81. *See* Alfred L. Brophy, *Multivariate Analysis Through Narrative History*, 15 GREEN BAG 2D 465, 469 (2012) (asking whether legal history is a method like law and economics).

statute's history tell us about its application. In this, legal history has, as David Rabban shows, a long tradition behind it. And maybe we will see that history in conjunction with economics and sociology has a great deal to teach us about the development of legal institutions even now.

The Unrecognized Triumph of Historical Jurisprudence

LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY. By David M. Rabban. New York, New York: Cambridge University Press, 2013. 564 pages. $85.00.

Reviewed by Brian Z. Tamanaha*

Historical jurisprudence has been nearly erased from the annals of American jurisprudence. Legal theory revolves around rival schools of thought representing contesting positions. A common arrangement in jurisprudence texts is to begin with natural law and legal positivism, in that order, followed by legal realism, and then a host of contemporary schools of thought.[1] This ordering is chronological as well as thematic: natural law theory began in classical times;[2] legal positivism arose in the nineteenth century to challenge natural law;[3] legal realism arose in the 1920s and 1930s to debunk the dominant formalist views of law;[4] the Hart–Fuller debate of the late 1950s marked the reenergizing of legal positivism;[5] social scientific approaches to law (Law & Society Movement) began to develop in the 1960s;[6] in the 1970s, Dworkin mounted a challenge to Hart's dominance,[7] law and economics subjected law to examination from an economic perspective,[8] and Critical legal studies of the radical left burst onto the scene to challenge legal liberalism.[9] A hodgepodge of descendants of these various

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1. *See, e.g.*, ROBERT L. HAYMAN, JR. ET AL., JURISPRUDENCE CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM xi (2d ed. 2002) (organizing the examination of the philosophy of law roughly based on chronology); *see generally* JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE (rev. ed. 1990) (providing an introduction and structure to the study of the philosophy of law); FREDERICK SCHAUER & WALTER SINNOTT-ARMSTRONG, THE PHILOSOPHY OF LAW: CLASSIC AND CONTEMPORARY READINGS WITH COMMENTARY (1996) (discussing the evolution of the philosophy of law to provide a background for commentary on recent developments).

2. HAYMAN ET AL., *supra* note 1, at 2.

3. *Id.* at 75.

4. *Id.* at 158–60.

5. *See id.* at 78–79 (discussing Hart's role as a contemporary positivist and his famous exchange with natural law theorist Lon Fuller).

6. David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV 1, 20–21 (1990).

7. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 42–46 (1967).

8. HAYMAN ET AL., *supra* note 1, at 299–300.

9. *Id.* at 402.

schools then followed. Historical jurisprudence is rarely mentioned. In an encyclopedic entry on "The Nature of Law," Andrei Marmor observes:

> In the course of the last few centuries, two main rival philosophical traditions have emerged, providing different answers to these questions [on the nature of law]. The older one, dating back to late mediaeval Christian scholarship, is called the natural law tradition. Since the early 19th century, Natural Law theories have been fiercely challenged by the legal positivism tradition promulgated by such scholars as Jeremy Bentham and John Austin.[10]

Contrast this narrative with a century ago, when Roscoe Pound wrote:

> Until recently, it has been possible to divide jurists into three principal groups, according to their views of the nature of law and of the standpoint from which the science of law should be approached. We may call these groups the Philosophical [natural law] School, the Historical School, and the Analytical School.[11]

Pound and others at the time asserted that in the late nineteenth century the historical school was dominant over the other two jurisprudence schools.[12] Natural law was in a state of decline. Renowned Oxford Professor James Bryce, writing in *Studies in History and Jurisprudence*, published in 1901, identified the same rival jurisprudential schools, but noted that "we now seldom hear the term Law of Nature. It seems to have vanished from the sphere of politics as well as from positive law."[13]

Not all contemporary jurisprudence scholars have forgotten historical jurisprudence. Robert Summers recognized that "legal theorists of the past two centuries have worked in one or more of the three ... great jurisprudential traditions—continental natural law theory, British and Austrian analytical positivism, and historical jurisprudence."[14] But this is unusual.

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10. Andrei Marmor, *The Nature of Law*, STAN. ENCYCLOPEDIA PHIL. (Feb. 25, 2011), http://plato.stanford.edu/entries/lawphil-nature/.

11. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence I*, 24 HARV. L. REV. 591, 591 (1911).

12. Roscoe Pound, Book Reviews, 35 HARV. L. REV. 774, 774 (1921) (reviewing PAUL VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE (1920)); *see also* Melville M. Bigelow, *A Scientific School of Legal Thought*, 17 GREEN BAG 1, 1 (1905) (highlighting the prominence of the historical school).

13. 2 JAMES BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 604 (1901). Although Bryce identifies four schools—metaphysical (natural law), analytical, historical, and comparative—he sees the latter two as interconnected. *Id.* at 607–37. Frederick Pollock also describes the latter two as intimately related, with both grounded in Montesquieu and Maine. *See* Frederick Pollock, *The History of Comparative Jurisprudence*, 5 J. SOC'Y COMP. LEGIS. 74, 75–84 (1903).

14. ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 11–12 (1982); *see also* Robert E. Rodes, Jr., *On the Historical School of Jurisprudence*, 49 AM. J. JURIS. 165, 184 (2004) (arguing for a limited application of the historical school's doctrines).

That a once-prominent theory of law could be nearly expunged from current memory, at least in the United States,[15] is a puzzle that merits explanation. In *Law's History*, David Rabban aims to reawaken us to the former prominence of historical jurisprudence and to explain its apparent fall. He places much of the blame on Roscoe Pound.

> By promoting "sociological jurisprudence" as an attractive alternative to "historical jurisprudence" in his enormously influential early work during the decade before World War I, Roscoe Pound contributed substantially to the demise of historical explanation in American legal scholarship as well as to what became the prevailing, though importantly inaccurate, view of its role in nineteenth-century legal thought.[16]

Rabban also argues:

> Pound was both the last major figure who shared the historical understanding of law that dominated American legal scholarship in the decades after 1870 and the person who did most to bring that era to a close. Despite the spectacular revival of legal history in the United States since 1970, history has not regained the central role in legal scholarship it had in the late nineteenth century.[17]

Pound criticized historical jurisprudence for promoting an abstract, deductive view of law;[18] modern legal scholars, in Pound's wake, have characterized this period as the "formalist age."[19] Rabban argues that, contrary to Pound's characterization, historical jurisprudents did not hold a "deductive formalist" view of law.[20] This book is the latest addition to a growing list of revisionist works—including my *Beyond the Formalist Realist Divide*[21]—which argue that this period has been distorted by modern legal historians and theorists.

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15. English jurisprudence scholars show a greater awareness of historical jurisprudence, perhaps owing to Maine's continuing renown, but even in England the topic has been disappearing from jurisprudence courses. *See* Peter Stein, *The Tasks of Historical Jurisprudence*, *in* THE LEGAL MIND: ESSAYS FOR TONY HONORÉ 293, 293–94 (Neil MacCormick & Peter Birks eds., 1986) (observing the decline of historical jurisprudence as a discipline taught in England).

16. DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY 8 (2013).

17. *Id.* at 471; *see also id.* at 149 (analyzing the movement away from historical scholarship in both England and the United States).

18. Pound, *supra* note 11, at 600; *see also* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605–06 (1908) (advocating a scientific approach to justice and the law).

19. For an example of scholars describing the era as formalist, see GRANT GILMORE, THE AGES OF AMERICAN LAW (1977).

20. RABBAN, *supra* note 16, at 512.

21. Rabban recognized the affinity between my argument and his: "I have read an unpublished paper by Brian Tamanaha, aptly entitled 'The Realism of the "Formalist" Age,' claiming that late nineteenth-century judges did not subscribe to versions of deductive formalism attributed to them by Pound and the legal realists, and, in fact, themselves revealed plenty of realism in their decisions." David M. Rabban, *Reconsidering* Law's History*: A Response to the Symposium Comments*, 1 JERUSALEM REV. LEGAL STUD. 106, 116 (2010). The essay Rabban cites was taken

Rabban presents his book as serving two main goals: highlighting the "major American contributions to . . . English legal history" in this period, and "recovering the historical school of American jurisprudence."[22] He achieves the former goal, persuasively showing that influential original work in legal history was produced in this period. Legal historians will gain a much greater appreciation for their forebears from this book. Rabban is less successful, however, in explaining what historical jurisprudence was about and why the theory apparently faded.

This Review will focus on the fate of historical jurisprudence, advancing two arguments. First, Rabban's account of the reasons for its apparent demise is unpersuasive. Second, contrary to beliefs about its demise, the theory of law promoted by historical jurisprudence has proven remarkably successful, and the failure to recognize this constitutes a fundamental misunderstanding in contemporary jurisprudence.

I. Why Did Historical Jurisprudence Decline?

Rabban's failure to keep track of legal history and historical jurisprudence as separate fields renders his account deeply problematic. In the passages quoted above, for example, Rabban points to Pound's disparagement of historical jurisprudence and advocacy of sociological jurisprudence as major factors in the demise of legal "history" and "historical explanation."[23] This switches from Pound's stated target to a different casualty. Pound *was* critical of *historical jurisprudence* as a theory of law owing to *a priori* reasoning he attributed to the theory that he objected to, but he supported *legal history* as a scholarly endeavor.[24] "If modern jurisprudence were to lose the historical method," Pound wrote, "it would prove even more sterile than the much-abused historical jurisprudence of the last century."[25] Rabban quotes this passage without recognizing that it casts doubt on his own causal explanation.[26] Attacks on historical jurisprudence—a theory of the nature of law—would not in itself lead to a decline of legal history—a scholarly field.

The distinction between legal history and historical jurisprudence was well understood at the time. Voicing a thinly veiled critique of Henry Maine, Frederick Pollock and Frederic William Maitland wrote in the introduction of their famous *The History of English Law*:

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from my book, BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010).

22. RABBAN, *supra* note 16, at 536.

23. *Id.* at 149.

24. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence III*, 25 HARV. L. REV. 489, 514–15 (1912).

25. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence II*, 25 HARV. L. REV. 140, 155 (1912).

26. RABBAN, *supra* note 16, at 462.

> [I]t has been usual for writers commencing the exposition of any particular system of law to undertake, to a greater or less extent, philosophical discussion of the nature of laws in general, and definitions of the most general terms of jurisprudence. We purposefully refrain from any such undertaking. The philosophical analysis and definition of law belongs, in our judgment, neither to the historical nor the dogmatic science of law, but to the theoretical part of politics.[27]

Pound clarified that "[l]egal history, the discovery and exposition of the actual course of development of a particular legal system or of a particular doctrine in a particular system, is not historical jurisprudence."[28] Legal history details past events that occurred in specific legal systems, whereas historical jurisprudence operates at a higher level of generality, formulating broadly applicable claims about law.

Legal *history* is not historical *jurisprudence*. Rabban knows this but does not carefully attend to its implications for his analysis.[29] He asserts that both declined after the turn of the century in America and England.[30] This might have been for the same or for different reasons, but we cannot tell because he looks at legal history, not at jurisprudence. Historical jurisprudence might have faded because jurisprudence scholars rejected its soundness as a theory of law or because its theoretical framework was not clearly or fully elaborated.[31] Or perhaps institutional support (academic positions) for historical jurisprudence was lacking, or no great jurisprudential figure emerged to renew the theory. Or perhaps jurisprudence scholars, owing to the intellectual tastes of those drawn to theorizing, preferred the abstractions, universalism, and conceptual analyses of natural law theory and legal positivism to the more empirically grounded orientation of historical

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27. R.C.J. COCKS, SIR HENRY MAINE: A STUDY IN VICTORIAN JURISPRUDENCE 143 (1988) (quoting FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (1895)). Cocks observes that this was meant as a criticism of Maine. *Id.*

28. Pound, *supra* note 11, at 616.

29. Ironically, Rabban expresses a similar frustration with Pound:

> Unfortunately, Pound was not always consistent in his discussion of legal history. Using various terminology to convey the range of methodological approaches to the field, Pound typically equated 'historical jurisprudence' with 'the historical school' while contrasting both with 'legal history' and 'sociological legal history.' Yet at times he confusingly referred to 'sociological legal history' as a branch of historical jurisprudence or legal history.

RABBAN, *supra* note 16, at 429 (footnotes omitted). Rabban's problem is his failure to analyze these as separate fields.

30. *Id.* at 8.

31. Neil Duxbury suggests that historical jurisprudence, which he labels "comparative jurisprudence," did not carry on English jurisprudence because it lacked a distinctive jurisprudential agenda. "These men [Maine, Vinogradoff, Pollock] may well have been Oxford professors of jurisprudence, but their reflections on the subject were insufficiently well structured and focused to ensure that their own jurisprudential achievements would have lasting appeal." NEIL DUXBURY, FREDERICK POLLOCK AND THE ENGLISH JURISTIC TRADITION 91 (2004).

jurisprudence. Perhaps other factors contributed (I will propose several shortly)—none of which would necessarily be related to the contemporaneous dormancy of legal history.

Rabban asserts multiple times, from the introduction to the final page, that Pound bears substantial responsibility for the transatlantic decline of historical jurisprudence *cum* legal history.[32] This claim is dubious for several reasons—especially its failure to account for developments in England. Well before Pound wrote, prominent turn-of-the-century English jurists lamented the failure of the universities to attract lawyers with "an interest in legal history and juristic speculation,"[33] and historical jurisprudence in England was beginning to appear moribund.[34] Furthermore, Pound's idiosyncratic characterization of historical jurisprudence as highly abstract was based upon the German branch, which did not resonate with the English.[35] The ideas of Henry Maine, the English giant of historical jurisprudence, bore little resemblance to Pound's characterization.[36] Thus Pound's attack would not have had much impact on English views. Pollock, a leading English jurisprudence scholar, remarked, "[W]hen I am confronted with Professor Pound's unqualified assertion that a historical-metaphysical doctrine 'was dominant in the science of law throughout the [nineteenth] century,' I feel tempted to ask which of us is standing on his head."[37] Pound's portrayal also did not fit American historical jurisprudence, as Rabban argues,[38] so it is doubtful that his criticisms had much of an impact on contemporaries on this side of the Atlantic.

Furthermore, it is unclear why Pound's advocacy of sociological jurisprudence would itself debilitate historical jurisprudence or legal history; Rabban's suggestion appears to be that scholars inclined toward history were persuaded by Pound to drop this interest for sociological work on law, which assumes an enormous power of persuasion on his part. More to the point, there was no evident growth in "sociological jurisprudence" in America or England when historical jurisprudence faded around the turn of the century; the most outstanding sociological jurisprudence in this period was written by Austrian Eugen Ehrlich, independent of Pound.[39] Prominent legal

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32. RABBAN, *supra* note 16, at 8, 149, 211, 471, 536.

33. DUXBURY, *supra* note 31, at 63 (quoting JAMES BRYCE, Legal Studies in the University of Oxford (1893), *in* 2 STUDIES IN HISTORY AND JURISPRUDENCE 504, 518 (1901)). Pollock offered a similar lament in 1909, citing the neglect of these studies in England. *Id.*

34. *Id.* at 136. Duxbury argues that historical jurisprudence did not satisfy the late-nineteenth-century Victorian university demands for rigor, precision, technicality, and systematization. *Id.*

35. RABBAN, *supra* note 16, at 454.

36. COCKS, *supra* note 27, at 32–38 (describing how Maine's historical jurisprudence tried to incorporate empirical ideas from the social sciences).

37. Frederick Pollock, *A Plea for Historical Interpretation*, 39 LAW Q. REV. 163, 164 (1923).

38. RABBAN, *supra* note 16, at 432.

39. For the best early work on sociological jurisprudence, see EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (Walter L. Moll trans., 1936). But this work was developed independently of Pound's call. The most sophisticated work in sociological

philosopher Morris Cohen remarked in 1937, in his survey of the preceding century of jurisprudence, that despite Pound's great learning and prominence, it is "amazing that . . . Pound has found so few disciples or direct followers."[40] Thus, there is no sign that Pound's advocacy had the causal effect Rabban implies.

When trying to understand the decline of American historical jurisprudence, one must also keep in mind that the German historicist tradition—the original intellectual inspiration for historical jurisprudence—also expired by the close of the nineteenth century,[41] as did "evolutionary social theory" in England.[42] These simultaneous declines in Germany and England of fields with intellectual connections to historical jurisprudence evidently had nothing to do with Pound's advocacy. Broader intellectual developments were at play.

Let me suggest four additional factors, beyond the possibilities briefly alluded to above, which might also have contributed. Evolutionary thinking was widespread in the late nineteenth century, as Rabban explains, and historical jurisprudence had prominent evolutionary strains.[43] Maine's assertion that law moves from status in primitive societies to contract in modern societies[44] is a classic example of evolutionary thinking. After the turn of the century, evolutionary theory, Herbert Spencer's Social Darwinism in particular,[45] fell into disfavor.[46] Franz Boas launched a sharp critique of comparative analyses of primitive societies—of the sort Maine pioneered—setting off "an anti-evolutionary tide that was to sweep over the whole field of anthropology for more than fifty years."[47] Evolutionary analysis was castigated as ethnocentric and racist, built on smug assumptions that the West was the high point by which all other civilizations were measured. The confidence in human progress that set in with the Enlightenment succumbed to a sense of pessimism after the turn of the twentieth century, particularly in

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jurisprudence in the United States developed after mid-century, following pioneering work by Julius Stone. *See, e.g.*, JULIUS STONE, THE PROVINCE AND FUNCTION OF LAW (1946).

40. Morris R. Cohen, *A Critical Sketch of Legal Philosophy in America*, *in* 2 LAW: A CENTURY OF PROGRESS, 1835-1935, at 266, 297–98 (A. Reppy ed., 1937).

41. *See* FREDERICK C. BEISER, THE GERMAN HISTORICIST TRADITION 23 (2011) (stating that the "golden years of German historicism" ended in the 1880s).

42. J.W. BURROW, EVOLUTION AND SOCIETY: A STUDY IN VICTORIAN SOCIAL THEORY 260 (1966).

43. RABBAN, *supra* note 16, at 67–72.

44. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 163–65 (Beacon Press 1970) (1861).

45. Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEXAS L. REV. 645, 655 (1985).

46. Stein, *supra* note 15, at 293–94.

47. ROBERT L. CARNEIRO, EVOLUTIONISM IN CULTURAL ANTHROPOLOGY: A CRITICAL HISTORY 75 (2003).

the wake of the devastation wrought by the First World War.[48] These negative views toward evolutionary theory and progress did not favor historical jurisprudence (although legal history itself would not have suffered from them).

The second factor relates to the age. The turn of the century was a period of rapid and sweeping transformation, ushering in urban industrial capitalism and bringing big business, labor unions, and the expansion of government. It was a time of economic depression, social dislocation, and strife. Battles between competing interests were fought out in legal arenas. Progressives who urged reform, like Pound, favored legislation as the vehicle to implement change.[49] Given the rapidly dawning modern world and the volumes of new law being produced to meet the needs of the time,[50] a jurisprudential school with a backward gaze would appear to be a less fecund source of insight. The rise of legislation and the administrative state, furthermore, lent an antiquated feel to late-nineteenth-century historical jurisprudents who centered their theories of law on the common law.[51] The most outspoken historical jurisprudent, James C. Carter, who emphasized custom as *the* source of law[52] at a time when much law had little apparent connection with custom, would have come across as badly out of touch.

A third factor, one Rabban mentions,[53] was the optimism during this period that the newer social sciences, then becoming established in universities,[54] would deliver useful insights about the management and improvement of human affairs. Rather than credit Pound with hastening the demise of historical jurisprudence (*cum* legal history), it is more correct to say that Pound's advocacy was itself a reflection of a general belief among progressive intellectuals that social sciences promised solutions to pressing social and legal problems.[55] Others in law asserted the same,[56] including

48. Stein, *supra* note 15, at 124. For an exploration of evolutionary ideas and notions of progress and decay, see generally ROBERT A. NISBET, SOCIAL CHANGE AND HISTORY: ASPECTS OF THE WESTERN THEORY OF DEVELOPMENT (1969).

49. *See* TAMANAHA, *supra* note 21, at 40–43 (explaining that judges' adherence to stare decisis made the common law a slow path to change).

50. Rabban alludes to this. RABBAN, *supra* note 16, at 523.

51. For a discussion of the rise of legislation relative to the common law, see BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 41–47 (2006).

52. *See* JAMES COOLIDGE CARTER, LAW: ITS ORIGIN, GROWTH, AND FUNCTION 120 (1907) ("[T]hat to which we give the name of Law always has been, still is, and will forever continue to be Custom.").

53. *See* RABBAN, *supra* note 16, at 432 (noting Pound's optimism "that the emerging social sciences could be used to identify social problems and solutions").

54. *See* DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 35–36 (1991) (discussing the rise of the social sciences in antebellum academia).

55. Rabban recognizes that the shift from history to the social sciences was a general one. RABBAN, *supra* note 16, at 520. Yet he claims that Pound's advocacy on its own had a major effect. *Id.* at 525–26.

Holmes a decade earlier.[57] Even Melville Bigelow, profiled by Rabban for his legal history work, urged a "scientific school of law" in which history was only one perspective among others which would identify the various social and psychological sources and influences on law.[58]

The fourth factor, related to the foregoing, is that historical jurisprudence was the victim of a misleading name. Cambridge professor Peter Stein, a rare contemporary scholar to situate his work within historical jurisprudence, emphasized this:

> Labelling is also important *within* the area of legal studies themselves, where the acceptance of a particular form of enquiry as respectable may depend on the attribution of an appropriate title. Labelling can work to the disadvantage of a subject, if it cannot free itself from the disfavour which a certain line of enquiry has attracted. Something of this kind has happened in the case of historical jurisprudence.[59]

The disfavor Stein alludes to is the widespread rejection of the notion that societies and law pass through evolutionary stages[60] (the first factor above).

My argument is different: the label "historical" jurisprudence is misleading because it gives the impression that *legal history* lies at the core of the theory. That is wrong. As Stein observes, "[n]ineteenth-century historical jurisprudence was founded on the connection between law and social and economic circumstances."[61] This was dubbed the "Historical School" because its most famous nineteenth-century theorists, Savigny and Maine, were Roman law scholars who drew on their historical knowledge to make their points.[62] Their theories of law assert that law is a product of the history of a society—but this postulate stands apart from legal history as an academic field. Maine's impact was much greater in anthropology and sociology than in legal history, and Maine himself promoted comparative jurisprudence;[63] his successor, Frederick Pollock, called it "comparative

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56. *See, e.g.*, William Draper Lewis, *The Social Sciences as the Basis of Legal Education*, 61 U. PA. L. REV. 531, 536–38 (1913) (advocating the integration of social science into legal education as a means to improve lawmaking and the judicial system generally).

57. *See generally* Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443 (1899) (expressing enthusiasm for the interaction of science and law).

58. Melville M. Bigelow, *A Scientific School of Legal Thought*, 17 GREEN BAG 1, 14 (1905).

59. Stein, *supra* note 15, at 293.

60. *Id.* at 304.

61. *Id.*

62. *See* RABBAN, *supra* note 16, at 4 (identifying Savigny and Maine with the historical school).

63. *See* COCKS, *supra* note 27, at 141–95 (describing Maine's use of the "comparative method" in his work); PETER STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA 99–121 (1980) (discussing Maine's contributions to anthropology and his comparative approach to the study of law); Alan D.J. Macfarlane, *Some Contributions of Maine to History and Anthropology*, *in* THE VICTORIAN ACHIEVEMENT OF SIR HENRY MAINE: A CENTENNIAL REAPPRAISAL 117–18 (Alan Diamond ed.,

jurisprudence."[64] These are telling signs that legal history was not primary. By centering on legal history, Rabban's recounting of historical jurisprudence in *Law's History* perpetuates a misunderstanding.

II. The Society–Law Connection

Frederick von Savigny's *Of the Vocation of Our Age for Legislation and Jurisprudence*,[65] published in 1814 to challenge the enactment of a Civil Code for Germany, by all accounts is the founding document of historical jurisprudence. Savigny criticized the natural law "conviction that there is a practical law of nature or reason, an ideal legislation for all times and all circumstances,"[66] and he criticized the legal positivism proposition that "all law, in its concrete form, is founded upon express enactments of the supreme power."[67] Against these, he argued that law is the unplanned product of forces within society:

> In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view.[68]

The source, or "seat" of the law, he held, is the "common conviction of the people."[69] Law is "first developed by custom and popular faith" of the people,[70] then jurists work these social influences into the legal doctrine.

Owing to the multifarious inextricable connections between law and society, Savigny held, it is a delusion to believe that one could produce a new code that severs "all historical associations" and begins "an entirely new life."[71] This is impossible not only because existing law rests on and grows out of what came before but also because the thinking of jurists is permeated by preexisting ways. "For it is impossible to annihilate the impressions and modes of thought of the jurists now living—impossible to change completely the nature of existing legal relations; and on this twofold impossibility rests

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1991) (discussing "Maine's contribution to political anthropology"); Edwards Shils, *Henry Sumner Maine in the Tradition of the Analysis of Society*, *in* THE VICTORIAN ACHIEVEMENT OF SIR HENRY MAINE: A CENTENNIAL REAPPRAISAL, *supra*, at 143–44 (discussing "Maine's contribution to sociology").

64. Pollock, *supra* note 13, at 74.

65. FREDERICK CHARLES VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Hayward trans., Littlewood & Co. 1831).

66. *Id.* at 23.

67. *Id.*

68. *Id.* at 24.

69. *Id.* at 28, 24.

70. *Id.* at 30.

71. *Id.* at 132.

the indissoluble organic connection of generations and ages; between which, development only, not absolute end and absolute beginning, is conceivable."[72]

Society is constantly moving, and law with it, he emphasized:

> But this organic connection of law with the being and character of the people, is also manifested in the progress of the times; and here, again, it may be compared with language. For law, as for language, there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency . . . . Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality.[73]

Although historical jurisprudence is frequently identified with evolutionism,[74] not all historical jurisprudents offered an evolutionary theory and not all legal evolutionists have been historical jurisprudents.[75] Savigny's account antedates Darwin's famous work by a half century; he emphasized that law *evolves* (develops) with the progress of civilization, but he did not proffer an evolutionary theory.

Knowledge of legal history has several important benefits noted by Savigny. Observing law over time makes apparent its gradual, organic development in connection with society;[76] it also shows that law often does not develop in isolation but is affected by external influences, like conquest, the importation of Roman law to Germany, or the spread of religion from one land to another.[77] Historical knowledge helps jurists (lawyers, judges, scholars) understand the meaning of existing legal rules.[78] And historical awareness helps inoculate scholars against succumbing to "a species of self-delusion," which he pinned on natural law theory, "namely, the holding that which is peculiar to ourselves to be common to human nature in general."[79]

I have detailed Savigny's views to show that the core propositions put forth by the progenitor of "historical jurisprudence" are not primarily about "legal history." Two planks stand at the center of the theory of law he articulated: law is the product of society and law is constantly evolving in connection with changes in society. It follows from these planks that law is a product of and tethered to the history of a society. While undoubtedly important to Savigny, legal history serves a *secondary* role, as an excellent source of information and insight about law. What made it a rival to natural

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72. *Id.*

73. *Id.* at 27.

74. *See generally, e.g.*, PAUL VINOGRADOFF, INTRODUCTION TO HISTORICAL JURISPRUDENCE 136–46 (1920) (providing examples of evolutionism's influence on jurisprudential studies).

75. E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 45 (1985).

76. SAVIGNY, *supra* note 65, at 49.

77. *Id.* at 54.

78. *Id.* at 102–03.

79. *Id.* at 134.

law theory and legal positive theory of law was the social theory of law—legal history is not a part of the theory of law itself.

Awareness of the law–society connection did not originate with Savigny. Montesquieu's *The Spirit of the Laws*,[80] published to great acclaim in the mid-eighteenth century, was the first to proclaim it. He asserted that law matches surrounding circumstances, including climate, terrain, quality of soil, mode of cultivation and food acquisition, occupations, political system, "the religion of the inhabitants, their inclinations, their wealth, their number, their commerce, their mores and their manners."[81] "Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another."[82] Savigny credits Montesquieu with establishing that law is tied to the unique circumstances of the people, and, consequently, diversity of law among communities is to be expected.[83]

After the mid-nineteenth century, when evolutionary ideas were in full bloom,[84] Henry Maine presented a distinctively evolutionary theory of law, portraying legal development as a core element of social development.[85] He criticized both natural law and legal positivism for being too abstract and for lacking any historical basis in their speculations about law.[86] Although he does not acknowledge any debt to Savigny,[87] Maine does credit Montesquieu for describing law as a social institution shaped by its surroundings.[88] Knowledge of legal history was important to Maine as a source of insight on the connections between law and society, though he also advocated the comparative method as the key to perceiving broader patterns in the society–law relationship.

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80. MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

81. *Id.* at 9.

82. *Id.* at 8.

83. *See* SAVIGNY, *supra* note 65, at 57–58 (crediting Montesquieu for cautioning against the uniformity of laws).

84. Burrow argues that evolutionary thought was common and Maine developed his ideas independent of Darwin. BURROW, *supra* note 42, at 139–40.

85. *See generally* MAINE, *supra* note 44 (tracing the development of law and legal institutions alongside the development of other social institutions and practices).

86. *See id.* at 70, 111 (criticizing natural law for implying a state of nature that did not exist and criticizing legal positivism for falling back on "conjecture"); *see also* PAUL VINOGRADOFF, THE TEACHING OF SIR HENRY MAINE 4–6 (1904) (explaining the basis for Maine's criticisms of natural law and "analytical jurisprudence"); STEIN, *supra* note 63, at 89–90 (detailing Maine's use of history to criticize natural law and legal positivism).

87. Whether Savigny's ideas influenced Maine is disputed. COCKS, *supra* note 27, at 24–28. But there is no question that their core views of the tight relationship between law and society are similar. *See* Hermann Kantorowicz, *Savigny and the Historical School of Law*, 53 LAW Q. REV. 326, 333 (1937) (arguing that Maine could only be considered representative of Savigny's "historical school" because of Maine's sympathy with Jhering, the leader of the "younger" historical school); STEIN, *supra* note 63, at 89–90 (explaining the similarities between Maine's and Savigny's use of history).

88. MAINE, *supra* note 44, at 111–12.

Rudolph von Jhering, a German contemporary of Maine, cast aside Savigny's mystical notion of the "common consciousness" as the underlying source of law. Reflecting the times, Jhering described legal development instead as the product of battles between competing individuals and groups seeking legal support for their ends. "In the course of time," Jhering wrote:

> [T]he interests of thousands of individuals, and of whole classes, have become bound up with the existing principles of law in such a manner that these cannot be done away with, without doing the greatest injury to the former. . . . Hence every such attempt, in natural obedience to the law of self-presentation, calls forth the most violent opposition of the imperilled interests, and with it a struggle in which, as in every struggle, the issue is decided not by the weight of reason, but by the relative strength of opposing forces . . . .[89]

Oliver Wendell Holmes described the production of law in similar terms.[90] Notwithstanding his criticisms of Savingy, Jhering held the two central planks that law is the product of society and that the two evolve organically.[91] (James Carter stood out as a throwback among American historical jurisprudents because his emphasis on shared custom harkened back to Savigny at a time when Jhering's account had much greater resonance.)[92]

At the turn of the twentieth century, Eugen Ehrlich likewise promoted the view that society is the center of gravity of law and that both evolve in sync.[93] Identifying his position with Montesquieu's, Ehrlich asserted, "As law is essentially a form of social life, it cannot be explained scientifically otherwise than by the working of social forces."[94] Leading American jurisprudents responded enthusiastically. Both Holmes and Pound praised Ehrlich's work as the "best" of its kind.[95] Pound commended Ehrlich for

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89. RUDOLPH VON JHERING, THE STRUGGLE FOR LAW 10 (John J. Lalor trans., Callghan & Co. 5th ed. 1879).

90. *See* Holmes, *supra* note 57, at 448 (describing law's development out of a "clash between competing ideas"); *see also* Oliver Wendell Holmes, *Summary of Events: Great Britain: The Gas-Stokers' Strike*, 7 AM. L. REV. 582, 583 (1873) (written anonymously) (describing law as the product of a struggle that usually reflects the "more powerful interests").

91. *See* STEIN, *supra* note 63, at 66–67 (explaining Jhering's theory that law evolves organically as lawyers attempt to solve the problems of "social life").

92. *See* CARTER, *supra* note 52, at 121 (contending that "*present existing* custom" serves as the basis of law).

93. *See* Brian Z. Tamanaha, *A Vision of Socio-Legal Change: Rescuing Ehrlich from "Living Law,"* 36 LAW & SOC. INQUIRY 297, 315 (2011) (explaining that Ehrlich believes that law "gets no repose" as society evolves).

94. Eugen Ehrlich, *Montesquieu and Sociological Jurisprudence*, 29 HARV. L. REV. 582, 584 (1916).

95. Letter from Oliver Wendell Holmes to Frederick Pollock (Dec. 29, 1919), *in* 2 HOLMES–POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932, at 34 (Mark DeWolfe Howe ed., 2d ed. 1961); N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 110 (1997) (quoting Pound's letter to Gray with this praise).

showing "that it is not enough to be conscious that the law is living and growing, we must rather be conscious that it is a part of human life. It is not merely that it should look upon nothing human as foreign to it, in a sense everything human is a part of it."[96] Karl Llewellyn lamented that when he discovered Ehrlich's work, he was "somewhat crushed in spirit, because [Ehrlich] had seen so much."[97] Llewellyn identified Ehrlich as an early exemplar of realist jurisprudence.[98]

For our purposes, the essential point to recognize is that Ehrlich is considered a founding figure of *sociological jurisprudence*. The text setting out his social theory of law is *Fundamental Principles of the Sociology of Law*, published in 1913.[99] When articulating his own views, Ehrlich extensively discusses Savigny, writing, "In forming an estimate of the doctrines of Savigny and Puchta, one must bear in mind that it was they who first introduced the idea of development into the theory of the sources of law and clearly saw the relation between the development of law and the history of a people as a whole."[100] His criticisms of Savigny did not question that law is a social institution infused by social influences.[101] Ehrlich recognized that history and sociology are compatible perspectives from which to examine the social nature of law:

> [T]he chief function of the history of law, as the founders of the Historical School have pointed out in their day, must be to show that the legal propositions and the legal institutions are growing out of the life of the people, out of the social and economic constitution as a whole. For the sociology of law it is of value only in so far as it is successful in doing this.[102]

A crucial observation can now be made about the relationship between historical jurisprudence and sociological jurisprudence. Approaching from his parochial commitment to legal history, Rabban sets the two at odds, competing for primacy, suggesting that the rise of the latter came at the expense of the former. That is a misconception. They share intellectual parentage, a core theory of law as a social institution, the conviction that social–legal development is ongoing in connection with social forces, and a commitment to empirically informed theorizing about law. This shared complex of positions marks out a single coherent rival to natural law and legal positivist theories of law. The main difference is that—consistent with the tenor of their respective times—the older group tended to emphasize

96. *Id.* at 108–09.

97. *Id.* at 291.

98. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 454 (1930).

99. EHRLICH, *supra* note 39.

100. *Id.* at 443.

101. *See id.* at 436–71 (criticizing Savigny's conception of the mechanisms through which social influences impact the law).

102. *Id.* at 475.

history and the newer the social sciences as their favored empirical source of knowledge. Like Savigny, Maine, and Jhering, Ehrlich was a scholar of Roman law, which he refers to extensively in his book. At the time he wrote, however, the developing field of sociology offered a broader framework to study the social nature of law, which he naturally adopted. It would make no sense for an empirically oriented social–legal theorist to artificially restrict himself to one field (history) when a broader range of informative perspectives had become available.

Historical jurisprudence was not vanquished by sociological jurisprudence—it morphed into it.[103] In his original article advocating sociological jurisprudence, Pound acknowledged that historical jurisprudence had expanded and taken an ethnological turn: "At first this wider historical jurisprudence was thought of as a comparative ethnological jurisprudence. But it was not long in assuming the name and something of the character of a sociological jurisprudence."[104] Paul Vinogradoff's *Introduction to Historical Jurisprudence*, published in 1920, ranges across history, psychology, sociology, economics, and political theory as they bear on social–legal development. Rabban, a legal historian, characterizes what occurred as the "demise" of historical jurisprudence (*cum* legal history), but in terms of the social theory of law, it is an advance, which in effect rendered the narrower *historical* jurisprudence label ill fitting and obsolete. The label fell into disuse, but the underlying theory of law carried on.

Historical and sociological jurisprudence are strains of a single jurisprudential school. Starting with Montesquieu, going through Savigny, Maine, Jhering, and Ehrlich, among many other theorists, including Oliver Wendell Holmes and other American historical jurisprudents, there is a manifest identity in their social theory of law. Later theorists criticized earlier ones, as well as contemporaries, while adding their own distinctive wrinkles, giving rise to significant internal diversity amongst them—just as there is great diversity within natural law and legal positivist theories. The social theory of law paints law as a social institution that is produced, molded, and buffeted by social influences, continually absorbing and responding to social forces and needs.

For lack of a recognized overarching label, it goes unrecognized that this constitutes a single jurisprudential school. This is an accident of naming. In its contest with natural law theory and legal positivism, had "historical jurisprudence" instead been dubbed "social historical jurisprudence" or

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103. Roy Kreitner and I take opposing positions on the fate of historical jurisprudence, although we both assert that it was successful. He contends that the abstract systematizing of the historical school came to dominate legal science in U.S. legal thought. Roy Kreitner, *Heroes, Anti-Heroes, and Villains*, 1 JERUSALEM REV. LEGAL STUD. 96, 101 (2010). I am skeptical of Kreitner's claim that German-type systemic thinking became popular in America. Rather than dominate legal science, I argue that it was subsumed within a broader range of social scientific perspectives on law.

104. Pound, *supra* note 11, at 614 (footnotes omitted). Although he is describing the German wing, Pound noted that a similar expansion had occurred in the English branch. *Id.* at 614 n.79.

"social–legal jurisprudence," identifying in its name what the *theory of law* was about, it would be perceived in completely different terms today—a story of success rather than failure.

III. The Forebear of Legal Realism and Modern Views

The social theory of law and the emphasis on social–legal change espoused by historical jurisprudents was taken over by the legal realists. Number one on Karl Llewellyn's list of realist tenets is "[t]he conception of law in flux, of moving law, and of the judicial creation of law."[105] Number three is "[t]he conception of society in flux, and in flux typically faster than the law."[106] Here is Llewellyn's account of how social change is manifested in law:

> It is society and not the courts which gives rise to, which shapes in the first instance the emerging institution; which kicks the courts into action. It is only from observation of society that the courts can pick their notions of what needs the new institution serves, what needs it baffles . . . . In any event, if the needs press and recur, sooner or later recognition of them will work into the law. Either they will induce the courts to break through and depart from earlier molds, or the bar will find some way to put new wine into old bottles and to induce in the bottles that elasticity and change of shape which, in the long run, marks all social institutions.[107]

Although these ideas are now associated with legal realism, it is classic historical jurisprudence.

Late-nineteenth-century historical jurisprudents repeatedly declared, as the legal realists would a generation later, that social influences made their way into law through the thinking of judges.[108] James Carter wrote, "Sympathizing with every advancing movement made by society, catching the spirit which animates its progress, it is [the judge's] aim [to] keep jurisprudence abreast with other social tendencies."[109] Christopher Tiedeman was more explicit in this 1896 passage:

> If the Court is to be considered as a body of individuals, standing far above the people, out of reach of their passions and opinions, in an atmosphere of cold reason, deciding every question that is brought before them according to the principles of eternal and never-varying Justice, then and then only may we consider the opinion of the Court

105. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931).

106. *Id.*

107. K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 59–60 (1951).

108. *See* Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEXAS L. REV. 731, 748–55 (2009) (comparing pre-1900 statements of noted historical jurists with statements made by legal realists and noting that "the core insights credited to the Realists had been stated decades earlier").

109. James C. Carter, *The Ideal and the Actual in Law*, 24 AM. L. REV. 752, 773 (1890).

> as the ultimate source of the law. This, however, is not the real evolution of municipal law. *The bias and peculiar views of the individual judge do certainly exert a considerable influence over the development of the law....* The opinion of the court, in which the reasons for its judgment are set forth, is a most valuable guide to a knowledge of law on a given proposition, but we cannot obtain a reliable conception of the effect of the decision by merely reading this opinion. This thorough knowledge is to be acquired only by studying the social and political environment of the parties and the subject matter of the suit, the present temper of public opinion and the scope and character of the popular demands, as they bear upon the particular question at issue.[110]

To understand a legal ruling, Tiedeman advised, one "must look beneath the judicial opinion" and take into consideration "the pressure of public opinion and the influences of private interests" surrounding the case.[111]

Now we have arrived at another surprise. Modern legal historians have asserted that "[t]he [historical school] legal theories of thinkers like Hammond, Cooley, Bliss, Tiedeman, Phelps, Dillon, and Carter provide the basis for a 'formalistic' view of law and judging."[112] The legal realists are commonly thought to have debunked legal formalism, which has been attributed to the historical jurists. It turns out, however, that their respective views of law and judging have much in common.[113] The ideas the legal realists espoused about the social nature of law and judging were originally championed by, and trace directly back to, historical jurisprudents. The social theory of law generates these insights.

This does not stop with the legal realists—*we* see law in these terms as well. Over two decades ago, Donald Elliott noted that the idea that law evolves in connection with society is "deeply ingrained," though its provenance has been forgotten. "We speak of the law 'adapting' to its social, cultural, and technological environment without the slightest awareness of the jurisprudential tradition we are invoking."[114] Similarly, legal historian Robert Gordon recently remarked that evolutionary–functionalist "theory and its accompanying narrative [have] dominated Western thinking about the relation between law and social change for the last two centuries, although in strictly legal writing the theory is usually inexplicit: it lurks as a set of

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110. Christopher G. Tiedeman, *The Doctrine of Stare Decisis*, 3 U. L. REV. 11, 19–20 (1896) (emphasis added).

111. Christopher G. Tiedeman, *Dictum and Decision*, 6 COLUM. L. TIMES 35, 39 (1893).

112. William P. LaPiana, *Jurisprudence of History and Truth*, 23 RUTGERS L.J. 519, 557 (1992).

113. I develop this argument more fully in *Beyond the Formalist–Realist Divide*. TAMANAHA, *supra* note 21, at 49–56, 79–89. Rabban describes Bigelow's views as "proto-realist," RABBAN, *supra* note 16, at 187–89, but does not go further to reconsider our conventional understanding of legal realism given the fact that many historical jurisprudents expressed similarly realistic views.

114. Elliott, *supra* note 75, at 38.

background assumptions rather than being explicitly set forth and argued for."[115]

Historical jurisprudence has triumphed[116]—at least in the general acceptance of its core theory of law. That is a remarkable conclusion to draw about a mostly forgotten jurisprudential school. It will once again take the field as a formidable rival to natural law and legal positivist theory, though under a broader name like social–legal jurisprudence, when a theorist combines the insights of historical and sociological jurisprudence with contemporary social–legal work to articulate a fully developed and convincing theory of the social nature of law.

115. Robert W. Gordon, *"Critical Legal Histories Revisited": A Response*, 37 LAW & SOC. INQUIRY 200, 202 (2012).

116. Frederic Beiser argues that, although it is thought to have expired, the German historicist tradition was successful in achieving the goal of having history recognized as a science. BEISER, *supra* note 41, at 25–26. My argument is that the success of historical jurisprudence lies in the general acceptance of the view of law it promoted.

Independence and Accountability in State Judicial Selection

THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA. By Jed Handelsman Shugerman. Cambridge, Massachussets: Harvard University Press, 2012. 400 pages. $35.00.

Reviewed by John Dinan*

Although in designing governing institutions American state constitution makers have deviated from various arrangements in place in the U.S. Constitution, state-level departures have been nowhere more extensive or important than regarding judicial selection. Some states follow the federal approach in vesting the power of appointing judges in the governor, generally with a requirement of legislative confirmation.[1] In a couple of states the legislature makes the appointments.[2] In other states, in a method first adopted in the 1830s, judges are chosen in partisan elections.[3] A number of states hold nonpartisan elections, an approach that gained favor in the 1910s.[4] The most recent innovation, dating back to the 1940s and now used in some form in twenty-five states, is the merit plan. Under such plans, the governor makes the initial selection, generally working from nominees forwarded by a selection commission, and once on the bench, the judge stands for retention elections at periodic intervals.[5] By the early twenty-first century, nearly ninety percent of state judges are subject to popular election in some fashion.[6]

Given that "almost no one else in the world has ever experimented with the popular election of judges," Jed Handelsman Shugerman poses the following question in *The People's Courts: Pursuing Judicial Independence in America*: "Why have Americans adopted such a strange practice, when

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1. *See* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 267 (2012) (noting that some states in New England have adopted the federal model of judicial appointments).

2. *Id.* at 267 & 366 n.3 (listing the states where the legislature appoints judges).

3. *Id.* at 78, 267. Shugerman notes, however, that it was not until the 1840s that this method was adopted on a broad scale. *Id.* at 101.

4. *Id.* at 267.

5. *See id.* at 201–02, 208 (describing the merit plan first proposed in Missouri that was later adopted, in that same basic form, by other states from the 1950s–1970s).

6. *See* THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 213–15 (2011) (reporting the number of states using each system). On the percentage of judges subjected to popular election, see SHUGERMAN, *supra* note 1, at 3.

almost no one else has done so before or after?"[7] In prior articles, scholars have traced the origin of particular selection systems, especially partisan elections and merit plans.[8] But Shugerman provides "the first comprehensive, archival study of state judicial selection over American history"[9] and considers the individuals, interests, and ideas responsible for changes over time. In doing so, he draws on an impressive array of sources, making particularly good use, among other archival records, of extensive debates in state constitutional conventions in the mid-nineteenth century as well as several relevant twentieth-century conventions.

Conceived as "a work of legal history and political history" and "also a history of an idea,"[10] Shugerman's book makes his principal argument that the development of state judicial selection can be viewed as "the story of the ongoing American pursuit of judicial independence—and the changing understandings of what judicial independence means."[11] As he argues: "Interest group politics, economics, and specific events drive these stories of judicial design at each stage, yet at the same time, ideas mattered. The idea of judicial independence has been surprisingly resilient and popular throughout American history."[12] In contrast with conventional accounts that treat the evolving design of state judicial selection systems as the product of shifting support for the competing goals of judicial accountability and independence, with judicial elections understood as securing accountability,[13] Shugerman emphasizes the predominant concern with independence and

7. SHUGARMAN, *supra* note 1, at 5.

8. For a discussion of the origin of judicial elections, see Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 45 HISTORIAN 337 (1983) [hereinafter Hall, *Judiciary on Trial*]; Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850–1920*, 1984 AM. B. FOUND. RES. J. 345 [hereinafter Hall, *Progressive Reform*]; and Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190 (1993). On the spread of the merit plan, see Marsha Puro et al., *An Analysis of Judicial Diffusion: Adoption of the Missouri Plan in the American States*, PUBLIUS, Fall 1985, at 85, and Philip L. Dubois, *The Politics of Innovation in State Courts: The Merit Plan of Judicial Selection*, PUBLIUS, Winter 1990, at 23. On the origin and spread of partisan elections, nonpartisan elections, and the merit plan, see F. Andrew Hanssen, *Learning about Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431 (2004).

9. SHUGERMAN, *supra* note 1, at 268.

10. *Id.* at 7.

11. *Id.* at 5.

12. *Id.*

13. *See, e.g.*, CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 7, 78–90 (2009) (explaining how competitive elections promote accountability and statistically exploring the link between electoral competition and accountability); *see also* PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 28 (1980) ("Although elections might serve other functions . . . their role in enabling the public to assert control over the course of judicial policy-making is the mainstay of the argument which supports the selection of state judges by election and not by some other method.").

maintains that "[j]udicial independence has long been the rallying cry *in favor* of judicial elections in their varying forms."[14]

This review proceeds in two parts. First, I summarize Shugerman's account of the three major developments in state judicial selection: the mid-nineteenth century adoption of partisan elections, the Progressive Era turn to nonpartisan elections, and the mid-twentieth-century rise and spread of merit selection. Second, I assess his principal argument that the history of state judicial selection is best understood through the analytical framework of judicial independence. Although helpful in understanding certain historical moments, especially the adoption of partisan elections and the rise of merit selection, a predominant concern with judicial independence may be less helpful in understanding contemporary debates, especially in comparison with standard accounts that stress the strong degree of support for accountability alongside independence.

I. The Origin of Judicial Elections

Shugerman's key contribution is to provide a comprehensive account of the development of state judicial selection from the early republic to the contemporary era, with particular attention to the origin of judicial elections. Although in the colonial era there were numerous examples of "elected officials who had some judicial responsibilities,"[15] and in the late 1700s and early 1800s Vermont, Georgia, and Indiana elected certain lower court judges, it was not until 1832 that Mississippi opted to elect all its judges.[16] However, "[b]y itself," "Mississippi offered a laboratory with no prestige, and judicial elections remained rare for more than a decade" after their adoption in the Mississippi Constitutional Convention of 1832.[17]

Judicial elections were only adopted on a broad scale after the New York Convention of 1846 decided to make all judges elected in what Shugerman views as a response to the Panics of 1837 and 1839.[18] As the understanding took hold that the Panics were attributable to state legislatures spending improvidently on roads, canals, and railroads that turned out to be unprofitable and resulted in significant state borrowing and increased taxes, state constitutional conventions in the 1840s and 1850s responded by enacting numerous constraints on legislatures.[19] To promote transparency, bills were limited to a single subject and had to be read multiple times before passage.[20] To prevent legislators from acting out of self-interest or under the influence of special interests, states restricted debt and stipulated in their

14. SHUGERMAN, *supra* note 1, at 5.
15. *Id.* at 28.
16. *Id.* at 57–76.
17. *Id.* at 76.
18. *Id.* at 84–86.
19. *Id.* at 84.
20. *Id.* at 105.

constitutions that taxes could be raised and debt incurred only after prior approval in a popular referendum.[21] Additionally—and this is Shugerman's key claim—convention delegates sought to ensure that state courts were willing and able to enforce these constitutional constraints against legislatures.[22] Judicial elections were a means of endowing judges "with more popular legitimacy" and thereby leading them "to act more boldly."[23] As he concludes, "In this context, responsibility to the other branches was the problem, and responsiveness to the people was the solution."[24] New York's turn to judicial elections triggered a wave of similar adoptions around the country, such that every state entering the Union from 1846 to 1912 adopted judicial elections, along with many longstanding states.[25]

Shugerman's account in this section, based on his 2010 *Harvard Law Review* article,[26] is the latest entry into a longstanding scholarly inquiry into the origin and spread of judicial elections. Although for many years judicial elections were seen as a logical outgrowth of the Jacksonian-era movement to democratize governing institutions,[27] a close reading of the relevant state convention debates led Kermit Hall and then Caleb Nelson to reject this understanding, albeit in different ways. Hall concluded in a pair of articles in 1983 and 1984 that "constitutionally moderate lawyers and judges" were primarily responsible for adoption of judicial elections.[28] Representatives of the legal profession were well positioned in leadership roles in state conventions to push for an elected judiciary that would "command more, rather than less, power and prestige" and provide "judges a democratic means of countering legislative power."[29] Nelson's exhaustive canvassing of the convention debates in a 1993 article led him to side with Hall's conclusion that "the reformers who backed the elective judiciary intended to check legislatures."[30] But Nelson maintained that "the switch to the election of judges was as much a popular reform as a lawyer's reform."[31] He also emphasized that "[t]he rise of the elective judiciary marked not a mere transfer of power from one branch of government to another, but an effort to decrease official power as a whole."[32]

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21. *Id.* at 104.
22. *Id.* at 105.
23. *Id.* at 97.
24. *Id.* at 99.
25. Hall, *Progressive Reform*, *supra* note 8, at 346–47.
26. Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061 (2010).
27. Hall, *Progressive Reform*, *supra* note 8, at 346–47; SHUGERMAN, *supra* note 1, at 77.
28. Hall, *Progressive Reform*, *supra* note 8, at 347–48; Hall, *Judiciary on Trial*, *supra* note 8, at 346–47.
29. Hall, *Progressive Reform*, *supra* note 8, at 348.
30. Nelson, *supra* note 8, at 203.
31. *Id.* at 202.
32. *Id.* at 203.

Shugerman's comprehensive investigation into the relevant convention debates and the political, economic, and partisan dynamics of these conventions dovetails with these recent interpretations to some extent but also differs in certain respects. Each of these accounts rejects the notion that judicial elections were simply an outgrowth of Jacksonian democracy; as Shugerman notes, the full-scale adoption of judicial elections came a decade after other democratizing changes were enacted in the 1830s.[33] As to whether this change was primarily driven by the legal profession, Shugerman follows Nelson and departs from Hall in arguing that judicial elections are best understood as a popular movement.[34] As Shugerman points out, adoption of judicial elections was such a foregone conclusion in the pivotal New York Convention of 1846 that the only question was whether to elect judges statewide or by district.[35] In terms of whether judicial elections were intended primarily to empower courts to check legislatures rather than to rein in officials in all departments, Shugerman argues, along with Hall and contrary to Nelson, that this was indeed their purpose.[36] In this key respect, Shugerman's account confirms Andrew Hanssen's conclusion in a 2004 article that judicial elections were adopted out of a recognition that "legislators did not always act in the public interest, and the need for an effective third-party enforcer (to ensure legislative adherence to constitutional and statutory guarantees) became increasingly clear" and a realization that judges were ideally suited to perform this role, especially if they were given "a power base of their own, through popular elections."[37]

II. The Turn to Nonpartisan Elections

The Progressive Era turn to nonpartisan judicial elections has generally attracted less scholarly interest and receives less attention in Shugerman's book. He devotes multiple chapters to the earlier adoption of partisan elections and later rise of the merit system but deals with the Progressive Era in a single chapter taking note of conflicting trends in the first two decades of the twentieth century.[38] On one hand, reformers sought to constrain judicial decision making through various institutional mechanisms.[39] At the same time, reformers sought to modify judicial selection systems by reducing the

33. SHUGERMAN, *supra* note 1, at 78 (arguing that "Jacksonian populism was an insufficient cause of judicial elections" and noting that the wave of judicial elections of state judges did not take place until the 1840s–1850s).

34. *Id.* at 115–16.

35. *Id.* at 95.

36. *See id.* at 105 (describing the limits that the constitutions imposed on legislatures and concluding that "[j]udicial elections were part of" an agenda to curtail legislative power).

37. Hanssen, *supra* note 8, at 441.

38. SHUGERMAN, *supra* note 1, ch. 8.

39. *Id.* at 159–60.

influence of partisanship and, it was hoped, the special interests seen as advantaged by partisan elections.[40]

The chief concern in the first two decades of the twentieth century was the willingness of state courts, even more than the U.S. Supreme Court, to block enactment of maximum-hours protections, minimum-wage guarantees, workers' compensation programs, and employer liability laws, among other labor reforms.[41] Supporters of these laws responded in part by pressing for enactment of various court-constraining measures.[42] Most notably, because Theodore Roosevelt made it a centerpiece of a widely circulated speech delivered to the Ohio Constitutional Convention of 1912, reformers sought to allow voters to recall judicial decisions by forcing a popular referendum on court decisions invalidating state statutes.[43] But Colorado was the only state to adopt the recall of judicial decisions through a 1912 amendment that was overturned by the state supreme court within a decade and before it could be put to use.[44] Supermajority requirements for the exercise of judicial review enjoyed somewhat more support and were adopted in Ohio in 1912, North Dakota in 1919, and Nebraska in 1920, although the Ohio provision was eventually repealed in 1968.[45] Popular recall of judges, as distinct from recall of judicial decisions, garnered even more support and was adopted in six states in the Progressive Era, beginning with Oregon in 1908 and spreading to California and Arizona in 1911, Colorado and Nevada in 1912, and North Dakota in 1920.[46] Another five states later adopted the recall procedure and did not exclude judges from its operation, bringing to eleven the number of states that currently have such provisions.[47]

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40. *Id.*

41. John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 989–99 (2007); Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63, 63–64 (1985) (noting that while state court decisions during this period rarely erected a permanent barrier to passage of progressive reforms, they occasionally delayed enactment of such measures).

42. Shugerman, *supra* note 1, at 160 ("Progressives also proposed other checks on the judiciary, such as judicial recall, overriding court decisions by popular vote, and limiting the power of judicial review.").

43. *See* JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 130–35 (2006) (discussing arguments made for and against restricting judicial review following Roosevelt's speech at the Ohio Constitutional Convention); Stephen Stagner, *The Recall of Judicial Decisions and the Due Process Debate*, 24 AM. J. LEGAL HIST. 257, 259 (arguing that despite the American Bar Association's opposition to Roosevelt's proposal, many prominent attorneys rallied to his defense after the convention).

44. DINAN, *supra* note 43, at 135.

45. *Id.* at 134.

46. *Id.* at 135, 342 n.171.

47. *Recall of State Officials*, NAT'L CONF. STATE LEGISLATURES, http://www.ncsl.org/legislatures-elections/elections/recall-of-state-officials.aspx (last updated June 6, 2012) (listing Georgia, Minnesota, Montana, New Jersey, and Wisconsin as allowing for the recall of officials and not excluding judges, in addition to the six states in the Progressive Era that adopted the recall and applied it to judges).

At the same time that some states were adopting court-constraining provisions—and Shugerman emphasizes the failure to gain more support and the decision by some backers to retreat from early expressions of support[48]—states began turning away from partisan judicial elections and adopting nonpartisan judicial ballots.[49] In part, Shugerman explains, this was because "[a] new perspective on partisanship developed: Partisan elections created a judiciary that was more easily captured by ideology and special interests."[50] North Dakota was the first state to adopt nonpartisan judicial elections in 1910, followed by Ohio and California in 1911 and six other states during the remainder of the decade, and another ten states in subsequent decades.[51] In some states, such as Ohio, judicial candidates continued to compete for nominations in party primaries but then appeared on a nonpartisan general election ballot. In most nonpartisan election states, judicial candidates compete without a party label throughout the process.

III. The Rise and Spread of the Merit System

Although the merit system had its origin in the Progressive Era in proposals circulated by the American Judicature Society (AJS), no state adopted this plan in any form until the 1930s.[52] In a pair of chapters addressing adoption of the merit plan in California (in modified form) in 1934 and Missouri in 1940 and then its spread to other states in the 1950s–1970s, Shugerman is primarily concerned with resolving "one of the strangest puzzles in the history of judicial reform."[53] As he notes, "It is exceedingly rare for states to abandon direct democracy,"[54] as voters frequently did in approving merit appointment plans during this period.[55] It is also surprising that "[m]erit plans started in western and midwestern states, and spread first through rural, populist areas" and that they were adopted "during populist reactions to an appointed U.S. Supreme Court and the elite legal establishment" especially during "the backlash against the Warren Court in the 1960s and early 1970s."[56]

Shugerman considers the role of individuals, interests, and ideas in the rise and spread of the merit system. Key parts were played in early-adopting states by individuals such as Earl Warren—who drafted a merit-selection plan for California as a member of the California Committee on the Better

48. *See* SHUGERMAN, *supra* note 1, at 164 (noting that Roosevelt's 1912 presidential campaign, which was based on "antijudicial anger," "failed to persuade the Democratic and Republican parties and failed to win public support for his judicial proposals").

49. *Id.* at 170.

50. *Id.* at 167.

51. *Id.* at 170.

52. *Id.* at 286.

53. *Id.* at 178.

54. *Id.*

55. *Id.* at 178–79.

56. *Id.*

Administration of Law[57]—and Rush Hudson Limbaugh (grandfather of the syndicated talk-radio host), in his capacity as a founder of the Missouri Institute for the Administration of Justice, a main proponent of the merit plan in that state.[58] Business groups and urban leaders were primary supporters, along with the bar association, whereas labor unions were leading critics.[59] But, Shugerman argues, "the key is the relative balance between emerging business strength versus emerging labor unions and urbanization. True, the merit states tended to be rural, but among rural states, they were urbanizing and industrializing."[60] In this regard, "California and Missouri in the 1930s are examples of states where the climate was just right: business had grown powerful enough to support merit, but unions and urban ethnic blocs had not yet grown strong enough to resist."[61] Supporters argued that merit selection "would make judges more efficient, because it would spare them the draining distraction of raising money and campaigning"; but they also "linked this issue to crime control: less party politicking meant more focus on the crime crisis."[62] And, "[i]n both California and Missouri, anticrime propaganda played a surprising role in winning over the public."[63]

Although California in 1934 was the first state to adopt a version of this system, the plan has often been called the Missouri Plan because Missouri voters in 1940 were the first to adopt it in the form it has generally taken in other states.[64] The California approach authorized the governor to make an initial nomination that had to be approved by a commission.[65] But in Missouri and other states, the merit commission took the first step of identifying a slate of nominees—often three candidates—from which the governor made an appointment.[66] Although no states adopted the merit plan for another decade after Missouri, Alabama voters approved an amendment in 1950 instituting the merit plan for the city of Birmingham.[67] Then, in drafting an inaugural constitution, delegates to the Alaska Constitutional Convention of 1955–1956 adopted a merit plan for all state judges.[68] By the end of the 1970s, over twenty states had adopted the merit selection/popular retention plan or either merit selection or retention elections.[69]

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57. *Id.* at 184–88.
58. *Id.* at 199–200.
59. *Id.* at 197.
60. *Id.* at 179.
61. *Id.* at 180.
62. *Id.* at 189.
63. *Id.* at 207.
64. *Id.* at 197.
65. *Id.*
66. *Id.* at 202.
67. *Id.* at 218, 222.
68. *Id.* at 224–26.
69. *Id.* at 286–87.

In setting out his explanation for the spread of the merit system—and focusing especially on the plan's popularity in "rural-but-industrializing states" and the importance of "opportunistic leadership"[70]—Shugerman challenges several explanations that have gained currency in recent decades. Philip Dubois focused in a 1990 article on "the political mobilization campaign[s] sponsored by the American Judicature Society . . . and a coalition of judicial reform groups."[71] Meanwhile, Hanssen's 2004 article advanced a party risk-aversion theory.[72] According to this model, states in which one party enjoyed a large legislative majority were less apt to change their selection system, whether to the merit plan or another plan, whereas states in which one party risked losing its majority were more willing to make a change.[73] Shugerman finds "little evidence that the AJS strategized and initiated this campaign from above more than the local bar, local civic leaders, and local business organized their campaigns on the ground."[74] And although he finds some support for the party risk-aversion account in California,[75] Missouri,[76] and "in a handful of states in the late 1960s, the evidence mostly points away from this factor, because most of these states adopted merit while one party dominated the state legislature."[77]

IV. Pursuing Judicial Independence or Balancing Independence and Accountability?

Other scholars have examined the development of state judicial selection systems, but primarily with an eye toward explaining adoption of a particular system and with the findings generally reported in law review articles or historical journals. *The People's Courts* is the first book to investigate the full history of state judicial selection, and it far surpasses prior studies in the wealth of evidence and detail. Shugerman conducts a painstaking analysis of state constitutional convention records. He makes extensive use of contemporaneous newspaper articles and other periodicals. He draws on and engages a wide range of legal, historical, and political science scholarship. And he gives due attention to interests, individuals, and ideas, as well as the contingent nature of various outcomes.

Above all, though, Shugerman is concerned with advancing an argument about the importance of judicial independence throughout the

70. *Id.* at 238.
71. Dubois, *supra* note 8, at 40.
72. *See* Hanssen, *supra* note 8, at 431 (outlining Hanssen's model).
73. *Id.* at 467–68.
74. SHUGERMAN, *supra* note 1, at 209.
75. *Id.* at 190–91.
76. *Id.* at 204.
77. *Id.* at 209.

history of state judicial selection continuing to the present.[78] In this regard, Shugerman's account differs from conventional approaches that frame the history of state judicial selection as influenced by the competing goals of independence and accountability, with a concern for independence predominating among certain reformers in certain eras and an aspiration for accountability prevailing among other groups at other times. One need only compare Shugerman's title, *The People's Courts: Pursuing Judicial Independence in America*, with other studies, including Paul Carrington's article, *Judicial Independence and Democratic Accountability in Highest State Courts*,[79] and G. Alan Tarr's book, *Without Fear or Favor: Judicial Independence and Judicial Accountability in the States*, published shortly after Shugerman's book.[80]

At times, Shugerman suggests he is not seeking to supplant the standard analytical framework, with its emphasis on independence and accountability, but rather aims to demonstrate that the appeal of judicial independence has gone unappreciated in earlier historical accounts that equated support for elections with an aspiration for accountability. Along these lines, he writes, "It may not be surprising that the American public has valued judicial accountability. But it is intriguing that the American public has a long history of valuing judicial independence at the same time. The modern models of judicial selection reflect both values."[81] Similarly, he concludes,

> One might have thought that judicial accountability is an inevitable and overwhelming force in a democracy, because public opinion, the parties, and elected officials would not allow the judiciary—"the least dangerous branch"—to obstruct their interests or clash with their values. However, it turns out that the value of judicial independence has been a surprisingly robust, resilient, and popular value from the colonial era to the present.[82]

Understood in this fashion, Shugerman's book is a useful corrective to a "simplistic" tendency "to link elections to judicial accountability and appointments to judicial independence."[83] Building on several prior studies[84]

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78. *Id.* at 268. Shugerman notes at the outset that his book "argues that the story of judicial elections is also the story of the ongoing American pursuit of judicial independence." *Id.* at 5.

79. *See* Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 80 (1998) (arguing that "courts, to merit their independence, must be faithful to democratic law" and noting his concern with attending to "the issues of the highest courts' independence and accountability").

80. G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES (2012).

81. SHUGERMAN, *supra* note 1, at 265.

82. *Id.* at 268.

83. *Id.* at 6.

84. *See* Carrington, *supra* note 79, at 89 (arguing that an elected judiciary was advocated "in part to secure judicial independence from irresponsible governors and legislators"); Hanssen, *supra* note 8, at 440–41 (recounting an early nineteenth-century commitment to "increasing the independence of state judges" by giving judges a "power base of their own, through popular elections").

and providing far more detail than has yet been assembled,[85] Shugerman is especially convincing in showing that mid-nineteenth-century supporters of judicial elections "emphasized the abstract principles of judicial independence in their arguments for judicial elections. Reformers defined judicial independence as insulation from a certain kind of insider politics: the partisan patronage politics of appointments. Open partisan politics out-of-doors was their solution, not the problem."[86] Additionally, and though it is less surprising, he shows that advocates of merit selection "relied heavily on the rhetoric of judicial independence to legitimate their reform efforts."[87] At a point in time when "partisan elections" and "open campaigning" had come to be viewed as problematic in the mid-twentieth century, "[a] new brand of insider politics was the solution: professional 'merit' nominating commissions run by bar leaders and committee members. The indignity of open campaigning was supposed to be replaced by the dignity of uncompetitive retention elections without campaigning."[88]

In other respects, Shugerman aims to go beyond showing that judicial independence has been an important aspiration alongside of judicial accountability and merely correcting any misapprehension that judicial elections were supported primarily as a means toward accountability. As illustrated by the book's subtitle, he seeks to place the concern with judicial independence at the forefront of this history. Toward this end, he argues that

> over the history of judicial selection reforms and campaigns, ... these campaigns more often than not have reflected a commitment to general judicial independence, not just relative independence and judicial accountability. The leaders of the reform efforts and the voting public have endorsed the separation of judges from regular politics, even if politics in some form cannot be eliminated.[89]

As he writes in the conclusion, in a particularly strong version of this argument: "The consistent concept over time has been that judges are fundamentally unlike other political officers, and they should be separated from politics in order to act as judges."[90]

Moreover, Shugerman is concerned not only with placing judicial independence at the forefront of historical accounts; he also argues, based in part on the historical record and in part on a consideration of recent developments, that judicial independence ought to be viewed as the primary concern in contemporary judicial selection debates. As he indicates in the introduction, in detailing the benefits of "[t]his tour of American legal and

85. At times, he also provides particular correctives to details in these other studies. *E.g.*, SHUGERMAN, *supra* note 1, at 326 n.45.

86. *Id.* at 6.

87. *Id.*

88. *Id.* at 6–7.

89. *Id.* at 256.

90. *Id.* at 269.

political history," "[t]he lessons of this history may help us find a plausible path back to judicial independence."[91] Likewise, in the conclusion he writes, "If we have learned from history, it is also a new opportunity for redeclaring judicial independence."[92]

In this regard, questions necessarily arise as to how to assess the prominence of independence throughout the development of judicial selection and, even more important, in contemporary debates. Regarding the historical record, Progressive Era debates and developments pose the biggest challenge to this analytical framework in light of the sweeping calls in that period for holding judges more accountable, whether through recall of judges, recall of judicial decisions, supermajority requirements for judicial review, or reliance on constitutional amendments to overturn court decisions. In considering these developments, Shugerman argues that "[t]he critical point here is that the idea of judicial independence retained its sway even among the progressives who were so frustrated by it,"[93] as illustrated by several reformers who "retreated from these attacks out of a fear of backlash."[94] Additionally, he contends that these innovations can be best explained as upholding a concept of "independent judges, dependent judiciary," in that "they curtailed judicial supremacy, but not judicial independence. They could overturn the judges' decisions without turning the judges out of office."[95]

Shugerman is on solid ground in emphasizing the limited success of Progressive Era campaigns to enact court-constraining devices. Recall of judicial decisions passed in a single state and was soon invalidated.[96] Supermajority requirements for judicial review were adopted in only three states and later repealed in one of them.[97] Moreover, and in line with Shugerman's account about the primacy of judicial independence even during this period, one can plausibly view enactment of these devices as well as the reliance on flexible state constitutional amendment processes to overturn errant court decisions as consistent with an aspiration for judicial independence, insofar as they did not involve removing judges from office.

Recall of judges, adopted in six states during the Progressive Era and in another five states during the remainder of the twentieth century,[98] presents a greater challenge for this framework, since this device was intended to remove judges from office and not simply to overturn errant decisions. A key question at Progressive Era state constitutional conventions where

91. *Id.* at 12.
92. *Id.* at 273.
93. *Id.* at 163.
94. *Id.*
95. *Id.* at 165.
96. *Id.* at 165.
97. *Id.* at 166.
98. *Recall of State Officials*, *supra* note 47.

reformers proposed instituting the recall was whether to exempt judges from its coverage. In fact, some convention delegates supported excluding judges from recall procedures on the ground that this would impair their impartiality.[99] Along these lines, eight of the nineteen states that currently permit voter recall of some state-level officials have explicitly declined to apply this device to judges.[100] However, eleven states, including Arizona, California, Colorado, Nevada, North Dakota, and Oregon in the Progressive Era, were intent on treating judges the same as other officials by subjecting them to removal from office through voter recall.[101]

More important than whether pursuit of judicial independence best captures the full scope of Progressive Era developments is whether this is the most helpful guide to contemporary debates. Certainly, judicial independence is a predominant concern for one group of contemporary reformers, many of whom support the merit plan largely because it is seen as better securing independence than alternative models.[102] Shugerman fits squarely in this tradition insofar as he argues that "[i]n this particular moment in American history, the two biggest threats to judicial independence are money and job insecurity"[103] and concludes, "Of the most realistic models, merit selection (circa 2000–2009) turns out to address both the problems of money and job security."[104] To be sure, he acknowledges various failings of the merit system and is particularly concerned about the 2010 defeat in retention elections of "three Iowa judges who had ruled in favor of gay marriage."[105] Nevertheless, he concludes, "The merit system's most concrete advantages are that it shifts the balance to judicial independence from the influence of party politics and money and that it has produced more job security for its judges."[106] Shugerman does go on to argue that merit selection "offers a balance between judicial accountability and independence"[107] and suggests several modest reforms to the merit plan that deserve consideration "[w]hether one prefers accountability or

99. See the statements of Alexander Tuthill in the Arizona Constitutional Convention of 1910 and of George Harris in the Ohio Constitutional Convention of 1912. DINAN, *supra* note 43, at 134.

100. *Recall of State Officials*, *supra* note 47 (identifying Alaska, Idaho, Kansas, Louisiana, Michigan, and Washington as excluding judges from the operation of the recall, along with Rhode Island, where the recall only applies to selected state officials and Illinois, where the recall only applies to the governor).

101. See the statements of Thomas Feeney and Michael Cunniff in support of subjecting judges to recall elections during the debates in the Arizona Constitutional Convention of 1910. DINAN, *supra* note 43, at 129.

102. *See generally* TARR, *supra* note 80 (analyzing reformers who value judicial independence and believe merit selection best achieves it).

103. SHUGERMAN, *supra* note 1, at 256–57.

104. *Id.* at 257.

105. *Id.* at 258.

106. *Id.* at 257.

107. *Id.* at 266.

independence."[108] But his primary concern is securing judicial independence and his main ground for supporting the merit system is that it provides "more reason to expect a degree of protection from the influence of money and partisan competition."[109]

Although a predominant concern with judicial independence certainly describes one strand of the contemporary judicial selection debate, it does not capture the aspirations of other scholars and public officials who are more concerned with judicial accountability and are currently urging adoption of alternatives to the merit system so as to secure greater accountability. Shugerman takes brief note of this competing perspective as it is represented in the academy when, citing to a recent book by Chris Bonneau and Melinda Gann Hall,[110] he writes that some scholars "believe judges should play by the same rules as other politicians" and "generally are skeptical of arguments for judicial independence from public opinion,"[111] and when he notes that "[s]ome regard hotly competitive retention elections as a hallmark of judicial accountability and public engagement."[112]

A predominant concern for judicial accountability is not only found in certain quarters of the current scholarly debate, but is also shared by a sizable number of public officials who have pressed in recent years for eliminating the merit system and adopting various alternatives, whether partisan elections or gubernatorial appointment and legislative confirmation. Again, Shugerman takes brief note of these recent reform efforts, mentioning the role of "corporate interests" in "campaigning to scrap the merit plan and go back to partisan elections,"[113] most notably in the birthplace of the Missouri Plan,[114] and labeling these efforts "simply part of a larger pattern: economic interests find ways of playing by the existing rules of judicial selection to win, and when they stop winning, they campaign to change the rules."[115] But given that Shugerman in other sections of the book considers the role of interests as well as ideas in animating proposed changes in judicial selection, it would seem especially important to consider the *ideas* undergirding recent campaigns to eliminate the merit system.

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108. *Id.* at 259. He notes that "retention elections allow for more adjustment of reelection thresholds"; "the nominating commissions can be adjusted to produce more accountability or more independence"; "judges' term lengths can be made longer or shorter"; "recusal rules can address the influence of money on the courts"; and "there are other mechanisms for checking the courts" such as relying on flexible state constitutional amendment processes to override decisions without voting judges out of office. *Id.* at 259–60, 264.

109. *Id.* at 266.

110. CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009).

111. SHUGERMAN, *supra* note 1, at 256.

112. *Id.* at 258.

113. *Id.* at 256.

114. *Id.*

115. *Id.*

In general, these campaigns are motivated by concerns for securing accountability, in line with the views expressed by Tennessee Governor Don Sundquist after the defeat of Tennessee Supreme Court Justice Penny White in a 1996 retention election on account of her opinion in a death-penalty case: "Should a judge look over his shoulder to the next election in determining how to rule on a case? I hope so. I hope so."[116] In the belief that merit commissions and retention elections do not go far enough in securing accountability, especially in light of statistics showing that only 1%–2% of judges are unseated in these elections—the 1986 defeat of three California judges, 1996 defeat of Tennessee Judge White, and 2010 defeat of three Iowa judges are notable exceptions[117]—reformers have pushed for adoption of alternative approaches, most notably in Missouri, Tennessee, Kansas, Oklahoma, and Arizona.[118]

Focusing on the as-yet unsuccessful efforts by Better Courts for Missouri to replace the merit-selection system in that state, the group's executive director James Harris in 2009, in announcing an initiative campaign to adopt partisan elections (an alternative proposal would have instituted gubernatorial appointment/senate confirmation), argued that popular elections would "make Missouri courts more responsive to the needs of the average Missourian."[119] Noting that elections are already used to select many Missouri judges but not appellate judges and not local judges in some counties, Harris contended that "[j]udicial elections have the chance to turn this around by bringing openness and accountability to Missouri's judiciary."[120] Although Harris also defended this reform as a means of reducing the influence of "trial lawyers and special interest groups that dominate the current process and often have vested interests in the outcomes of judicial rulings,"[121] in what could be viewed as a concern with securing independence from these interests, a leading concern, which was at least as important and perhaps more important than achieving independence, was securing greater accountability.

It is true that recent campaigns to scrap the merit system have enjoyed limited success,[122] making it difficult to assess the precise extent to which they present a challenge to Shugerman's claim about the popularity of judicial independence. But especially in the aftermath of Republican gains in

116. *Id.* at 3.

117. *Id.* at 254–55.

118. *See History of Reform Efforts: Unsuccessful Reform Efforts*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/reform_efforts/failed_reform_efforts.cfm?state (detailing unsuccessful judicial reform efforts that have taken place throughout the United States).

119. Jason Rosenbaum, *Initiative Seeks Direct Elections for All Judges in Missouri*, MISSOURI LAWYERS MEDIA (Oct. 12, 2009), http://www.dolanmedia.com/view.cfm?recID=530024.

120. *Id.*

121. *Id.*

122. *See History of Reform Efforts: Unsuccessful Reform Efforts*, *supra* note 118 (listing failed attempts in several states to replace their judicial merit-selection systems).

2010 state elections, measures eliminating the merit system have enjoyed some success in state legislative chambers,[123] most notably in Tennessee, where the legislature in 2012 approved a constitutional amendment eliminating the merit commission and moving to gubernatorial selection/senate confirmation, and, if approved by a subsequent legislature in a second vote, it will be submitted to voters in 2014.[124] The results of this popular referendum, as well as other referendums to eliminate merit selection that may appear on other state ballots in coming years, will provide an important gauge of voters' current support for accountability.

It is also worth emphasizing that voters have shown no support in recent years for *expanding* merit selection. Voters rejected by wide margins measures to expand existing merit plans in Florida in 2000 and South Dakota in 2004, as Shugerman notes.[125] And in the most recent referendum of this sort, Nevada voters in 2010 rejected by a 58–42 margin, for the third time in the last four decades,[126] a merit-selection amendment backed by former U.S. Supreme Court Justice Sandra Day O'Connor and defended throughout the campaign as a means of securing greater judicial independence.[127] At the least, evidence from the outcomes of popular referendums is mixed regarding the continued popularity of judicial independence and voters' desire to separate judges from politics.

The key point is that regardless of the appeal of judicial independence in prior eras and the way that earlier generations supported judicial elections as a means of securing independence, it is not clear that the contemporary period is best characterized by the pursuit of judicial independence or that recent movements to scrap merit selection and reintroduce partisan elections are motivated by a primary concern with securing independence. As a guide to the full range of views animating contemporary reform debates, one might more profitably turn to conventional accounts that emphasize the competing goals of judicial independence and accountability and the shifting, as well as

123. *See* Bill Raftery, *Merit Selection: Comprehensive State-by-State Review of Efforts to Modify or End Existing Systems*, GAVEL TO GAVEL (Apr. 10, 2012), http://gaveltogavel.us/site/2012/04/10/merit-selection-comprehensive-state-by-state-review-of-efforts-to-modify-or-end-existing-systems/ (examining efforts in 2012 to modify or end existing merit-selection systems as created by constitutional provision or statute).

124. Erik Schelzig, *Tennessee House OKs Judicial Selection Plan*, ASSOCIATED PRESS (Apr. 26, 2012), http://www.timesnews.net/article/9045845/tennessee-house-oks-judicial-selection-plan.

125. SHUGERMAN, *supra* note 1, at 364–65 n.90.

126. *Judicial Selection in the States: Nevada*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/index.cfm?state=NV.

127. For example, see her comments quoted in Buck Wargo, *Former U.S. Supreme Court Justice Says Appointed Judges Better for Business*, LAS VEGAS SUN, Sept. 22, 2010, http://www.lasvegassun.com/news/2010/sep/22/former-us-supreme-court-justice-says-appointed-jud/.

varied, support for these aspirations. Nevertheless, as a detailed treatment of the individuals, interests, and ideas responsible for judicial selection reform at key moments in American history, *The People's Courts* far surpasses prior accounts.

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The Relative Concept of Judicial Independence

THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA. By Jed Handelsman Shugerman. Cambridge, Massachusetts: Harvard University Press, 2012. 400 pages. $35.00.

Reviewed by Mark S. Hurwitz*

Introduction

Should judicial offices be subject to electoral processes? That question is endlessly debated, usually from a normative perspective. Groups like the American Judicature Society (AJS) and the American Bar Association (ABA) spend much of their resources vehemently contending that judicial elections are bad for justice and should be replaced.[1] Others argue instead that judicial elections satisfy the American tradition of accountability to the public, and thus as important policy makers judges should be held electorally accountable.[2]

In *The People's Courts: Pursuing Judicial Independence in America*,[3] Jed Handelsman Shugerman takes a more nuanced approach to the topic of judicial elections. In this meticulously researched book, Handelsman discusses the history of judicial elections in the United States, while placing elections squarely within the debate concerning judicial independence and accountability. That is, while he discusses the benefits and burdens of judicial elections and other judicial selection systems, Handelsman counters that the answer is not as simple as claiming the goals of judicial selection are the mutually exclusive concepts of independence or accountability. As he states in his conclusion:

> The adoption of partisan judicial elections in the nineteenth century and then their partial rejection/reformation in the twentieth century *both*

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1. *See generally* COMM'N ON THE 21ST CENTURY JUDICIARY, AM. BAR ASS'N, JUSTICE IN JEOPARDY (2003) (criticizing excessively expensive judicial election campaigns that contribute to the public perception of impropriety and partisanship as well as impair the independence of the judicial system); RACHEL PAINE CAUFIELD, AM. JUDICATURE SOC'Y, INSIDE MERIT SELECTION: A NATIONAL SURVEY OF JUDICIAL NOMINATING COMMISSIONERS (2012), *available at* http://www.judicialselection.us/uploads/documents/JNC_Survey_ReportFINAL3_92E04A2F04E65.pdf (supporting the American trend towards the reformed judicial "merit selection" process as opposed to previously unreformed methods of judicial election).

2. *See generally* CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009) (arguing that judicial elections positively enhance the relationship between American citizens and the judiciary by promoting judicial accountability).

3. JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (2012).

> were the result of a widespread commitment to the idea of judicial independence. This seeming paradox is possible because judicial independence is often a relative concept, and the understandings of judicial independence have changed over time. Relatedly, the perceptions of "good" and "bad" politics have also changed over time.[4]

With this theme in mind, Shugerman illustrates the events that led to changes (and sometimes stability) in judicial selection over time, with a focus on the history and longevity of elections. As he does so, Shugerman shows the specifics of particular cases while also putting events and transitions in historical context. Indeed, that is how I will proceed in this Review. I first will summarize Shugerman's arguments in historical and chronological order, as he advances in his book. Then, I will address the arguments made by Shugerman.

I. Stages of Judicial Selection and Independence over Time

Shugerman contends that the transformation of judicial selection over time in the United States, particularly with respect to judicial elections, entails the concepts of separation of powers and judicial independence. How do elections relate to judicial independence? Shugerman discusses that in some detail when he demonstrates how elections came about in the United States in the mid-nineteenth century, and how these institutions have reacted to different contextual influences over time. To introduce his thesis, Shugerman states that "this book argues that the story of judicial elections is also the story of the ongoing American pursuit of judicial independence—and the changing understandings of what judicial independence means."[5]

More particularly, in his view, contextual aspects of political life in America influenced judicial selection. "Each generation feared concrete evils: imperious kings, incompetent legislators, corrupt political parties, corrupting special interests, demagoguery, and the masses."[6] Confronting those evils led to attempted changes (some successful, some not) to judicial selection in the states. Those changes in selection systems as they relate to issues of judicial independence extend to Shugerman's five stages of judicial selection over the course of American history: (1) "premodern unseparated judiciary," (2) "judicial aristocracy," (3) "judicial democracy," (4) "judicial meritocracy," and (5) "judicial plutocracy."[7] Shugerman's book tackles each of these periods in some detail.

4. *Id.* at 271.
5. *Id.* at 5.
6. *Id.* at 8.
7. *Id.* at 9.

A. Judicial Aristocracy Develops from a Premodern Unseparated Judiciary

According to Shugerman, colonial courts in America were not at all independent, as they were dependent upon other political actors with little protection that comes from separation of powers.[8] During this premodern time period, which he addresses in Chapter 1, judges served at the pleasure of the sovereign King.[9] While courts earned some separation from the crown at various points during colonial history, King George III reasserted the position that judges are subject to the monarch's rule. "The colonial period is filled with instances of American colonists seeking to give their judges tenure 'during good behavior' as protection from the Crown, and repeatedly the British pushed back."[10]

Shugerman goes on to discuss many of the details of colonial life, particularly as it related to the judiciary and how change to the judiciary eventually came about via the American Revolution—thus the title of this chapter, "Declaring Judicial Independence."[11] The debate over judges during this period, both pre- and post-Revolution, concerned not so much how judges were selected but instead the circumstances of their tenure.[12] Since colonial judges were easily removed by the Crown if the former did not please the latter, the early period in American history was defined by a more clear separation of powers with specific terms of office.[13] In this regard, Shugerman illustrates how some states provided for tenure "during good behavior" while others had specific term limits.[14] But the key aspect of these institutions was independence from executive control.

The federal Constitution, of course, provided for presidential appointment of justices with senatorial approval, with effective lifetime appointment based on serving during good behavior.[15] Shugerman notes that there was not much debate over judicial selection at the Constitutional Convention in Philadelphia, as the Framers simply desired to include a federal judiciary that was nonexistent during the period governed by the Articles of Confederation.[16] However, Shugerman notes that the Framers did care about judicial independence from the Executive, which remained a sore point from the colonial era.[17] The Constitution provided protections for an independent

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8. *Id.* at 15–16.

9. *Id.* at 15–17.

10. *Id.* at 18.

11. *Id.* ch. 1.

12. *See id.* at 23–26 (recounting the debate between Federalist support for life tenure in order to check "the imprudence of democracy" and the Anti-Federalist fear that a judiciary with unchecked terms of service would create an ongoing "oligarchic" system discounting the concerns of the people).

13. *Id.* at 18–20.

14. *Id.* at 20.

15. U.S. CONST. art. II, § 2, cl. 2; *id.* art. III, § 1.

16. SHUGERMAN, *supra* note 3, at 20.

17. *See id.* at 19–20 (noting that prior to the Revolution, "independence of the judiciary from the Crown was a key issue in a majority of the colonies").

judiciary by mandating there be a Supreme Court and by providing justices with lifetime appointment (with a "high threshold for removal" based on impeachment) and salary guarantees.[18] Thus, the federal Constitution was fairly clear on judicial independence.

During the debate over ratification in the states, however, Shugerman asserts that the terms of judicial independence began to shift. That is, in Shugerman's view, Alexander Hamilton changed the idea of judicial independence when he contended in *Federalist No. 78* that the Constitution's lifetime tenure provision was protection of the Judiciary from illegitimate legislative power, whereas previously judicial independence was considered protection against illegitimate executive power.[19] This is the first of many examples of Shugerman's argument that judicial independence is relative, as he contends that "independent *from whom or what*?" is an important question when considering the notion of judicial independence.[20]

Thus, the premodern period of weak judges and courts became a judicial aristocracy in the early constitutional period, protected by separation of powers. Shugerman claims this stems from Hamilton's idea of judicial independence: "Hamilton's explanation reflects the idea of judicial aristocracy—not in the pejorative sense of a privileged class of nobility, but in the sense of a separate and independent estate, enjoying the privileges of life tenure so that it can check the excesses of both monarchy and democracy."[21] While the Anti-Federalists were not pleased with this scenario, they were not able to change the institution of selection and tenure as enumerated in the Constitution.[22]

Shugerman concludes this chapter by explaining that there were many elected officials in the colonial period who had judicial responsibilities, but that there were no judicial elections per se in the colonial period or even in the early constitutional period.[23] The time for judicial elections would come in the states, of course, but it took some time and some doing.

B. Judicial Democracy

Shugerman spends the bulk of his book (Chapters 2 through 8) analyzing the stage of judicial history that he refers to as judicial democracy. While judicial elections are critical to this era, it did not begin with elections.[24] In fact, for the seeds of judicial elections to grow, there first needed to be a sense that courts were powerful yet vulnerable. That is the subject of Chapter 2,

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18. *Id.* at 21.
19. *Id.* at 22.
20. *Id.* at 7.
21. *Id.* at 23.
22. *Id.* at 24–27.
23. *Id.* at 27–29.
24. *See id.* at 30 (asserting that judicial elections were "uncommon in the early phase of judicial democracy").

"Judicial Challenges in the Early Republic."[25] Shugerman argues that while the early constitutional period is credited with an expansion of judicial power, particularly by means of Chief Justice Marshall's assertion of judicial review in *Marbury v. Madison*,[26] from a practical perspective courts were not as independent, and *Marbury* not as consequential, as conventional wisdom presumes.[27] Indeed, during this period there were numerous attacks on courts, often led by "Radical Jeffersonians" who advocated greater political control of courts and the abandonment of common law, while contending that the legal profession that controlled the Judiciary was "evil."[28]

Shugerman maintains that judicial review was not used all that much during this time period.[29] Of course, the first time the U.S. Supreme Court utilized the power of judicial review after *Marbury* was in the infamous *Dred Scott v. Sanford*[30] decision, half a century after Chief Justice Marshall's assertion of the power. Even in the States, judicial review was not employed all that often.[31] And, while there were some judges who applied judicial review more than occasionally—particularly in New York, Kentucky, Tennessee, and Missouri—in the end the legislatures in these states, not the courts, won the ensuing battles between these branches of government.[32] His point in this chapter is that notions of separation of powers and judicial review found in various laws and texts were insufficient to protect judges, who were "often swept aside by the stronger force of party politics and democratic power."[33]

The consequence of these strong-arm tactics by legislatures, Shugerman argues, is the rise of judicial elections, as discussed in Chapters 3 through 5. In Chapter 3, "Judicial Elections as Separation of Powers," Shugerman uses a number of case studies to show how political parties and interest groups embraced Jacksonian themes of populism.[34] This included a push for elections in all political offices, including the Judiciary.[35] Interestingly, Shugerman argues that the rationale for employing judicial elections was to bring about

25. *Id.* ch. 2.

26. 5 U.S. (1 Cranch) 137 (1803).

27. *See* SHUGERMAN, *supra* note 3, at 31 (citing instances of state politicians "sweeping [judges] off the bench or abolishing their jobs" in response to assertions of the power of judicial review).

28. *Id.* at 49.

29. *See id.* at 31 (stating that exercise of "judicial review was either rare or nonexistent from the Founding through the 1830s").

30. 60 U.S. (19 How.) 393 (1857).

31. *See* SHUGERMAN, *supra* note 3, at 31 (finding that the average state supreme court "invalidated only one or two state statutes per decade through the 1830s").

32. *Id.* at 53.

33. *Id.* at 56.

34. *Id.* ch. 3.

35. *See id.* at 66 (describing how the Whole Hog party fought for separation of powers and judicial independence in Mississippi and noting that their victory resulted in election of all Mississippi's judges).

accountability to the people while increasing separation of powers and judicial independence from corrupt or incompetent legislatures.[36]

During this period of time, Mississippi was the first state to adopt judicial elections in 1832.[37] President Andrew Jackson endorsed judicial elections as part of what is commonly known as the era of Jacksonian democracy. Yet, Shugerman shows that only Mississippi formally embraced judicial elections during the Jackson Administration (1829–1837); indeed, no other state implemented judicial elections even during Jackson's lifetime (he died in 1845).[38] His point is that elections came about after the Jacksonian era, as the push during this time period was for judicial independence in the states.[39]

Instead of Jacksonian democracy, Shugerman contends in Chapter 4, "Panic and Trigger," that there were two turning points that led more directly to judicial elections: (1) the banking crisis and economic depressions of the late 1830s and early 1840s, and (2) the New York Constitutional Convention of 1846.[40] The blame for much of the nation's economic woes was placed at the doorstep of various state legislatures.[41] Thus, the push for judicial elections reached a critical mass, as the argument among those favoring elections was that this institution would check the lowly legislatures while increasing judicial independence.[42]

This argument was made and accepted by the delegates to the New York Constitutional Convention, who overwhelmingly approved a new constitution establishing a new court system, with all of its judges subject to elections and specified terms of office.[43] In turn, this "triggered a national revolution in judicial politics" as many states soon adopted elections in the late 1840s and 1850s.[44]

Shugerman entitles Chapter 5 "The American Revolution of 1848," due to what he sees as a constitutional revolution in the states between 1844–1853, when twelve existing states adopted new constitutions and four entered the Union with new constitutions.[45] During this time period, many states embraced judicial elections as part of an antilegislative agenda.[46] That is, states supported judicial elections not only as a check on legislatures, but also to bring about accountability, as judges would be agents of the people.[47] But, Shugerman argues that elections were about more than accountability, as they

36. *Id.* at 57.
37. *Id.*
38. *Id.* at 77.
39. *Id.* at 77, 84.
40. *Id.*
41. *Id.*
42. *Id.* at 84–85.
43. *Id.* at 98–99.
44. *Id.* at 102.
45. *Id.* at 103.
46. *Id.* at 104–05.
47. *Id.* at 105.

were designed to increase judicial independence and as judiciaries would be more professional and rise above politics.[48] And, once again Shugerman brings context to bear, showing that while adopting judicial elections at first had little to do with the issue of slavery, that changed in the 1850s as "slavery entered judicial politics more directly."[49]

What evidence does Shugerman bring to bear that courts were stronger and more professional after becoming electoral institutions? Shugerman points out that state courts were much more likely to utilize the power of judicial review during this period than at any previous time in the nation's history. This is the subject of his Chapter 6, "The Boom in Judicial Review."[50] Shugerman claims that judicial elections increased the use of judicial review, as judges were now making countermajoritarian arguments in favor of judicial review.[51] Shugerman's counterintuitive argument is stated most clearly as follows: "Judicial power and judicial independence have thrived in America because they can be defended simultaneously as the guardians of democracy and the guardians against too much democracy."[52]

While judicial elections were successful in bringing about a check on legislatures, thus promoting judicial independence, storm clouds soon arose on the horizon after the Civil War. As discussed in Chapter 7, "Reconstructing Independence," partisan politics began to infuse judicial elections.[53] The solution proposed and adopted in a number of states was not to get rid of elections but to lengthen terms of office.[54] Once again, judicial independence was the key ingredient, as many felt that longer judicial tenures, while potentially sacrificing accountability a bit, would decrease the influence of political parties and corruption.[55] Shugerman also shows how accountability did not decrease even with the extended terms of office, as elected judges proved to be sensitive to those current events he uses as case studies.[56]

Nevertheless, partisan politics continued to influence judicial elections. Chapter 8's "The Progressives' Failed Solutions" follows the early twentieth-century reform movement.[57] In particular, Shugerman asserts that Progressives initially attempted to eliminate partisan problems stemming from the *Lochner* era by bringing about nonpartisan elections, but these reform efforts failed. Shugerman concludes that "[n]onpartisan elections produced

48. *Id.*
49. *Id.* at 120.
50. *Id.* ch. 6.
51. *Id.* at 123.
52. *Id.* at 143.
53. *Id.* ch. 7.
54. *Id.* at 150.
55. *Id.* at 149–50.
56. *Id.* at 158.
57. *Id.* ch. 8.

less judicial accountability to the people and less judicial independence from politics."[58]

Then, a new wave of judicial reformers entered the picture, beginning with Roscoe Pound's famous speech before the ABA.[59] After this seminal moment, reform groups such as the AJS and ABA entertained various new selection mechanisms, each designed to obviate political influence from the courts.[60] Shugerman includes these new selection systems in his chapter on failed solutions because ideas like merit selection and retention elections did not take hold during the Progressive Era.[61] In part, these new approaches failed because neither the public nor political elites were willing to accede their control to legal elites—at least not yet. While "[t]he Progressive Era was littered with failed judicial reforms, . . . it planted an idea that grew through the rest of the century."[62] Indeed, these proposals soon brought about the next stage of Shugerman's judicial politics: the era of meritocracy.

C. *Judicial Meritocracy*

Beginning during the Great Depression and continuing on through the 1970s, the era of judicial meritocracy dominated judicial selection.[63] While AJS had proposed years earlier a selection system centered on retention elections and nominating commissions, it was not until the 1930s that judicial elections would finally begin to give way to this new selection method.[64] In Chapter 9, "Crime, and the Revival of Appointment," Shugerman illustrates the events that led a number of states to consider, and some to adopt, what is conventionally known as the merit system.[65] While merit is often referred to as the Missouri Plan due to that state being the first to adopt this system in 1940, it was California that first approved a version of merit in 1934.[66] Shugerman offers interesting insight into why Missouri, not California, is credited by name with this system: in California the Governor, not a nominating commission, is the initiator in selection.[67] He also discuses the influence of Chief Justice Earl Warren, then an Oakland prosecutor, in changing judicial elections in California.[68] Why did this selection system advocated by the AJS and ABA pass at this point in time and not during the Progressive era? Simply put, Shugerman contends that economic conditions

58. *Id.* at 173.
59. *Id.*
60. *Id.* at 174–75.
61. *Id.* at 175–76.
62. *Id.* at 176.
63. *See id.* at 178–79 (describing the emergence of merit reforms during the Great Depression and their continuance through the 1970s).
64. *Id.*
65. *Id.* at 179–80.
66. *Id.* at 195, 197.
67. *Id.* at 197.
68. *Id.* at 184–91.

contributing to a crime wave, as well as local events in California and Missouri, all pushed voters over the edge and a form of merit selection over the top.[69]

Another factor, according to Shugerman, is that merit was advocated by business interests that aligned themselves with the AJS/ABA proposals.[70] In particular, labor unions were very adept at winning partisan elections, including judicial elections.[71] Taking notice of this, "business interests changed their approach, from a strategy of winning partisan elections to a strategy of getting rid of partisan elections in favor of professional appointment."[72] This new selection system would not have come about, Shugerman argues, without the alignment of business interests, legal interest groups, and a populace fed up with a poor economy and excessive crime.[73]

The meritocracy era gained strength in post-War America. Again, context was critical, as Shugerman offers that Cold War attitudes triggered reform based on merit.[74] Interestingly, neither the AJS nor the ABA referred to the merit system until the late 1950s, even though civil service reform had been called "merit" since the Progressive Era in the early twentieth century.[75] This confluence of events led to the popular rise of merit in the states. "In the late 1950s and early 1960s, 'merit' captured a national perspective, connecting equality of opportunity to nonpartisan expertise. These Cold War ideological shifts set the stage for merit's spread."[76]

In propounding this selection system, the AJS and ABA emphasized the institution of nomination by commission, not retention elections.[77] As well, a new notion of judicial independence, compounded with an emphasis on the rule of law, led to the spread of merit, as Shugerman shows in more case studies.[78] Times once again would change, leading to Shugerman's final stage of judicial politics.

D. The Current Era of Judicial Plutocracy

How is judicial politics a plutocracy? Shugerman contends in Chapter 11, "Judicial Plutocracy," after 1980, that it is not about a wealthy class controlling the judicial branch.[79] Instead, he asserts it concerns the massive increase in campaign spending that has taken control of all kinds of

69. *Id.* at 193–94.
70. *Id.* at 206.
71. *Id.*
72. *Id.*
73. *Id.* at 207.
74. *Id.* at 215.
75. *Id.* at 174, 216–17.
76. *Id.* at 218.
77. *See id.* at 194–95 (detailing the ABA's move toward supporting the nominational appointment process in accord with AJS).
78. *Id.* at 239–40.
79. *Id.* at 241.

judicial elections, whether partisan, nonpartisan, or retention.[80] Conservative interests and business groups often aligned in the tort wars with campaign expenditures designed to rid courts of judges they did not care for (such as Justice Rose Bird and her colleagues in California in the 1980s), and to endorse judicial candidates they supported (including Karl Rove's campaigns for Justice Tom Phillips and others).[81]

Shugerman transitions between competitive elections and retention elections, showing how the influence of money is similar and different in these systems. He also discusses the pros and cons of merit, falling somewhere in the middle of this debate. For instance, at one point he claims that "[p]olitics and influence inevitably find their way into any system of judicial selection."[82] Then, he says that merit promotes judicial independence and judicial job security, and while merit selection is not "nonpolitical," it is "multipolitical or pluralistic, and it furthers the separation of powers by creating a different selection mechanism from . . . party-controlled elections."[83]

After discussing these eras of judicial politics, Shugerman offers summation and prescription in a concluding chapter, "Interests, Ideas, and Judicial Independence." He contends that elections are deeply ingrained institutions in American politics, and that each historical stage has been influenced by judicial accountability and independence.[84] Moreover, judicial independence is a relative concept, changing over time.[85] Shugerman concludes with a strong defense of the rule of law, which he seems to equate with judicial independence.[86] These concepts are more important than impartiality and nonpartisanship, which instead are aspirational but remain essential to the functioning of courts. He concludes, "At the start of the twenty-first century, we face a new crisis in judicial politics and special interests. If we have learned from history, it is also a new opportunity for redeclaring judicial independence."[87]

II. Shugerman's Theory of Relativity

Shugerman has written a fascinating book that is scrupulously researched. For instance, I received a grant from the Michigan Supreme Court Historical Society to study the unique selection system for the Michigan Supreme Court. During my research on the history of a single state court, I engaged in detailed archival research and unearthed many documents that for the most part had not seen the light of day for some time. One of the important

80. *Id.*
81. *Id.* at 241–53.
82. *Id.* at 255.
83. *Id.* at 259.
84. *Id.* at 267–68.
85. *Id.* at 272.
86. *Id.* at 272–73.
87. *Id.* at 273.

pieces of evidence located during my research was an article discussing why a 1934 ballot initiative in Michigan failed and the prospects for the upcoming 1938 merit proposal.[88] To Shugerman's credit, he cites this same article while discussing Michigan's deliberation with, and the failure of, merit selection.[89] This is but one example of Shugerman's conscientious research design as he seems to leave almost no stone unturned.

There is much more to like about *The People's Courts*. In particular, Shugerman provides a historical context for judicial elections, showing that they are deeply ingrained in American politics, but also how various interests have supported and opposed this selection system over time. As well, the inclusion of current events in their historical contexts and their influences on judicial politics is a key feature of this book. In other words, politics is not lost on Shugerman's take on judicial politics, and scholars of many fields should take note of this approach.

Shugerman deserves much credit for exemplifying that judicial independence is broader than its colloquial, even scholarly, usage. In other words, what is judicial independence and why is it important? Shugerman shows this can mean independence from executive oversight, from legislative power, or from popular accountability. Moreover, at various points in the history of judicial politics, advocates for particular selection systems exploited the argument of providing courts with independence as a way of fostering support for that selection system. In many ways, this is the strongest contribution of this book.

Nevertheless, I have a few points of criticism. For instance, a central theme of his book is that judicial elections should be considered as the pursuit of judicial independence. Since this goes against conventional wisdom, Shugerman could have discussed some of the literature on judicial elections as accountable mechanisms. In particular, Bonneau and Hall have written a provocative book on judicial elections, in which they show with much empirical evidence the positive aspects of elections.[90] While Shugerman cites their book, his arguments would have been much more persuasive had he engaged in some of the arguments made by Bonneau and Hall in some detail. While each supports elections, they do so for different reasons. In the words of Bonneau and Hall, "[J]udicial elections are democracy-enhancing institutions that operate efficaciously and serve to create a valuable nexus between citizens

88. *See generally* George E. Brand, *Michigan State Bar's Work for Judicial Appointment*, 22 J. AM. JUDICATURE SOC'Y 199 (1938) (discussing the appointment process of judges in Michigan); *see also* Mark S. Hurwitz, *Selection System, Diversity and the Michigan Supreme Court*, 56 WAYNE L. REV. 691 (2010) (discussing judicial selection processes generally, and the unique system employed by the Michigan Supreme Court); Elizabeth Wheat & Mark S. Hurwitz, *The Politics of Judicial Selection: The Case of the Michigan Supreme Court*, 96 JUDICATURE (forthcoming January/February 2013) (discussing the history and politics behind Michigan's unique selection system for its Supreme Court).

89. SHUGERMAN, *supra* note 3, at 197 n.90 (citing Brand, *supra* note 88).

90. BONNEAU & HALL, *supra* note 2.

and the bench."[91] In other words, elections limit independence by enhancing public accountability. Since this is very different from Shugerman's argument, more on this point would have enhanced his thesis.[92]

Speaking of empirical evidence, while Shugerman effectively includes a number of graphs and tables showing how elections and other important issues came about in history, he does not make use of empirical evidence regarding the arguments in his book. I realize this is not a book that utilizes empirics by design, even though the topic and arguments scream out for empirical verification.[93] Nevertheless, I would have liked to see evidence beyond his verbal arguments. For instance, even though judicial elections did not take hold until after President Jackson's term, the theme and influence of Jacksonian democracy continued to rage long after Jackson's administration. Thus, stating that it was not the Jacksonian era that caused a surge in judicial elections because they did not occur until later is an argument that could have been (perhaps even should have been) subject to empirical verification.

In this regard, Shugerman seems to blur the lines between the Jeffersonian and Jacksonian eras and their respective influence. While both presidents contended that exercise of judicial power was often inappropriate, it was unclear whether certain events were the result of Jeffersonian or Jacksonian politics. In a similar vein, Shugerman writes: "A closer examination of these events illustrates that the early American courts were not as cohesive or independent as the received lore of the Marshall Court has portrayed."[94] Surely, conventional wisdom provides that the Marshall Court induced judicial power throughout the country. Nevertheless, scholars have been arguing for quite some time that this was not necessarily the case, and Shugerman could have at least cited to some of the literature here, as his is not a lone voice in this matter.[95]

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91. *Id.* at 2.

92. Similarly, there is a growing literature on the influence of campaign expenditures on judicial elections and behavior, which Shugerman ignores. *See generally, e.g.*, Chris W. Bonneau & Damon M. Cann, *Campaign Spending, Diminishing Marginal Returns, and Campaign Finance Restrictions in Judicial Elections*, 73 J. POL. 1267 (2011) (examining the effect of institutional campaign finance restrictions on the performance of incumbents and challengers); Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 ST. POL. & POL'Y Q. 281 (2007) (exploring possible conflicts of interests arising when an attorney, who has contributed financially to a judge's campaign, then appears in court before that same judge); Melinda Gann Hall & Chris W. Bonneau, *Mobilizing Interest: The Effects of Money on Citizen Participation in State Supreme Court Elections*, 52 AM. J. POL. SCI. 457 (2008) (investigating "whether judicial election campaign spending increases citizen participation in the recruitment and retention of judges").

93. For an example of a recent book that employs empirical evidence with respect to judicial independence, *see* TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE (2011).

94. SHUGERMAN, *supra* note 3, at 49.

95. *See, e.g.*, Michael W. McConnell, *The Story of* Marbury v. Madison*: Making Defeat Look Like Victory*, *in* CONSTITUTIONAL LAW STORIES 13, 22–23 (Michael C. Dorf ed., 2004) (arguing that the proposition established in *Marbury v. Madison*, recognizing the authority of the courts to decline enforcement of a statute deemed unconstitutional, was not particularly controversial at the time); Elliot E. Slotnick, *The Place of Judicial Review in the American Tradition: The Emergence of an Eclectic Power*, 71 JUDICATURE 68, 70 (1987) (positing, for example, that despite the fact that Chief

Finally, Shugerman's argument that judicial independence is a relative, perhaps even nebulous, concept is a useful one. How independence is viewed by elites and masses at any given point in history matters in many ways and for a variety of reasons. Well done. However, the problem here concerns specificity of his argument. That is, when you assert that a concept is relative and transforms over time, then it can become somewhat effortless to fit whatever puzzle piece you may have into the available slots, simply because you can. In other words, it is difficult to state with precision how or why independence matters when that concept is incessantly shifting.

Shugerman does a nice job in demonstrating that the arguments in favor of several potential changes to selection systems were often caged in terms of judicial independence. However, that is different from asserting that "the story of judicial elections is also the story of the ongoing American pursuit of judicial independence—and the changing understandings of what judicial independence means."[96] Yes, at least sometimes. That is, as Shugerman shows, in the mid-nineteenth century, some advocates for elections used independence from legislative abuse as a rationale for that selection mechanism. But, the contemporary debate on elections turns more on issues of accountability, and thus limiting judicial independence.[97]

These criticisms aside, this is a very useful book that scholars of judicial politics in general, and selection systems more particularly, will find enlightening and engaging. Shugerman brings to bear a number of difficult concepts, and he adroitly addresses them by articulating a fresh approach to the old yet continually important debate concerning judicial independence. All told, *The People's Courts* is a significant addition to the literature.

Justice Marshall enunciated the doctrine of judicial review in *Marbury v. Madison*, the doctrine had previously been recognized in various other settings).

96. SHUGERMAN, *supra* note 3, at 5.

97. *See generally, e.g.*, BONNEAU & HALL, *supra* note 2 (explaining that proponents of judicial elections argue that these elections promote accountability, since judges must answer to their electorate for their decisions).

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Notes

Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*

Introduction

According to her congressional testimony, when Jamie Leigh Jones arrived in Baghdad to work for Halliburton, she was housed in a barracks with four hundred male coworkers[1] and was almost immediately sexually harassed.[2] When she complained to managers, she was told to "go to the spa."[3] The very next evening, she was "drugged, beaten, and gang-raped by several [Halliburton] employees."[4] After the incident, Halliburton kept her in a container under armed guard.[5] When she finally returned to the United States, Jones was initially denied her day in court because her employment contract included an arbitration clause.[6] Although the jury found against Ms. Jones in her civil trial,[7] her story and a recent Supreme Court decision[8] have cast the public spotlight on arbitration, and arbitration is under siege.[9]

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1. *Enforcement of Federal Criminal Law to Protect Americans Working for U.S. Contractors in Iraq: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec.*, 110th Cong. 35 (2007), *available at* http://judiciary.house.gov/hearings/printers/110th/39709.PDF [hereinafter Jones Statement] (prepared statement of Jamie Leigh Jones) ("Upon arrival at Camp Hope, I was assigned to a barracks which was . . . approximately 25 women to more than 400 men.").

2. Jones v. Halliburton Co., 583 F.3d 228, 231 (5th Cir. 2009); *see also* Jones Statement, *supra* note 1, at 33 ("I was subject to repeated catcalls and men who were partially dressed in their underwear while I was walking to the restroom on a separate floor from me.").

3. *Jones*, 583 F.3d at 231.

4. *Id.*

5. *Id.* at 232.

6. *Id.* at 232–33.

7. Associated Press, *Texas: Jury Rejects Assertion of Rape Against Military Contractor in Iraq*, N.Y. TIMES, July 8, 2011, http://www.nytimes.com/2011/07/09/us/09brfs-Kbr.html.

8. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

9. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 1028, 12 U.S.C. § 5518 (Supp. IV 2011) ("The [Consumer Financial Protection] Bureau shall conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services."); Editorial, *Gutting Class Action*, N.Y. TIMES, May 12, 2011, http://www.nytimes.com/2011/05/13/opinion/13fri1.html?_r=0 [hereinafter *Gutting Class Action*] (characterizing the 5-to-4 *Concepcion* decision as "a devastating

At the center of the controversy is a fundamental question that has divided scholars for the past decade: Should arbitration clauses in employment and consumer contracts be enforced despite the risk of unequal bargaining?[10]

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blow to consumer rights," and noting that "[i]n a welcome effort to protect consumers, employees and others, Senators Al Franken and Richard Blumenthal and Representative Hank Johnson have just introduced the Arbitration Fairness Act. It would make required arbitration clauses unenforceable . . . ."); *see also* Kimberly Atkins, *Future and Authority of New Consumer Agency in Doubt*, LAW. USA, July 21, 2011, http://lawyersusaonline.com/blog/2011/07/21/consumer-financial-protection-bureau-a-bureau-born-into-controversy/ (noting that the Consumer Financial Protection Bureau "could be the only hope of essentially overturning [*Concepcion*]"); Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BUSINESSWEEK, June 5, 2008, http://www.businessweek.com/stories/2008-06-04/banks-vs-dot-consumers-guess-who-wins ("What if a judge solicited cases from big corporations by offering them a business-friendly venue in which to pursue consumers who are behind on their bills? What if the judge tried to make this pitch more appealing by teaming up with the corporations' outside lawyers? And what if the same corporations helped pay the judge's salary? . . . [T]hat's essentially how one of the country's largest private arbitration firms [the National Arbitration Forum] operates.").

10. *See, e.g.*, Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 771–72 (evaluating the merits of arbitration clauses); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Claims*, 72 N.Y.U. L. REV. 1344, 1349–59 (1997) (proposing guidelines for and discussing the merits of predispute arbitration agreements); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001) (arguing that the arbitration system can be better for the average claimant than a litigation-based system); Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 418–42 (2000) (arguing that arbitration is disadvantageous for large employers); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 54–71 (2000) [hereinafter Sternlight, *Will the Class Action Survive?*] (evaluating the impact of predispute arbitration agreements on class actions); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1648–58 (2005) [hereinafter Sternlight, *Creeping Mandatory Arbitration*] (discussing the impact of mandatory arbitration on individuals); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 701–02 (1996) [hereinafter Sternlight, *Panacea or Corporate Tool?*] (arguing that consumers should not be forced to unknowingly waive their rights to a jury trial); Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012) [hereinafter Sternlight, *Tsunami*] ("*Concepcion* is proving to be a tsunami that is wiping out existing and potential consumer and employment class actions."); Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, POL'Y ANALYSIS, Apr. 18, 2002, at 8 [hereinafter Ware, *Arbitration Under Assault*] ("What opponents of . . . mandatory arbitration really oppose is freedom of contract."); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 253 (2006) [hereinafter Ware, *Enforcing Adhesive Arbitration*] (arguing that "general enforcement" of arbitration clauses "is socially desirable and . . . benefits most consumers [and] employees"); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 138–45 (1996) (discussing the insufficiency of voluntary consent); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89 [hereinafter Ware, *Paying the Price*] (arguing that businesses will, over time, pass on any cost savings derived from arbitration to consumers); Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 STAN. L. REV. 1677, 1716–18 (2005) (viewing arbitration of class actions as violating the due process rights of absentee class members).

Scholars have mostly divided into two camps on this complicated question.[11] In one camp, supporters of binding arbitration argue that the problem of unfair bargaining is overstated, and that arbitration has significant benefits for employees and consumers that increase overall social welfare.[12] The other camp opposes the enforcement of binding arbitration agreements, pointing to the *Jones* case and other arbitration horror stories that demonstrate that binding arbitration for consumers and employees can lead to disastrous and inequitable results.[13] After *Jones* and *Concepcion*, this academic debate has spilled over into the political arena with potentially meaningful and lasting consequences. And (as is often the case) the entry into the political debate has done little to moderate either camp; if anything, it has crystalized and polarized the sides further.[14]

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11. For examples of scholars who have advocated for a position between those two poles, see Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 470 (2011) (proposing congressional reform to simply abolish arbitration clauses that act as class action waivers in consumer contracts); Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 311–13 (2012) (proposing legislation with basic procedural guarantees in employment arbitration); Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 268, 280–81 (2008) (opposing the prohibition of predispute arbitration clauses but recognizing a need to improve the current system). *See also* Bradley Dillon-Coffman, Comment, *Revising the Revision: Procedural Alternatives to the Arbitration Fairness Act*, 57 UCLA L. REV. 1095, 1099 (2010) (proposing "procedural rules to balance arbitral mechanisms between businesses and their consumers or employees").

12. *See, e.g.*, Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 859 (2006) (arguing that arbitration clauses in consumer form contracts "offer a form of endgame dispute resolution that allows firms to focus more on business value and less on litigation risk in negotiating the terms of their ongoing consumer relationships"); Ware, *Enforcing Adhesive Arbitration*, *supra* note 10, at 253 (arguing that "general enforcement" of arbitration clauses "is socially desirable and . . . benefits most consumers [and] employees"); Ware, *Paying the Price*, *supra* note 10, at 91 (arguing that mandatory arbitration lowers consumer prices because competition forces firms to pass savings to consumers).

13. *See, e.g.*, Andrea Doneff, *Arbitration Clauses in Contracts of Adhesion Trap "Sophisticated Parties" Too*, 2010 J. DISP. RESOL. 235, 257–58 (lauding the "Franken Amendment" to the defense appropriation bill—which prohibits defense contractors from including arbitration clauses of Title VII or tort claims arising out of sexual harassment or assault in their employment agreements—as a "small, specific step"); Sternlight, *Tsunami*, *supra* note 10, at 704 (arguing that "*Concepcion* will provide companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued").

14. *See* Sternlight, *Tsunami*, *supra* note 10, at 727 (calling for "Congress to take corrective action and to ensure that all persons continue to have access to justice"); Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 665 (1999) (finding strong correlation between campaign contributions from plaintiffs' lawyers on the one hand and business groups on the other, and votes on arbitration law cases: "Business-funded justices cast 71 percent of their votes for the holding that an arbitration agreement was formed, while plaintiffs'-lawyer-funded justices cast only 9 percent of their votes for that holding" (footnote omitted)); *see also* Erwin Chemerinsky, Op-Ed., *Supreme Court: Class (Action) Dismissed*, L.A. TIMES, May 10, 2011, http://articles.latimes.com/2011/may/10/opinion/la-oe-chemerinsky-class-action-20110510 ("The Supreme Court's recent 5-4 decision preventing consumers from bringing

In addition to the divide in the scholarship, a divide has emerged between two branches of government. The Supreme Court has expanded the enforcement of arbitration clauses, under increasingly broad interpretations of the Federal Arbitration Act. As a result of decisions like *AT&T Mobility LLC v. Concepcion*,[15] the doctrinal distinctions between labor–management and international arbitration on the one hand, and consumer and employment arbitration on the other, have been whittled away in favor of a broad federal policy favoring arbitration in troubling contexts—particularly consumer and employment contexts, where expanding arbitration presents problems. In response, proposed reforms from Congress such as the Arbitration Fairness Act would broadly abolish all arbitration in consumer and employment agreements, Title VII disputes, and franchise agreements.

This Note argues that the optimal solution is in the middle ground. Binding arbitration clauses in consumer and employment contracts should continue to be enforced because arbitration provides employees and consumers important advantages; however, consumer and employment arbitration must be seriously reformed. The reform should be sensitive to the different concerns that arise from different types of disputes, instead of the blunderbuss approaches that have emerged out of Congress and the Supreme Court.

The main thrust of this Note is to propose meaningful reform that balances the competing social interests. This Note argues three main points. First, arbitration clauses in employment and consumer contracts are not per se the problem—the real problem is *unfair* arbitration as a result of inadequate procedural guarantees that result from disparities not only in bargaining power (as other scholars have argued), but in access to information about disputes (commonly formulated as a "repeat-player problem")[16] that causes procedural difficulties for third-party verification and review. The repeat-player problem is not in and of itself problematic,[17] but it renders the procedural guarantees of unconscionability review inadequate. Second, certain types of arbitration undermine the deterrence component of consumer- and employment-protection statutes. Therefore, the Supreme

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class-action suits against corporations is part of a disturbing trend of the five most conservative justices closing the courthouse doors to injured individuals. This is nothing other than a conservative majority favoring the interests of businesses over consumers, employees and others suffering injuries.").

15. 131 S. Ct. 1740 (2011).

16. *See, e.g.*, Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 191 (1997) ("[T]his study documents that the repeat player effect exists.").

17. *E.g.*, David B. Lipsky et al., *The Arbitration of Employment Disputes in the Securities Industry: A Study of FINRA Awards, 1986–2008*, DISP. RESOL. J., Feb.–Apr. 2010, at 12, 58 ("[W]hen we conducted a multivariate regression analysis, . . . we found that the repeat player variable had no significant effect on the size of the award.").

Court's broad federal policy favoring arbitration in all contexts and all circumstances should be reconsidered.

Third, arbitration has real benefits to consumers and employees. Some evidence strongly suggests that arbitration increases access to justice, and that most plaintiff-employees and plaintiff-consumers do *better* in arbitration than in litigation. Therefore, making arbitration nonbinding for employees and consumers (as Congress would do with proposed legislation like the Arbitration Fairness Act) would have the negative consequence of less arbitration. From these three points, this Note argues that binding arbitration[18] in consumer and employment[19] contracts should be reformed but not abolished.

This Note argues for important reform: regulations that provide procedural guarantees to consumers and employees, and that provide safe harbors to companies through regulations promulgated by the nascent Consumer Financial Protection Bureau (CFPB) (for consumer arbitration) and the Equal Employment Opportunity Commission (EEOC) (for employment arbitration).[20] Under the current law, a consumer or employee bringing a dispute is precluded from litigating if she entered into a binding agreement to arbitrate.[21] The consumer is compelled to arbitrate and his case is dismissed unless he can show that the agreement to arbitrate is

18. Binding arbitration is defined (for the purposes of this Note) as the specific enforcement, through a motion to compel arbitration, of a predispute agreement to arbitrate.

19. Employment arbitration is defined (for the purposes of this Note) as the predispute agreement that the employer and employee will arbitrate disputes arising from the employment relationship. This is not to be confused with labor arbitration (often referred to in the literature as "interest arbitration"), where the arbitrator resolves disputes between labor and management arising from a collective bargaining agreement. These types of disputes are beyond the scope of this Note, and they enjoy special judicial treatment. *See, e.g.*, United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960) ("The present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances . . . ." (citation omitted)); David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 744 (1973) (describing the grievance dispute-resolution procedure in labor arbitration).

20. Often, franchise agreements are lumped together with employment agreements and consumer contracts as problematic areas of adhesive bargaining, because franchisees are often small businesses dealing with large corporations, and thus lack the bargaining strength to negotiate arbitration clauses in advance. *See, e.g.*, Sternlight, *Panacea or Corporate Tool?*, *supra* note 10, at 637–39 & n.5 (describing franchisees together with consumers and employees as "little guys" in the context of arbitration). Franchise agreements present a special problem, *see, e.g.*, Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. § 402(a) (2011) (leaving out franchise agreements in proposed reform), that is outside the scope of this Note and will not be discussed further. *See* Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielson, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 402–03 (2011) (criticizing the categorical prohibition of arbitration agreements in franchise agreements).

21. *See, e.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148, 1150 (7th Cir. 1997) (enforcing an arbitration agreement included in a form "inside the box," reasoning that the customer assented "[b]y keeping the computer beyond 30 days").

unconscionable.[22] As the plaintiff, the consumer bears the burden in these cases to show that the contract is unconscionable because, for example, it was obtained through oppression or surprise due to unequal bargaining power.[23] To the extent that the claim is statutory, any claim that arbitration does not effectively vindicate statutory rights must be evaluated on a case-by-case basis with the burden on the party resisting arbitration.[24]

This Note's proposal is to flip that burden: place the burden on the proponent of the motion to compel arbitration to show that the arbitration provides sufficient procedural guarantees. Importantly, the burden only shifts if the company seeking to compel arbitration is large enough that repeat participation, information asymmetry, and sophistication is a fair presumption: fifty employees or more.[25] But—most importantly—the burden would be satisfied if the company meets an industry-specific regulation that would provide a safe harbor and set specific criteria for specific categories of disputes.

This proposal is superior to the two currently competing models of reform. On the one side, the Supreme Court in recent terms has judicially adopted a blunderbuss solution: broader enforcement of arbitration clauses for *all* types of disputes.[26] On the other side, the Arbitration Fairness Act proposes to make an overly broad array of arbitration clauses unenforceable—specifically, the Act would render unenforceable arbitration clauses as they apply to contracts for employment, consumer goods, and disputes under civil rights statutes.[27]

These competing models are overly broad and do not sensitively weigh the conflicting policy concerns of different types of disputes, an error that this Note's proposal strives to address.

The Note proceeds as follows. Part I analyzes the path of arbitration in the U.S. Supreme Court up to *Concepcion*: from the original interpretation—commercial contracts between businesses[28]—toward the modern

22. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011).

23. *Id.*

24. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91–92 (2000).

25. Fifty is selected because it is a focal point for a variety of legislation. *E.g.*, Patient Protection and Affordable Care Act of 2010 § 4980H(d)(2), 26 U.S.C. § 4980H(d)(2) (Supp. 2011) (defining "applicable large employer" as "an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year"); *see also* HEALTH REFORM FOR SMALL BUSINESSES: THE AFFORDABLE CARE ACT INCREASES CHOICE AND SAVING MONEY FOR SMALL BUSINESSES 1, *available at* http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf (noting that the Affordable Care Act "specifically exempts all firms that have fewer than 50 employees—96 percent of all firms in the United States or 5.8 million out of 6 million total firms—from any employer responsibility requirements").

26. *See infra* subparts I(C)–(E) (detailing the recent pro-arbitration trend in Supreme Court jurisprudence).

27. Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. § 402(a) (2011).

28. *See infra* note 34 and accompanying text.

enforceability in all employment and consumer contracts that can in some cases preclude consumer class actions. Part II discusses the horror-story cases, such as *Jones v. Halliburton*, and the subsequent reaction in Congress—the Arbitration Fairness Act. This Part argues that the problem is not arbitration per se; the real problem is *unfair* arbitration as a result of institutional and structural differences between different types of disputes. Part III proposes a solution—dispute-specific regulations which provide procedural guarantees for plaintiffs and safe harbors for companies. Finally, the Note offers a brief conclusion.

I. The Establishment of the Federal Policy Favoring Arbitration

Arbitration has a long and storied history both in the United States and abroad. In specific industries and for certain categories of disputes, arbitration was (and remains) practically the exclusive forum for dispute resolution;[29] further, studies of arbitration before the Federal Arbitration Act (FAA) also indicated that arbitration was appropriate for some, but not all disputes.[30] But in the nineteenth and early twentieth centuries, U.S. common law judges scrutinized all predispute arbitration agreements, refusing to specifically enforce predispute agreements to arbitrate.[31]

In 1925, at the behest of lobbying from business groups and the American Bar Association (ABA),[32] Congress enacted the FAA to displace judicial hostility to the enforcement of predispute arbitration agreements.[33]

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29. *See* Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 852 (1961) (discussing the results of a survey and noting that in exchanges of grain and livestock, "100 percent of those responding reported the use of institutionalized arbitration"); *see also* MARTIN DOMKE, 1 DOMKE ON COMMERCIAL ARBITRATION § 2:6 (Larry E. Edmonson ed., 2012) (quoting the preamble of a West New Jersey law from 1682 as stating that in "'certain cases suits at law are needless and frivolous and . . . arbitration offers a far more preferable means of settling such disputes'").

30. *See* Mentschikoff, *supra* note 29, at 848–54 (discussing the factors that cause industries to prefer, or not prefer, arbitration).

31. *See, e.g.*, Tobey v. Cnty. of Bristol, 23 F. Cas. 1313, 1320 (C.C.D. Mass. 1845) ("'I consider it to be quite settled, that this court will not entertain a bill for the specific performance of an agreement to refer to arbitration; nor will it, in such a case, substitute the master for the arbitrators, which would be to bind the parties contrary to their agreement.'" (quoting Sir John Leach in Agar v. Macklew, 2 Sim. & S. 418 and collecting cases)); Chicago M. & St. P. Ry. Co. v. Stewart, 19 F. 5, 12 (C.C.D. Minn. 1883) (collecting sources); DOMKE, *supra* note 29, at § 2:8 ("From the mid 1800's [sic] through the early 20th century American judicial disfavor adopted as its rationale an unquestioning adoption of the English theory that arbitration agreements 'ousted the jurisdiction of the courts' complimented by self-serving 'public policy' assertions.").

32. Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 125–26 (2002) ("The ABA Committee on Commerce, Trade and Commercial Law prepared the original draft of the bill, and Congress enacted it into law with only minor amendments." (citing IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 84–91 (1992))).

33. *E.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001) (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270–71 (1995); Gilmer v. Interstate/Johnson Lane Corp.,

While, arguably, the FAA's original purpose was to secure enforcement of predispute arbitration in merchant–commercial contracts,[34] because of a combination of history,[35] new scholarly focus on freedom of contract,[36] path dependence,[37] and the then-recent trend toward textualist statutory interpretation to the exclusion of legislative history,[38] in the late 1980s and 1990s, a federal policy in favor of broad enforcement of arbitration emerged.[39] The development of this federal policy began in particular areas (labor–management relations and international commerce), but has since expanded to overwhelm the prior doctrinal distinctions.

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500 U.S. 20, 24 (1991)) (stating that the FAA was passed as a response to judicial hostility to enforcing arbitration agreements).

34. The FAA was drafted by the ABA Committee on Commerce, Trade and Commercial Law and enacted with few revisions. Drahozal, *supra* note 32, at 125–26.

35. The unfortunate inclusion of "commerce" in the FAA before the expansion of Commerce Clause jurisprudence arising from the New Deal, and (ironically) the Civil Rights eras gave "commerce" a much broader definition than mere commercial or merchant transactions.

36. The proliferation of the law and economics movement, and its influence on the federal judiciary through the appointment of its scholars as judges, contributed to the promulgation of freedom-of-contract principles during this time period. *See, e.g.*, William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 235–40 (1979) (proposing a "purely private market in judicial services," and arguing that the resulting "competition among judges would yield the optimum amount and quality of judicial services at minimum social cost"); *see also* Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 4–5, 11 (1984) (noting that "[t]he Justices today are more sophisticated in economic reasoning, and they apply it in a more thoroughgoing way, than at any other time in our history," and arguing that "[w]hen a court declines to enforce the arbitration agreement, it makes others situated similarly to the one who avoided arbitration worse off"). The now-Judges Posner and Easterbrook were then faculty members at the University of Chicago School of Law. Landes & Posner, *supra* at 235; Easterbrook, *supra* at 4.

37. Path dependence is how the path of precedent shapes the current law in "specific and systemic ways." Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 604 (2001). Hathaway identifies three strands of path dependence theory: (1) increasing returns, where because it is less costly to continue down the same path than to change, there are increasing returns from an initial decision; (2) evolutionary path dependence, where law changes gradually but is slowly punctuated by periods of rapid adaptation; and (3) sequencing path dependence, where the order in which choices are considered shapes the outcome. *Id.* at 606–08.

38. *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 483–84 (1989) (reversing established precedent based on the text of § 2 of the FAA); *cf. id.* at 487 (Stevens, J., dissenting) (criticizing the majority for making "textual arguments on both sides regarding the interrelation of federal securities and arbitration Acts. None of these arguments, however, carries sufficient weight to tip the balance between judicial and legislative authority and overturn an interpretation of an Act of Congress that has been settled for many years" (footnote omitted) (citation omitted)).

39. *See infra* subpart I(C).

A. The Federal Arbitration Act—Original Intent and Early Interpretations

There is a robust scholarly debate over the original interpretation of the FAA,[40] but scholars and jurists agree that the central purpose of the Act was to displace judicial hostility toward arbitration.[41] The FAA states, "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[42]

Initially courts interpreted the FAA narrowly. For example, it was originally presumed that the FAA applied to federal courts only, not state courts, as the Act preceded *Erie*[43] by more than a decade.[44] Employment disputes were presumed to be beyond the scope of the arbitration agreement,[45] as were antitrust claims,[46] and investor securities fraud claims under the Securities Exchange Act of 1934.[47] Some commentators

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40. *See* Chistopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 395–96 n.17 (2004) (collecting sources and summarizing the debate in the scholarship in relation to federal preemption of the FAA).

41. DOMKE, *supra* note 29, at § 2:9. The main divide in the scholarship (and between the Justices of the Supreme Court) is whether the Act was intended to preempt state law. *Compare* Southland Corp. v. Keating, 465 U.S. 1, 14 (1984) ("To confine the scope of the Act to arbitrations sought to be enforced in federal courts would frustrate what we believe Congress intended to be a broad enactment appropriate in scope . . . ."), *with id.* at 30 (O'Connor, J., dissenting) ("Today's decision . . . gives the FAA a reach far broader than Congress intended.").

42. Federal Arbitration Act, 9 U.S.C. § 2 (2006). Sections three and seven provide for enforcement mechanisms, mandating the "courts of the United States" to stay trial or compel arbitration. *Id.* §§ 3, 7.

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

44. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 286 (1995) (Thomas, J., dissenting) (noting that it was not until 1984 that the Court concluded that the FAA § 2 extended to the states, and arguing that "[t]he explanation for this delay is simple: The statute that Congress enacted actually applies only in federal courts." (collecting sources)).

45. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 47–50 (1974) (holding that an employee's right to trial under the Civil Rights Act was not precluded by submission to final arbitration under a collective bargaining agreement); Peabody Galion v. Dollar, 666 F.2d 1309, 1320 (10th Cir. 1981) (collecting cases).

46. *See, e.g.*, Applied Digital Tech., Inc. v. Cont'l Cas. Co., 576 F.2d 116, 117–19 (7th Cir. 1978) (affirming an order to enjoin arbitration on the basis that antitrust claims permeated the case, making it inappropriate to arbitrate); Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827–28 (2d Cir. 1968) (holding that antitrust claims are inappropriate for arbitration).

47. *E.g.*, Wilko v. Swan, 346 U.S. 427, 438 (1953) ("Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act."), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); Mayaja, Inc. v. Bodkin, 803 F.2d 157, 162 (5th Cir. 1986) (holding that the district court properly refused to compel arbitration of 1934 Act claims), *vacated and remanded by* Shearson Lehman Brothers v. Mayaja, Inc., 482 U.S. 923 (1987); Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 538 F.2d 532, 536 (3d Cir. 1976) ("It is enough to say that the Supreme Court found prospective waivers of the right to judicial trial and review to be inconsistent with Congress' overriding concern for the protection of investors.").

characterized these interpretations as enunciations of a "public policy" exception.[48] But that all began to change in the early 1970s in the Supreme Court.[49]

B. Expanding Arbitration in Labor and International Disputes.

The first step in the expansion of interpretations of the FAA occurred as a result of the labor strife of the 1930s–1950s. Prior to 1935, courts struggled with how to enforce collective bargaining agreements negotiated between unions and management. The issue was mainly whether a *union* could sue for negotiated rights, even though the agreement flowed from rights of individual workers, and "[n]one of the prevailing theories of collective agreements provided a basis for a union to enforce an agreement on behalf of and yet independently of individual members."[50]

In establishing the broad policy favoring labor arbitration, Justice Douglas (writing for the majority) adopted an approach sensitive to the specific characteristics of the dispute and the underlying policies: "In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife."[51] Reasoning that arbitration of labor disputes has "quite different functions" from commercial arbitration,[52] and is "part and parcel of the collective bargaining process itself,"[53] the Court established for the first time a broad policy favoring arbitration: in interpreting "[a]n order to arbitrate the particular grievance," the Court held, "[d]oubts should be resolved in favor of coverage."[54]

The Court in *Steelworkers* was persuaded that the usual problems associated with private adjudication did not apply in labor arbitration. The Court distinguished cases (namely *Wilko v. Swan*,[55] interpreting the Securities Act) that had narrowly interpreted the FAA; because labor arbitration is different, "the run of arbitration cases . . . becomes irrelevant to

48. Ware, *Arbitration Under Assault*, *supra* note 10, at 4 ("[C]ourts often refused to enforce agreements to arbitrate claims created by 'public interest' statutes in such areas as employment . . . , antitrust, and securities. Courts did that on the ground that it would violate 'public policy' to enforce such agreements.").

49. *See id.* at 4–5 (describing the Court's post-1975 decisions as "fidelity to the contractual approach"); *see also* Sternlight, *Creeping Mandatory Arbitration*, *supra* note 10, at 1637 ("[T]he Supreme Court's attitude toward commercial arbitration changed dramatically beginning in the 1970s and 1980s."); *cf.* Hathaway, *supra* note 37, at 607 (discussing evolutionary path dependence as marked by dramatic rapid shifts).

50. Katherine V.W. Stone, *The* Steelworkers' Trilogy*: The Evolution of Labor Arbitration*, *in* LABOR LAW STORIES 149, 155 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

51. United Steelworkers of Am. v. Warrior & Gulf Navigation Co. (*Steelworkers*), 363 U.S. 574, 578 (1960).

52. *Id.*

53. *Id.*

54. *Id.* at 582–83.

55. 346 U.S. 427 (1953).

our problem. [In commercial arbitration,] the choice is between the adjudication ... in courts with *established procedures* or even *special statutory safeguards* on the one hand and the settlement of them in the more informal arbitration tribunal on the other."[56] Even though the reasoning in *Steelworkers* was limited to the collective-bargaining context by *Alexander v. Gardner-Denver Co.*,[57] *Steelworkers* paved the way for the subsequent decade's expansion of arbitration agreements.[58]

In *Scherk v. Alberto-Culver Co.*,[59] the Supreme Court expanded the interpretation of § 2 of the FAA in the arena of international commerce. In *Scherk*, the Court reasoned that international business concerns supported enforcement of an agreement to arbitrate in one specific type of dispute—international commercial disputes:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is ... an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. ...
>
> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.[60]

The Court in *Scherk* placed great emphasis on issues of comity and party expectations at stake in international commerce, and the international nature of the transaction, and the Court enforced the agreement to arbitrate.[61] Once again, as in the case of labor arbitration, this was a dispute-specific holding sensitive to the underlying nature of the *type* of dispute and the policies at issue; in this case, facilitating the increasingly international economy by protecting party expectations and assuring the enforceability of judgments. But even though the expansion of arbitration was grounded in specific areas of the law—labor and international disputes—*Scherk* and *Steelworkers* would later enable the Court to expand the reach of the FAA beyond these contexts.

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56. *Steelworkers*, 363 U.S. at 578 (emphasis added).

57. 415 U.S. 36 (1974); *id.* at 51 ("[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true ... that a *union* may waive certain statutory rights related to collective activity ...." (emphasis added)); *see id.* at 46 n.6, 50–51, 59–60.

58. And, as shall be discussed more at length below, *Steelworkers* inadvertently provided precedent for expansive interpretations of the FAA beyond the labor–management context. *See infra* note 66 and accompanying text.

59. 417 U.S. 506 (1974).

60. *Id.* at 516–17.

61. *Id.* This closely followed the then-emerging trend towards the enforcement of international agreements by their terms, reversing judicial scrutiny of forum-selection clauses and the like. *See, e.g.*, M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972) (enforcing a forum-selection clause while noting the "present-day commercial realities and expanding international trade").

C. *Expanding the Protection of Arbitration*

In the 1980s and 1990s, the Supreme Court expanded the protection of arbitration agreements beyond labor and international contexts. In 1983, the Court in *Moses H. Cone Memorial Hospital*[62] extended the reasoning from the labor context articulated in *Steelworkers*[63]—adopting for the first time a federal policy in favor of arbitration (outside the labor–collective-bargaining arena).[64] The Court articulated the holding in broad sweeping language: "Section 2 [of the FAA] is a congressional declaration of *a liberal federal policy favoring arbitration agreements*, notwithstanding any state substantive or procedural policies to the contrary."[65] Some commentators have argued that this enunciation of a federal policy in favor of arbitration was an inappropriate application of case law from labor arbitration, which was built on the inapposite policy of favoring amicable resolutions of labor–management disputes through arbitration to avoid labor strife.[66] But this broad language would lead to the broad expansion of arbitration.

Soon thereafter, the Court held that the FAA preempted state statutes that prohibited arbitration of specific types of agreements in *Southland Corp. v. Keating*.[67] Beginning with *Mitsubishi*,[68] which extended *Sherk*'s international rationale[69] to enable arbitration of antitrust claims—over the

62. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

63. *See Steelworkers*, 363 U.S. 574, 582–83 (1960) (stating that when interpreting "[a]n order to arbitrate the particular grievance[, d]oubts should be resolved in favor of coverage").

64. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25.

65. *Id.* at 24 (emphasis added).

66. *See, e.g.*, Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers *Trilogy to* Gilmer, 44 HASTINGS L.J. 1187, 1192 (1993) (stating that labor arbitration does not function as a "litigation alternative" but is instead "an alternative to the strike. Courts regard the arbitration provision as a quid pro quo for a no strike clause"); Sternlight, *Creeping Mandatory Arbitration*, *supra* note 10, at 1637 n.28 (arguing that the Court in *Moses H. Cone Memorial Hospital* inappropriately borrowed from the labor arbitration decisions of collective bargaining, where there is "an entirely different policy concern[] . . . [because] in the collective bargaining context 'arbitration is the substitute for industrial strife'" (quoting *Steelworkers*, 363 U.S. 574, 578 (1960)).

67. 465 U.S. 1, 16 & n.10 (1984).

68. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

69. Yves Dezalay and Bryant Garth argued that the international character of the arbitration agreement was critical to the decision, as was the elite status of the International Chamber of Commerce (ICC). *See* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 158–59 (1996) (noting that the ICC amicus brief listed former Supreme Court Justice Potter Stewart as among the ICC's arbitrators); *accord Mitsubishi*, 473 U.S. at 629 (concluding that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement [to arbitrate], even assuming that a contrary result would be forthcoming in a domestic context").

public-law concerns voiced by the Court in *Gardner-Denver*[70]—each of the so-called public policy exceptions were whittled away.[71] Eventually, in *Allied-Bruce Terminex v. Dobson*,[72] the Court relied on the "involving commerce" text of § 2 of the FAA to interpret it as implementing Congress's intent to "exercise [its] commerce power to the full."[73]

1. The Employment Context.—This federal policy favoring arbitration has had a pronounced effect in the employment context. Before the Court's shift, many employers and employees presumed that substantive law concerns would prevent the Court from compelling arbitration of employment discrimination claims.[74] *Alexander v. Gardner-Denver Co.*[75] is representative of the Court's prior view of employment arbitration before the pendulum began to swing toward the modern policy. The Court hesitated to enforce an arbitration clause where there were competing concerns of public policy.[76] But the federal policy favoring arbitration would later render *Gardner-Denver* and its public-law rationale a dead letter.

The process began with *Gilmer v. Interstate/Johnson Lane Corp.*[77] In *Gilmer*, an employee brought a claim under the ADEA for age discrimination.[78] The Supreme Court held that arbitration should be

70. *See Mitsubishi*, 473 U.S. at 628–29 (recognizing and overruling the "'pervasive public interest in enforcement of the antitrust laws . . . [that] make . . . antitrust claims . . . inappropriate for arbitration'" (quoting Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827–28 (2d Cir. 1968)).

71. *See, e.g.*, Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 89–91 (2000) (holding that statutory claims under the Truth in Lending Act were arbitrable because "federal statutory claims can be appropriately resolved through arbitration" and pointing to cases that demonstrate that even claims arising under statutes designed to further important public policies may be arbitrated). In so doing, the Court relied heavily on *Mitsubishi* in domestic contexts, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting *Mitsubishi*, 473 U.S. at 628), even though the Court in *Mitsubishi* reasoned from the international context and expressly reserved the domestic issue. *See Mitsubishi*, 473 U.S. at 629 (reasoning from "concerns of international comity" but noting that "a contrary result would be forthcoming in a domestic context"); *see also* Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J. 547, 564–65 (2005) (asserting that by 1991 the Supreme Court had made clear that, absent a clearly expressed congressional intent to the contrary, predispute arbitration agreements were enforceable "even when statutory, public law rights were at stake").

72. 513 U.S. 265 (1995).

73. *Id.* at 277.

74. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 10, at 1637–38 & n.31.

75. 415 U.S. 36 (1974).

76. *See id.* at 59–60 (recognizing the federal policy favoring arbitration of labor disputes but holding that the competing federal policy against discriminatory employment practices could be best accommodated by permitting an employee to pursue his remedy under both the arbitration clause of a collective-bargaining agreement and his cause of action under Title VII).

77. 500 U.S. 20 (1991).

78. *Id.* at 23–24.

compelled.[79] The Court reasoned that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights . . . ; it only submits to their resolution in an arbitral, rather than a judicial, forum."[80] Eventually, in *Circuit City Stores, Inc. v. Adams*,[81] the Court considered the employment-exception text of § 1 of the FAA and held that the exception only applied to employment contracts of transportation because the "text of § 1 precludes interpreting the exclusion provision to defeat the language of § 2."[82] Thus, the Court relied on *Gilmer* in remanding the case to compel arbitration.[83] Employment disputes, even over statutory claims, were now arbitrable.

2. The Consumer Context.—The recognition of a federal policy in favor of arbitration had a pronounced effect on consumer-contract jurisprudence as well, but in a more circumspect fashion—through the Commerce Clause's federal preemption jurisprudence. Many states had consumer protection statutes that prohibited the enforcement of predispute arbitration agreements.[84] Under preemption doctrine, these statutes were enforceable to the extent that they did not "involve interstate commerce."[85] In *Allied-Bruce Terminex v. Dobson*, however, the Supreme Court held that in applying the FAA to a termite-control consumer agreement § 2 of the FAA is to be given the broadest possible scope.[86] The Court reasoned that the language "involving commerce" is the "functional equivalent of 'affecting [commerce],' .... words [that] normally mean a full exercise of constitutional power."[87] One glance at the Court's Commerce Clause jurisprudence would lead any reasonable general counsel to believe that virtually no contract was beyond the reach of the FAA and the liberal federal

79. *Id.* at 35.

80. *Id.* at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (deciding an international arbitration case)).

81. 532 U.S. 105 (2001).

82. *Id.* at 119.

83. *Id.* at 123–24.

84. *See, e.g.*, ALA. CODE § 8-1-41(3) (2009) (mandating that a court cannot specifically enforce "[a]n agreement to submit a controversy to arbitration"); CAL. LAB. CODE § 229 (West 2011) ("Actions ... for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate.").

85. *See* 9 U.S.C. §§ 1–2 (2006) (enforcing arbitration clauses if there is "a contract evidencing a transaction involving commerce," and defining "commerce" as "commerce among the several States or with foreign nations"); Allied-Bruce Terminex Cos. v. Dobson, 628 So.2d 354, 355–57 (Ala. 1993) (holding that because the parties did not contemplate "substantial interstate activity when they entered the termite bond" the company could not enforce the agreement to arbitrate under Alabama law), *rev'd*, 513 U.S. 265 (1995).

86. 513 U.S. at 276–77.

87. *Id.* at 273–74, 277.

policy favoring arbitration.[88] *Allied-Bruce Terminex* not unexpectedly led to the dramatic proliferation of arbitration clauses in consumer contracts.

The FAA reversed the common law hostility to arbitration. Initially, the Court retained a restrictive approach to the Act's interpretation—applying the FAA to commercial contracts, recognizing a public law distinction, and allowing states to regulate their contract law of arbitration. But beginning in the international context and spreading to consumer and employment contracts, a strong federal policy favoring arbitration gained a foothold, and agreements to arbitrate would soon proliferate.

D. Arbitration Agreements Proliferate

A brief summary of the empirical data confirms what is intuitively true for most readers—in the last decade, arbitration agreements have become practically ubiquitous. In 1979, five years after *Scherk*, the Bureau of National Affairs found that only about one-and-a-half percent of employers surveyed used arbitration clauses.[89] By 1995, the year of the *Allied-Bruce Terminex* opinion, the U.S. General Accounting Office (GAO) found that 10% of employers were using arbitration for employment disputes.[90] In just two years, that number rose to 19%.[91] In the consumer contract context, the growth has been even more pronounced. One survey indicated that 35.4% of sampled businesses used arbitration clauses in their consumer contracts.[92] This is particularly prevalent in the financial industry, rising to 69.2%.[93] The scope of the arbitration clauses in this survey varied, but 30.8% precluded class actions[94]—a provision whose enforceability was an open question up until 2011.

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88. *See, e.g.*, Daniel v. Paul, 395 U.S. 298, 305–08 (1969) (reasoning that the Lady Nixon Club snack bar affected commerce in part because "[t]he snack bar serves a limited fare—hot dogs and hamburgers on buns, soft drinks, and milk," which presumably moved in interstate commerce); Wickard v. Filburn, 317 U.S. 111, 128–30 (1942) (upholding under the Commerce Clause a federal statute prohibiting the growing of wheat for home consumption). *But see* Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2587 (2012) (suggesting that Congress's power to act under the Commerce Clause may be limited where individuals are not participating in commerce, for such a power "would open a new and potentially vast domain to congressional authority").

89. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 31 & n.6 (1998) (citing BUREAU OF NAT'L AFFAIRS, PERSONNEL POLICIES FORUM SURVEY NO. 125, POLICIES FOR UNORGANIZED EMPLOYEES (1979)).

90. *Id.* at 31 & n.7 (citing U.S. GEN. ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 7 (1995)).

91. *Id.* at 31 & n.8 (citing U.S. GEN. ACCOUNTING OFFICE, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE 2 (1997)).

92. Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 62–64 (2004).

93. *Id.*

94. *Id.* at 65. For a collection of the different types of consumer arbitration agreements challenged in court, see Sternlight, *Creeping Mandatory Arbitration*, *supra* note 10, at 1638–39.

More recently, in 2008, an empirical study found mandatory arbitration clauses in 92.9% of employment contracts and 76.9% of consumer contracts.[95] This study also found that, in contrast, these same companies provided for mandatory arbitration in less than 10% of their negotiated, nonconsumer, nonemployment contracts.[96]

E. Class Actions and Arbitration

The expanding federal policy in favor of arbitration brought an increasing number of employment and consumer disputes within the scope of arbitration. As arbitration agreements were continually enforced,[97] arbitration agreements spilled over into the class action arena—purporting to waive consumers' and employees' class action rights. As discussed below, state courts responded, in some cases attempting to hold these clauses unenforceable. For a time, the enforceability of (what amounted to) class action waivers was an open question until the Supreme Court settled the law in 2011. In *Concepcion*, the Court upheld the use of an arbitration clause as a class action waiver.[98]

If the impetus behind corporations' rapid adoption of arbitration clauses was a desire to reduce legal expenses and potential liability,[99] then avoiding class actions would be of paramount importance. After all, broad consumer or employment class actions are quintessential "bet-the-company" litigation designed primarily to deter wrongful corporate conduct.[100] As the federal policy favoring arbitration agreements emerged, arbitration agreements were upheld under increasingly egregious facts,[101] and defense counsel

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95. Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 886 (2008).

96. *Id.* at 876.

97. *See supra* notes 77–83 and accompanying text.

98. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (striking down the *Discover Bank* rule as preempted because it stood as an obstacle to the purposes of the FAA).

99. *See, e.g.*, Maltby, *supra* note 89, at 31 ("The primary motivation of employers for creating [arbitration] systems appears to be reducing legal expenses.").

100. *See, e.g.*, Heather A. Pigman & Martin C. Calhoun, *Unsettling the Settled: Is There a Re-emerging Debate Regarding the Role of Choice-of-Law in Class Certification Proceedings*, 77 DEF. COUNS. J. 465, 465 (2010) (observing that class actions can potentially "turn small value individual actions into 'bet the company' litigation").

101. *See, e.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997) (Easterbrook, J.) (enforcing an arbitration agreement included in a form in the box, reasoning that the customer assented "[b]y keeping the computer beyond 30 days"); Am. Gen. Fin. Servs., Inc. v. Griffin, 327 F. Supp. 2d 678, 682–83 (N.D. Miss. 2004) (enforcing an arbitration clause in an insurance contract against a blind plaintiff even though defendant's employees failed to explain the terms of the arbitration clause); Marsh v. First USA Bank, 103 F. Supp. 2d 909, 918–19 (N.D. Tex. 2000) (holding that a consumer carries the burden to prove a negative—nonreceipt of the arbitration clause—once the bank has presented evidence that the clause was mailed). *But see* Broemmer v. Abortion Servs. of Phx., Ltd., 840 P.2d 1013, 1014–15, 1017 (Ariz. 1992) (en banc) (holding unenforceable a predispute arbitration agreement in a form signed before receiving an abortion).

increasingly advised corporate clients to use arbitration clauses to avoid class action lawsuits.[102] It is noteworthy that these clauses were *not* intended to implement arbitration as much as to *avoid* class actions.[103] Some companies attempted to apply these clauses retroactively to avoid class actions already filed.[104]

The effectiveness of these clauses for the most part remained an open question prior to 1990, and for good reason: prior to the wave of decisions recognizing a federal policy in favor of arbitration,[105] considerations of public policy often trumped agreements to arbitrate.[106] Class actions are generally thought to further the public interest by deterring wrongful conduct.[107]

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102. *See, e.g.*, Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 141 (1997) ("[S]trict enforcement of an arbitration clause should enable the franchisor to dramatically reduce its aggregate exposure"); Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, but Who's the Predator? Banks Can Use Arbitration Clauses as a Defense*, BUS. L. TODAY, May/June 1998, at 24, 26 ("All of the dangers inherent in an individual consumer lawsuit . . . are magnified exponentially when a class of hundreds or thousands of consumers is certified. . . . Arbitration is a powerful deterrent to class action lawsuits against lenders because the great weight of authority holds that arbitrations cannot be conducted on a class basis unless the parties have agreed to do so."); Caroline E. Mayer, *Hidden in Fine Print: "You Can't Sue Us"; Arbitration Clauses Block Consumers from Taking Companies to Court*, WASH. POST, May 22, 1999, at A1 (quoting a National Arbitration Forum official as saying, "The only thing which will prevent 'Year 2000' class actions is an arbitration clause in every contract, note and security agreement."). The National Arbitration Forum was exposed by *Businessweek* as suffering from egregious conflicts of interest. *See* Berner & Grow, *supra* note 9 (observing that Harvard Law School Professor Elizabeth Bartholet revealed in an interview that after she awarded a consumer $48,000 in damages, the National Arbitration Forum (NAF) removed her from eleven other cases, about which she said, "NAF ran a process that systematically serviced the interests of credit-card companies").

103. For example, professors Issacharoff and Delaney argue that credit card companies are "even less enthusiastic about classwide arbitration than about class action litigation." Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 179 (2006); *see also* Jack Wilson, *"No-Class-Action Arbitration Clauses," State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 779–80 (2004) ("[I]f Discover can't compel individual arbitration, it doesn't want to be in arbitration at all.").

104. In one case, a credit card company already in a consumer class action lawsuit attempted to distribute a class action waiver to potential plaintiffs; in court, the defendant argued that the plaintiffs consented to arbitrate by "failing to reject the arbitration clause." In re Currency Conversion Fee Antitrust Litig., 361 F. Supp. 2d 237, 249, 251 (S.D.N.Y. 2005). The court, however, did not enforce the arbitration agreement, reasoning that "when a defendant contacts putative class members for the purpose of altering the status of a pending litigation, such communication is improper without judicial authorization." *Id.* at 253.

105. *See supra* notes 62–88 and accompanying text.

106. *See supra* notes 45–48 and accompanying text.

107. *See, e.g.*, Discover Bank v. Superior Court, 113 P.3d 1100, 1105–06 (Cal. 2005) (recognizing "the role of the class action in deterring and redressing wrongdoing" (internal quotation marks omitted)), *abrogated by* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 514 (1996) ("The class action . . . represents a potentially effective mechanism for privately enforcing the law [and] deterring wrongful conduct . . . .").

The two tracks of the federal policy favoring arbitration—enforceability in spite of public policy implications[108] and expansive preemption[109]—came to a head in *Concepcion*. The Supreme Court in *Concepcion* struck down California's *Discover Bank* rule.[110] The *Discover Bank* rule provided that clauses were per se unconscionable and unenforceable under California law if (1) the agreement "predictably involve[s] small amounts of damages," (2) "the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money," (3) and "the waiver becomes in practice the exemption of the party from responsibility."[111] In striking down this rule that, at least on its face, applied equally to litigation and arbitration contracts containing class action waivers, the Court not only invoked the specter of the former "judicial hostility towards arbitration," but implied that California was a likely culprit of its resurgence.[112] The Court reasoned that the *Discover Bank* "rule would have a disproportionate impact on arbitration agreements" even though it purported to apply to contracts generally.[113] Thus, the Court reasoned that the *Discover Bank* rule frustrated the purpose of the FAA[114] and held that the FAA preempted the *Discover Bank* rule—5 to 4.[115]

In addition to the early interpretations of the FAA (reversing former judicial hostility to arbitration in commercial contracts), the case law has since recognized (1) a federal policy favoring broad enforceability of arbitration clauses and (2) a rule of construction favoring the arbitration of claims related to the scope of the agreement to arbitrate.[116] *Concepcion*

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108. *See supra* notes 50–73 and accompanying text.

109. *See supra* notes 85–88 and accompanying text.

110. *Concepcion*, 131 S. Ct. at 1753.

111. *Discover Bank*, 113 P.3d at 1110 (internal quotation marks omitted).

112. *See Concepcion*, 131 S. Ct. at 1747 ("[I]t is worth noting that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." (citing Steven A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 54, 66 (2006); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFFALO L. REV. 185, 186–87 (2004))).

113. *Concepcion*, 131 S. Ct. at 1747.

114. *Id.* at 1758 (Breyer, J., dissenting) ("[W]e have also cautioned against thinking that Congress' primary objective was to guarantee . . . procedural advantages [such as expeditious resolution of disputes]."). *Dean Witter* supports Justice Breyer's argument here. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) ("We therefore reject the suggestion that the overriding goal of the [Federal] Arbitration Act was to promote the expeditious resolution of claims."). Unlike the majority, Justice Thomas, concurring, argued that the text, not the "purpose," of the FAA mandated the result in *Concepcion*. *Concepcion*, 131 S. Ct. at 1753 (Thomas, J., concurring).

115. *Id.* at 1753 (majority opinion).

116. *See* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 673 (2012) (requiring a clear statement of statutory intent to counter the FAA's policy favoring arbitration, and holding that "[b]ecause the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms").

established that arbitration clauses that waive class action rights will be generally enforceable.[117] This extension of the FAA has infuriated arbitration critics in the academy[118] and Congress, as will be discussed in the next Part.[119] As Part II argues, the problem is *not* the expansion of arbitration per se. Instead, the problem is that this expanding policy is sweeping in disputes that may not belong in arbitration. Part III will later propose a model for reform.

II. Concerns over Arbitration in the Academy and Congress

The case law firmly recognizing a broad federal policy favoring arbitration has only served to amplify the concerns from arbitration's critics. These concerns include the adhesive quality of the agreement to arbitrate, the lack of precedent, and the privacy of the proceeding—precluding deterrence. These concerns are of even greater importance in the class action context, because where the amounts are small, agreements to arbitrate practically foreclose both compensation for many claimants and substantive deterrence for society. Nonetheless, arbitration offers significant advantages for employees and consumers as well as companies. This Part analyzes these issues and Congress's response and concludes that the problem is not

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117. However, this is not the only reading of *Concepcion*. For example, a two-judge panel in the Second Circuit in *In re American Express Merchants' Litigation* interpreted *Concepcion* narrowly as offering "a path for analyzing whether a state contract law is preempted by the FAA," separate and apart from so-called "vindication of statutory rights analysis, which is part of the federal substantive law of arbitratibility." 667 F.3d 204, 213 (2d Cir. 2012) (internal quotation marks omitted). This interpretation of the FAA is likely in conflict with the Supreme Court's view. After all, the Supreme Court itself granted American Express's petition for a writ of certiorari, vacated the judgment, and remanded for reconsideration in light of a recent decision that narrowed the availability of class arbitration where the agreement was silent on the matter. Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010) (citing Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1770 (2010)). As the Ninth Circuit recently observed in *Coneff v. AT&T Corp.*, "*Concepcion* is broadly written," and the court in *Coneff* expressly rejected the Second Circuit's distinction between *Concepcion* and statutory-rights cases. 673 F.3d 1155, 1158–59 (9th Cir. 2012) (interpreting *Concepcion* in light of a state statutory scheme). When this Note went to print, the Supreme Court had recently granted American Express's petition for certiorari, and set oral argument for February 27, 2013. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 594 (Nov. 9, 2012) (granting petition for certiorari); Supreme Court of the U.S. Oct. Term 2012: For the Session Beginning Feb. 19, 2013 (Dec. 17, 2012), *available at* http://www.supremecourt.gov/oral_arguments/argument_calendars/monthlyargumentcalfeb2013.pdf. Further, it remains to be seen how the Court would evaluate a class action waiver in the face of a federal statute, like the Truth in Lending Act, that implicitly provides for class actions. *See* Note, *Class Actions Under the Truth in Lending Act*, 83 YALE L.J. 1410, 1412 & nn.16–17 (1974) (detailing the situations where class action lawsuits have been allowed under the Truth in Lending Act).

118. *E.g.*, Chemerinsky, *supra* note 14 ("The notion that an injured person has a right to his or her day in court is deeply ingrained in American culture. But the proliferation of arbitration agreements, and the Supreme Court's aggressive enforcement of them, means that it is increasingly a myth that an injured person can sue.").

119. *See infra* Part II.

arbitration itself, but rather unfair arbitration caused by unequal bargaining at the outset. This Part will inform the proposal for reform of Part III.

A. Concerns of Adhesion and the Unconscionability Doctrine: Summarizing and Critiquing the Unconscionability Arguments

Perhaps the most salient (or at least most discussed) perceived problem in employment and consumer arbitration is the "adhesive" quality of the agreement to arbitrate.[120] In most modern consumer and employee contracts, the corporation offers the terms in a standard form on a take-it-or-leave-it basis,[121] and the employee or consumer has little opportunity to engage in arm's-length bargaining over terms either because the corporation has a practical monopoly or all competitor corporations use essentially the same terms.[122] Often called "superior bargaining power" or procedural unconscionability,[123] this striking power differential may undermine the enforceability of the agreement to arbitrate, especially in the presence of a substantively oppressive term.[124]

Also, modern social science (or "behavioral economics") has argued that bounded rationality may lead to inefficient agreements.[125] This literature is more important in dispute resolution because a dispute is an event that is

120. *See generally* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943) (recognizing and articulating, for perhaps the first time, the special problem of standard form contracts in mass-marketed consumer products).

121. *See, e.g.*, CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 676 (2012) (Ginsburg, J., dissenting) ("The Court today holds that credit repair organizations can escape suit by providing in their take-it-or-leave-it contracts that arbitration will serve as the parties' sole dispute-resolution mechanism. . . . But Congress enacted the CROA with vulnerable consumers in mind—consumers likely to read the words 'right to sue' to mean the right to litigate in court, not the obligation to submit disputes to binding arbitration.").

122. Kessler, *supra* note 120, at 632.

123. *See* Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 461, 470–71 (1995) (arguing that courts have incorporated the unconscionability doctrine into § 2-302 of the Uniform Commercial Code (U.C.C.) because of an alarming unfairness in bargaining power); *see also* U.C.C. § 2-302 cmt.1 (2003) (stating that "[c]ourts have been particularly vigilant when the contract at issue is set forth in a standard form").

124. U.C.C. § 2-302 cmt.1; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.").

125. *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203 (2003) (arguing that consumers are "boundedly rational decisionmakers who will normally price only a limited number of product attributes as part of their purchase decision" and that "[w]hen contract terms are not among these attributes, drafting parties will have a market incentive to include terms in their standard forms that favor themselves, whether or not such terms are efficient").

for most employees and consumers uncertain (subject to the salience effect) and in the future (subject to hyperbolic discounting).[126]

Anti-arbitration scholars often argue that by waiving their day in court, consumers and employees surrender important procedural safeguards.[127] For example, discovery is often extremely limited.[128] For a consumer in a dispute with a large corporation, this may eliminate a tool necessary to prove a product liability claim.[129] Further, the plaintiff loses the jury trial and with it the perceived possibility of a large judgment.[130] And a plaintiff may lose an opportunity for public vindication or retribution; after all, some plaintiffs want more than money.[131]

These scholars also argue that arbitration does not create precedent. In a common law system, this deprives the public of opportunities for the clarification of rules and the shaping of policy.[132] Also, the privacy of arbitration prevents a public outing of a corporate bad actor and discourages other lawsuits. Further, privacy precludes the deterrent effect on other corporations of a public judgment, especially important in the context of consumer class actions.[133]

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126. For a description and analysis of hyperbolic discounting, see Benjamin A. Malin, *Hyperbolic Discounting and Uniform Savings Floors*, 92 J. PUB. ECON. 1986, 1986 (2008).

127. *E.g.*, Sternlight, *Creeping Mandatory Arbitration*, *supra* note 10, at 1648–53 (discussing various procedural and rights protections that plaintiffs sacrifice in arbitration).

128. *See, e.g.*, Ware, *Arbitration Under Assault*, *supra* note 10, at 3 ("[A]rbitration typically reduces costs . . . by streamlining discovery.").

129. *See* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 46–47 & n.34 (stating that in an arbitration, the only way to "unearth . . . information [is by] finding a witness"); Sternlight, *Panacea or Corporate Tool?*, *supra* note 10, at 683–84 (contending that even seemingly neutral discovery rules harm consumers because the corporation is the party with all the records, and the consumer is the one that needs access to them); *see also* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 683 (Cal. 2000) (Mosk, J.) ("[E]mployers typically have in their possession many of the documents relevant for bringing an employment discrimination case, as well as having in their employ many of the relevant witnesses. The denial of adequate discovery in arbitration proceedings leads to the de facto frustration of the employee's statutory rights. . . . We agree that adequate discovery is indispensable for the vindication of FEHA claims.").

130. *See* Jean R. Sternlight, *In Defense of Mandatory Arbitration (If Imposed on the Company)*, 8 NEV. L.J. 82, 85 (2007) (suggesting that plaintiffs would not voluntarily arbitrate large claims, which implies they perceive a larger payout through litigation).

131. For an example of a particularly egregious case where the plaintiff may have wanted the psychological vindication of a jury trial, which may explain the new attorney and the refiling in district court, see Jones v. Halliburton Co., 583 F.3d 228, 232 (5th Cir. 2009).

132. Sternlight, *Creeping Mandatory Arbitration*, *supra* note 10, at 1661–62.

133. Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 431 (1999). But arbitrations are not always private. Arbitrators or counsel can make a particularly egregious case public; after all, the Erin Brockovich case was an arbitration. ERIN BROCKOVICH (Universal Studios 2000). *But see* Kathleen Sharp, *"Erin Brockovich": The Real Story*, SALON.COM (Apr. 14, 2000, 4:00 PM), http://www.salon.com/2000/04/14/sharp/ (arguing that, in the real story, many victims "are wondering where the money went—and they're mad at their lawyers").

Pro-arbitration scholars often respond that while most of the terms in employment and consumer contracts could be considered adhesive, they should nonetheless be enforceable. The savings from these contracts are passed along to consumers and employees in the form of lower prices and higher wages.[134] For the egregious cases, these scholars (and jurists) point to contract law's unconscionability doctrine and the "savings" clause of the FAA—a point Justice Scalia expressly carved out in *Concepcion*—as a means for judges to police the adequacy of the bargain.[135]

I offer three responses to the argument that the unconscionability doctrine adequately polices the process. First, recent scholarship not only argues that judicial and scholarly skepticism of adhesion contracts is misplaced,[136] but also suggests that the unconscionability doctrine itself polices the wrong types of negotiating behavior and structure that typically lead to inefficient nonprice terms.[137] Traditional contract law of unconscionability has two elements: procedural unconscionability, relating to disparities in bargaining power, and substantive unconscionability, which evaluates the terms of the agreement.[138] Rarely will procedural unconscionability in and of itself invalidate an agreement without some substantively unreasonable terms.[139] But Professors Choi and Triantis persuasively argue that sellers with oppressive bargaining power *alone* can impose inefficiently one-sided terms even between sophisticated parties, because sellers with superior bargaining power can screen buyers to reduce

134. Ware, *Arbitration Under Assault*, *supra* note 10, at 10; *cf.* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991) ("[P]assengers who purchase [form contract cruise tickets] containing a forum[-selection] clause . . . benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.").

135. *See, e.g.*, Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEXAS L. REV. 1329, 1367 n.157 (2012) ("[C]ourts use the unconscionability doctrine to invalidate oppressive arbitration agreements.").

136. Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665, 1731 (2012) ("This result underscores the current judicial and scholarly skepticism as to the earlier concern over adhesion and the lack of meaningful choice is exaggerated.").

137. *See id.* at 1730 (noting that "[c]ourts do not interfere with commercial contracts based solely on a procedural concern with unequal bargaining power," even though the model showed "inefficiently one-sided terms can persist even between sophisticated parties when the seller engages in screening or the buyer engages in signaling, particularly when bargaining power is unequal").

138. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) ("Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L.J. 485, 487 (1967) (distinguishing "procedural unconscionability" from "substantive unconscionability" because "[t]he law may legitimately be interested both in the way agreements come about and in what they provide").

139. Choi & Triantis, *supra* note 136, at 48.

the quality of nonprice terms to maximize profit in a way that is not socially optimal.[140]

Second, assuming that the legal standard does adequately police nonprice terms, there remains an epistemological problem perhaps unique to arbitration. How exactly does a plaintiff employee or consumer *show* that the contract is substantively unconscionable? If the arbitration procedure is unfair and the agreeement is substantively unconscionable—which is especially likely when one party has no real opportunity to bargain over the process—then the employee is practically without remedy, unless he can prove the arbitration clause itself was adhesive and unconscionable.[141] For these reasons, arbitration is facing serious and warranted criticism.[142]

Third, courts are arguably no longer in the position to adequately police unconscionability. After *Rent-A-Center, West, Inc. v. Jackson*,[143] decisions about whether the arbitration clause is itself unconscionable are for the *arbitrator* at least in the first instance—provided that the arbitration agreement authorized the arbitrator to make that decision.[144] While this only delays judicial review of unconscionability until after the arbitrator initially decides the question, if a potential plaintiff has a small-dollar dispute, this delay can impose sufficient costs to deter at least the marginal plaintiffs.

Also, in class actions, it is not at all clear that consent is the real issue. After all, unlike in *Garner-Denver* where the parties consented to arbitrate and the Court wrestled with substantive public policies on the one hand and private autonomy on the other,[145] private autonomy is of diminished importance in class actions.

Even though consent may not be the real issue, concerns over adhesiveness have certainly animated the critics, as have the arbitration horror stories that have inspired recently enacted and proposed legislation.

B. Arbitration Horror Stories—The Jamie Leigh Jones Saga

Perhaps no case has received more attention than *Jones v. Halliburton*, which has been used as a rallying cry against arbitration.[146] The facts were

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140. *Id.* at 49.

141. *See* 9 U.S.C. § 2 (2006) ("[A] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

142. *See* Sternlight, *supra* note 130, at 106 (advocating against private mandatory arbitration and supporting the Arbitration Fairness Act introduced in 2007).

143. 130 S. Ct. 2772 (2010).

144. *Id.* at 2779.

145. *See* notes 71–77 and accompanying text.

146. *See, e.g.*, HOT COFFEE (HBO 2011) (documenting tort reform and featuring Jamie Leigh Jones and Senator Al Franken prominently).

summarized at the beginning of this Note,[147] and the legal issue was whether the arbitration clause of an employment agreement provided for the resolution of civil claims arising from an alleged sexual assault at the employer's barracks.[148] This is often described as "arbitrability."[149] Jones challenged the enforceability of her arbitration clause, which provided for arbitration of all disputes arising from her employment.

Because of the presumption in favor of arbitrability (which was established as part of the broad policy favoring arbitration),[150] arbitration agreements were increasingly enforced.[151] And as arbitration agreements proliferated into consumer and employment contracts,[152] new questions of arbitrability arose. Suddenly, it became an open question whether claims arising from a sexual assault were within the scope of an arbitration clause of an employment agreement.[153]

Although intuitively a sexual assault claim seems outside the scope of an employment agreement,[154] this was a difficult issue for the Fifth Circuit to resolve due to the emergence of a federal policy in favor of arbitration. The Supreme Court has adopted a presumptive rule of construction: "[t]he [Federal] Arbitration Act establishes that . . . any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[155] Nonetheless, over a dissent citing this very rule,[156] the Fifth Circuit in *Jones* held that the sexual-assault-related claims were not arbitrable.[157] But in denying arbitration of the claims in *Jones*, the court was careful to note that

147. *See supra* notes 1–6 and accompanying text.

148. Jones v. Halliburton Co., 583 F.3d 228, 230 (5th Cir. 2009).

149. Arbitrability is perhaps best understood as the subject matter jurisdiction of the arbitrator. ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 707 (4th ed. 2006).

150. *See supra* Part I.

151. *See supra* subparts I(C)–(D).

152. *See supra* subparts I(C)–(D).

153. *Compare Jones*, 583 F.3d at 239 (concluding that the scope of the clause "stops at Jones' bedroom door," suggesting that an open question remains in other employment situations), *with id.* at 242 (DeMoss, J., dissenting) (relying on the federal policy resolving ambiguities in favor of arbitrability and arguing the issue before this court "should be resolved in favor of arbitration"); Oravetz v. Halliburton Co., No. 07-20285-CIV, 2007 WL 7067475, at *4 (S.D. Fla. July 24, 2007) (compelling arbitration under a similar arbitration agreement of claims that arose from an alleged sexual assault because the plaintiff's "claims arise from an alleged assault that took place while she was being housed in an apartment provided to her as an employee of [Halliburton]").

154. *See, e.g.*, Nathan Koppel, *When Suing Your Boss Is Not an Option: More Companies Are Requiring Employees to Settle Disputes by Going into Arbitration*, WALL ST. J., Dec. 18, 2007, http://online.wsj.com/article/SB119794297960335675.html (describing "outrage and media attention" at the absence of criminal charges stemming from Jamie Leigh Jones's assault).

155. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

156. *Jones*, 583 F.3d at 242 (DeMoss, J., dissenting).

157. *Id.* at 242 (majority opinion).

the inquiry is "fact-specific,"[158] leading at least one court to explicitly distinguish *Jones* in ordering arbitration of sexual-assault-related claims.[159]

Even though Jones had the opportunity to litigate her claim, the jury ruled against her at the subsequent civil trial.[160] But Jones achieved lasting victory in Congress. Her congressional testimony helped lead to a rider on an appropriations bill that prohibited government defense contractors from including arbitration clauses in their employment agreements.[161] Jones's unfortunate story helped put a public face on what was previously an arcane procedural issue.[162] Combined with outrage over the *Concepcion* decision, horror stories like *Jones*—including the National Arbitration Forum,[163] the *Hooters* case,[164] and *American Apparel*[165]—are prompting serious congressional inquiries and possible reform.

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158. *Id.* at 240.

159. Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1220–21 (11th Cir. 2011) (distinguishing *Jones* and compelling arbitration "[a]lthough the rape and its aftermath led to these five claims against the cruise line"). American Apparel has also succeeded in compelling arbitration of allegations of sexual harassment and assault. *See, e.g.*, Jose Martinez, *$260M Sex Slave Suit Against Dov Charney Tossed*, N.Y. POST, Mar. 21, 2012, http://www.nypost.com/p/news/local/manhattan/sex_slave_lawsuit_against_dov_charney_QbbaVC6MhDVo13Fz4yTBuL ("A Brooklyn court won't have to deal with the X-rated claims made against American Apparel chief Dov Charney, who was accused . . . of turning a teen-age girl into his sex slave. The racy allegations made by Irene Morales should instead be heard behind closed doors in arbitration [the court ruled] . . . .").

160. Daniel Gilbert, *Jury Favors KBR in Iraq Rape Trial*, WALL ST. J., July 9, 2011, http://online.wsj.com/article/SB10001424052702303365804576434301221391760.html; *see also* Stephanie Mencimer, *Why Jamie Leigh Jones Lost Her KBR Rape Case*, MOTHER JONES, July 8, 2011, http://motherjones.com/politics/2011/07/kbr-could-win-jamie-leigh-jones-rape-trial? (explaining how a Houston jury found Jamie Leigh Jones was not raped).

161. The rider provides:

> None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract for an amount in excess of $1,000,000 that is awarded more than 60 days after the effective date of this Act, unless the contractor agrees not to: (1) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under [T]itle VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.

Department of Defense Appropriations Act, 2010, Pub. L. 111-118, § 8116(a), 123 Stat. 3409 (2009).

162. HOT COFFEE, *supra* note 146.

163. *See* Berner & Grow, *supra* note 9 (questioning the National Arbitration Forum's fairness to consumers).

164. *See* Hooters of Am., Inc. v. Phillips 173 F.3d 933, 940 (4th Cir. 1999) (holding agreement to arbitrate unenforceable because the procedures established "a sham system unworthy even of the name of arbitration").

165. *See* Nelson v. Am. Apparel, Inc., No. B205937, 2008 WL 4713262, at *1, *7–8 (Cal. Ct. App. Oct. 28, 2008) (compelling arbitration even though the agreement stated, "The Arbitrator shall be selected by American Apparel at its sole and unfettered discretion. . . . The Arbitrator's decision will state only the following: 'Mary Nelson was not subjected to unlawful sexual harassment in

C. *Congress's Response*

In addition to the rider to the defense appropriations bill championed by Senator Franken in 2009, there are several legislative actions pending in Congress. Congress has considered amending the FAA in the recent past, and Senator Feingold, in response to Supreme Court decisions expansively interpreting the FAA, proposed an initial Arbitration Fairness Act in 2007.[166] The findings section stated,

> A series of United States Supreme Court decisions have changed the meaning of the [FAA] so that it now extends to disputes between parties of greatly disparate economic power, such as a consumer . . . and employment disputes. As a result, . . . corporations are requiring millions . . . to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.[167]

While the initial Arbitration Fairness Act failed to make it out of committee,[168] the Arbitration Fairness Act was re-proposed after the *Jones* case[169] and again in 2011.[170] Several commentators have suggested that the most recent iteration of the Arbitration Fairness Act will fare better.[171]

There are several bills that have been enacted, authorize action, or are pending. First, Congress enacted the previously mentioned defense rider. Second, Congress has empowered the Consumer Financial Protection Bureau under Dodd-Frank to evaluate consumer arbitration. Third, the Arbitration Fairness Act proposes to abolish mandatory arbitration clauses in consumer and employment agreements. Let's take these one at a time.

The Fiscal Year 2010 Defense Appropriations rider states,

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violation of the California Fair Employment & Housing Act. Dov Charney never sexualized, propositioned or made any sexual advances of any nature whatsoever towards Mary Nelson,'" because "the potential illegality of the 'arbitration' clause in paragraph 7 with its goal of issuing a press release for the purpose of misleading journalists and the public is severable from the remainder of the settlement agreement" (emphasis omitted)).

166. S. 1782, 110th Cong. (2007).

167. *Id.* § 2.

168. Cole, *supra* note 11, at 458 n.1 (noting the 2007 Arbitration Fairness Act among a number of proposals, "[a]lmost none of [which] were reported out of committee, and those that survived the committee step . . . were not voted on by the House or Senate").

169. H.R. 1020, 111th Cong. (2009) (finding that the Supreme Court has "changed the meaning" of the FAA).

170. *See Gutting Class Action*, *supra* note 9 (noting that "[i]n a welcome effort to protect consumers, employees and others, Senators Al Franken and Richard Blumenthal and Representative Hank Johnson have just [re]introduced the Arbitration Fairness Act[, ... which] would make required arbitration clauses unenforceable").

171. *See* Cole, *supra* note 11, at 459–60 ("This reintroduction comes at a good time . . . . With adverse Supreme Court decisions and a Democratic president, successful adoption of the AFA would appear more likely."); Malin, *supra* note 11, at 289 (observing that the re-introduced Arbitration Fairness Act "had a reasonable chance of passage," at least until the 2010 mid-term elections).

> None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract for an amount in excess of $1,000,000 that is awarded more than 60 days after the effective date of this Act, unless the contractor agrees not to:
>
> (1) enter into any agreement with any of its employees or independent contractors that requires as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.[172]

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 provides that,

> The [Consumer Financial Protection] Bureau shall conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services . . . .[173]
>
> . . .
>
> The Commission, by rule, *may prohibit, or impose conditions* or limitations on the use of, agreements that require customers or clients of any investment adviser dealer to arbitrate any future dispute . . . .[174]

The Arbitration Fairness Act proposes that, "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute."[175]

As will be discussed in detail later, in light of the benefits of many applications of arbitration banned by these proposals, these proposals are overly broad.

D. The Benefits of Binding Arbitration for Consumers and Employees

Arbitration has significant advantages for consumers and employees. Arbitrators are (for the most part) neither bound by precedent, nor required to issue opinions;[176] so they have the freedom to craft equitable relief that

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172. Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409 (2009).

173. Pub. L. No. 111-203, § 1028, 124 Stat. 1376 (codified at 12 U.S.C. § 5518(a)).

174. *Id.* at § 921 (codified at 15 U.S.C. § 78(o)) (emphasis added).

175. Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. § 402(a) (2011).

176. RAU ET AL., *supra* note 149, at 612 (noting that "outside the field of labor arbitration[,] arbitrators (unlike judges) commonly do not write reasoned opinions" and that the AAA "actively discourages arbitrators from doing so").

benefits the two parties, even to the detriment of the third-party public, because no precedent is set. The majority of consumers and employees achieve better outcomes through arbitration because of faster adjudication, minimized litigation costs, and increased access to justice. This holds true even for quintessentially statutory claims such as Title VII disputes over employment discrimination.

1. Lack of Public Policy Consideration and Rules.—Arbitrators are not bound by legal rules and may craft awards without a concern for precedent, which can be positive for employees and consumers.[177] Consider, for example, the following hypothetical to illustrate how this can benefit consumers and employees.[178] Suppose that a patient undergoes treatment for a rare disease at a research hospital, and part of his liver is removed. While the patient is undergoing treatment, the doctors at the research hospital realize that tissue from his liver potentially could be very valuable for medical research. So the doctors make plans to conduct research on the liver with the hope of eventually benefiting financially, but the doctors conceal this from the patient to make sure he abandons the tissue. The doctors eventually develop a life-saving (and lucrative) medical treatment using the patient's tissue. When the patient discovers this—and notices the doctors' treatment has become quite profitable—he sues in court.

A court confronting this issue faces a dilemma. On the one hand, what the doctors did seems wrong—the tissue belonged to the patient in a very real and personal way. The only reason he discarded the tissue was that he was unaware of its potential value—a fact the doctors purposefully concealed. But on the other hand, the precedent of finding for the patient could greatly chill medical research in future cases. After all, patients might be unwilling to part with tissue based on the potential of future value. Thus, this decision might deter or prevent the development of other life-saving medical treatments.[179] The court must choose between compensating this one

177. *Cf. id.* at 628, 636 (noting that unlike domestic arbitration, which mostly "dispense[s] with reasoned opinions," labor arbitration and "parties in international cases *do* usually expect arbitrators to provide a written opinion," and observing that "international arbitrators have been moving towards a 'common law of international arbitration'" (citing W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 638 (3d ed. 2000)).

178. This hypothetical scenario is based loosely on the facts of Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990) (in bank).

179. *Cf.* Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 132 (discussing *Moore* and arguing that "[m]ost compelling to the court was the prospect that assigning ownership rights to those in Moore's situation would have a chilling effect on medical research and technological progress, endeavors that significantly outweigh any individual's right to share in the profits derived from his or her excised tissue"); *see* James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CALIF. L. REV. 1413, 1511 (1992) ("The court in *Moore* worries about the classification, limitation, and relativization of property.") (emphasis omitted).

plaintiff and possibly harming numerous other people who may one day be deprived of valuable medical treatment.

But if this case arose in arbitration, precedent may not matter. The arbitrator would be free to craft an award that compensated the patient equitably without the fear that the precedent would hurt medical research in the future. This example can be extended to situations under Title VII or state consumer protection laws, where precedential opinions can impose tremendous potential liability on employers. Thus, the absence of public policy consideration in arbitration can potentially benefit consumers and employees.

2. Efficiency and Speed.—Through arbitration, more small claims are heard, benefiting the majority of consumers and a significant percentage of employees. According to the American Arbitration Association (AAA) in 1995, one-third of arbitrated disputes were under $10,000 while another third were between $10,000 and $50,000, and the average processing time was less than six months.[180] A more recent analysis of AAA arbitrations showed that, indeed, 91.5% of the AAA's arbitrated consumer disputes in 2005 were for less than $75,000.[181] In the specific employment context, one study found that the median claim was $106,151 and one-quarter of claims were for less than $36,000.[182] The average time to resolution (including settlement) was a little over one year, which compared favorably to the two to two-and-a-half years to reach trial in litigation.[183] Therefore, many plaintiffs obtain speedy relief on small claims that would be otherwise foreclosed by the cost of litigation.[184] In time-sensitive industries, such as internet technology, speed is crucial.[185] In litigation, a corporate defendant can delay to force a small settlement.

Although delivering value to the plaintiff-employee or -consumer is not why companies include arbitration clauses, neither is depriving plaintiffs of their fair recovery. Instead, corporate defendants want certainty in predicting

180. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280–81 (1995).

181. *See* SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION, PRELIMINARY REPORT 66 n.47, 68 tbl.3 (2009) [hereinafter AAA CONSUMER ARBITRATION], *available at* http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_010205&RevisionSelectionMethod=LatestReleased (finding that 215 out of 235 consumer arbitrations in 2005 were for less than $75,000).

182. Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 10 (2011).

183. *Id.* at 8 (finding 284.4 days for settlement and 361.5 days for award).

184. Ware, *Arbitration Under Assault*, *supra* note 10, at 6, 10.

185. *Cf.* Maureen A. Weston, *Doping Control, Mandatory Arbitration, and Process Dangers for Accused Athletes in International Sports*, 10 PEPP. DISP. RESOL. L.J. 5, 20–21 (2009) (describing the expedited process for Olympic disputes).

outcomes.[186] Seeking to avoid the unpredictably expensive jury verdict, corporations are willing to pay out a larger number of smaller claims in exchange.[187] Because most disputes are small, arbitration is preferable for most employees and consumers. Further, there is no evidence that plaintiffs with large claims do worse in arbitration.[188]

In fact, some empirical data suggests that employees particularly do *better* in arbitration than in federal litigation. Because most corporate defendants can remove, federal courts are often the venue for employment disputes for many employees.[189] One study of 3,419 employment discrimination cases found that 60% were disposed of by pretrial motion.[190] This resulted in employees prevailing 14.9% of the time,[191] compared with a 63% win rate among employees who arbitrated their claims.[192] While it is impossible to make any definitive inferences from data like this, mainly because of confounding variables such as the selection of cases for arbitration, the effect of settlement, and differences in representation (such as through a union), it is by no means clear that employees are worse off in arbitration.[193]

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186. Ware, *Arbitration Under Assault*, *supra* note 10, at 9.

187. *Id.* ("The consumer gets lower prices and, perhaps, better access to justice for meritorious claims that are too small for a lawyer to litigate. In exchange, the business gets lower process costs and, perhaps, reduced exposure to big-dollar jury awards and class actions.").

188. Though there is certainly that perception, especially among trial lawyers. *See id.* at 10 ("Well-organized and well-funded trial lawyers eagerly draw media attention to the drama of the large liability claim. . . . The many people who would benefit from increased access to justice do not have a political organization as focused and effective as the trial lawyers who seek to restrict access [to arbitration].").

189. *Cf.* Donald G. Gifford, *Climate Change and the Public Law Model of Torts: Reinvigorating Judicial Restraint Doctrines*, 62 S.C. L. REV. 201, 250 (2011) ("Particularly after the adoption of the Class Action Fairness Act of 2005, it is likely that most corporate defendants in public interest tort actions will be able to remove their cases to federal courts . . . ." (footnotes omitted)); Connor D. Deverell, Casenote, *Defining a Corporation's "Principal Place of Business": The United States Supreme Court's Decision in* Hertz Corp. v. Friend, 56 LOY. L. REV. 733, 741 (2010) ("Removing a state court suit to federal court also provides a tactical advantage to corporations[,] so corporate defendants will often remove cases to wear down their opponents and encourage settlement.").

190. Maltby, *supra* note 89, at 47.

191. *Id.* at 46.

192. *Id.*

193. In fact, research from Dan Kahan and, more specifically, Paul Secunda, suggests that data in employment disputes comport with notions of sensitivity and cultural cognition—that the legal decisions, particularly in labor disputes, "come[] down to a choice among conflicting cultural norms." Paul M. Secunda, Psychological Realism in Labor and Employment Law 24 (March 2011) (unpublished manuscript) *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1008&context=paul_secunda. *See also, e.g.*, Dan M. Kahan, *"Ideology in" or "Cultural Cognition of" Judging: What Difference Does It Make?*, 92 MARQ. L. REV. 413, 415–16 (2009) (discussing ways in which values influence judicial decisions); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 879–81 (2009) (arguing that an individual's resolution of a factual issue is influenced by "various sources of value-motivated cognition"); Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV.

3. Expert Adjudication.—Another advantage of arbitration is the expert decision maker. Whereas in litigation, parties hire their own experts at considerable expense to impose their interpretations on the court, in arbitration, the parties can select an expert as their arbitrator. For example, in Olympic disputes, experts in sports are selected as arbitrators.[194]

This rationale holds true even in the context of a statutory scheme, such as anti-discrimination under Title VII. Consider the Court's reasoning in *Gardner-Denver*, denying arbitration: "[T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land."[195] Even though the Court reasoned that this creates a public policy reason for denying arbitration, I disagree.

Determining the subtle nuances of discrimination in a workplace can require more sensitivity and familiarity with an industry than familiarity with the case law. For example, in the academic community, discovering discrimination may be more subtle than evaluating simple pay disparities—including prestigious appointments or even informal consultations over hiring decisions. The same holds true for other insular industries, such as finance.[196] Provided with sufficient procedural guarantees, the parties could select an expert arbitrator. Instead of hoping they are assigned a good judge or are able to select a favorable jury, the parties could select an expert in the area with desirable cultural or gender sensitivity.

Some scholars argue that, if that were the case, why not simply have nonbinding arbitration?[197] Simply put, arbitration by expert does not work if it is not mandatory. The party with the weaker case would not want an expert, because an expert might quickly recognize that weakness. Also, perceptions and priorities often shift post-dispute.[198]

4. Venue, Jurisdiction, and Enforcement Abroad in International Contexts.—Particularly in international disputes, an appropriate venue can be difficult to determine.[199] In arbitration, jurisdiction and venue are based on

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107, 148 (2010) (asserting that cultural cognition theory provides an explanation about how judges with different cultural worldviews decide cases).

194. Weston, *supra* note 185, at 20.

195. Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974).

196. *See, e.g.*, SUSAN ANTILLA, TALES FROM THE BOOM-BOOM ROOM: WOMEN VS. WALL STREET (2002) (describing subtle (and not-so-subtle) stories of gender discrimination in Wall Street investment banking firms that were later arbitrated).

197. *E.g.*, Sternlight, *supra* note 130, at 85.

198. Ware, *Arbitration Under Assault*, *supra* note 10, at 9; *cf.* HOMER, THE ODYSSEY 250 (Robert Maynard Hutchins et al. eds., Samuel Butler trans., 1952) ("Therefore pass these Sirens by, and stop your men's ears with wax that none of them may hear; but if you like you can listen yourself, for you may get the men to bind you [to] . . . the mast itself . . . .").

199. *Cf.* RAU ET AL., *supra* note 149, at 627 (arguing that factors like the possibility of parallel litigation, uncertainty regarding the governing rules of decision in a foreign tribunal, and uncertainty as to the rules of conflict of laws lead parties to choose arbitration in settling disputes).

consent, so this is not a concern.[200] For example, in *Jones v. Halliburton*, had Jones chosen to arbitrate, she would have avoided the venue and jurisdictional complications that arise in disputes between an American employee and a corporation operating in a war zone overseas.[201] In fact, at trial, several of Jones's claims were tossed out for jurisdictional reasons.[202] Further, when a party tries to enforce a judgment abroad, a foreign court may scrutinize the holding skeptically. Because arbitration is based on consent, an award is as enforceable as a contract and has the force of international law.[203]

Because of the significant positive advantages of arbitration for consumers and employees, the Arbitration Fairness Act and the appropriations rider are overly broad, and for that reason inappropriate. The ideal reform must sensitively balance the underlying policies at issue in the specific types of dispute.

III. A Proposal for Reform

This Note proposes that administrative agencies promulgate rules for arbitration for companies with more than fifty employees. Because a proposal to reform arbitration must be sensitively tailored to meet the specific needs of different types of dispute, under this proposal administrative agencies would promulgate regulations for specific industries and specific categories of disputes. Instead of simply broadly enforcing arbitration clauses—as the Supreme Court has increasingly done—or, on the other hand, holding these clauses unenforceable in a broad swath of disputes—as Congress proposes—this reform balances the competing policy concerns of efficient and effective adjudication on the one hand, and deterrence and access to justice on the other.

A. The Proposal

Congress should enact legislation and the CFPB and the EEOC should promulgate rules that target only companies of a sufficient size—those with more than fifty employees—so that repeat-player concerns, sophistication,

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200. *See id.* (noting the common tendency to view an arbitral award "as 'the outcome of contractual relationships, rather than of the exercise of state powers'" (quoting Richard N. Gardner, *Economic and Political Implications of International Commercial Arbitration*, *in* INTERNATIONAL TRADE ARBITRATION 20–21 (Martin Domke ed., 1958)).

201. *See* Jones v. Halliburton Co., 791 F. Supp. 2d 567, 594–96 (S.D. Tex. 2011) (dismissing several claims for lack of subject matter jurisdiction).

202. *Id.* at 595–97 (dismissing Jones's false imprisonment and retaliation claims on the grounds that Jones had failed to exhaust her administrative remedies prior to filing suit, which resulted in her claims being barred by the TCHRA and Title VII).

203. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 330 U.N.T.S. 40; RAU ET AL., *supra* note 149, at 627.

and information asymmetry are realistic presumptions. For these companies, in disputes with a consumer or employee, the burden should shift: Instead of placing the burden on the plaintiff-employee or -consumer to prove that the agreement was unconscionable or that the process cannot effectively vindicate statutory claims, the burden would shift to the defendant company. The defendant company would then have to affirmatively show that it meets the requirements of an agency regulation—which is the heart of this proposal. This proposal is not intended to provide substantive decision rules. On the contrary, the main thrust of this proposal is to provide some examples that demonstrate that not all arbitration is the same, different categories of disputes require different rules, and the best mode of reform is one that balances the different priorities and policies—namely specific rules promulgated by an administrative agency rather than broad pronouncements by Congress or the Supreme Court.

1. Procedural Guarantees and Safe Harbors Through Administrative Regulations and Guidance.—Rather than self-governance by the private arbitration agencies,[204] or general due process rules for all consumer and employment arbitration regardless of type,[205] this Note argues for a more nuanced approach. Empowered by Congress, the Consumer Financial Protection Bureau and the Equal Employment and Opportunity Commission should promulgate procedural guarantees *specific* to each type of arbitration. If the sufficiently large company meets the requirements, then the court reviewing a motion to compel arbitration *must* compel arbitration. On the other hand, if the company fails to meet the requirements, then the reviewing court *must* deny arbitration, with one exception. If the large company can show by clear and convincing evidence that its procedures are fair—even though it fails to meet the requirements of the regulation—then the court would compel arbitration. The concern that this limited exception addresses

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204. *Cf.* Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMP. RTS. & EMP. POL'Y J. 363, 396–403 (2007) (discussing self-regulation of the arbitration community). *See generally* AM. ARBITRATION ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES (2009), *available at* http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased (providing the rules by which the AAA will administer employment disputes); JUDICIAL ARBITRATION & MEDIATION SERVS., JAMS ENGINEERING AND CONSTRUCTION ARBITRATION RULES & PROCEDURES (2009), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_construction_rules-2009.pdf (outlining the rules that govern construction disputes before JAMS); NAT'L ARBITRATION FORUM, CODE OF PROCEDURE (2008), *available at* http://www.adrforum.com/users/naf/resources/CodeofProcedure2008-print2.pdf (providing the rules that govern most disputes before the NAF).

205. *See, e.g.*, Dillon-Coffman, *supra* note 11, at 1120 (proposing the addition of "an institutional middleman . . . to eliminate potential conflicts of interest and safeguard consumers and employees"); Malin, *supra* note 11, at 311–14 (arguing for regulation of employment arbitration through congressional amendment of the FAA and arguing that agency "tailoring" can be "inappropriate").

is that some dispute types in specific industries—such as information technology—change at a rapid pace and may require procedures that sufficiently protect the employee or consumer even though they vary from a regulation. This exception also leaves open the possibility that if a company believes it can more cheaply comply, it can depart from the regulation; but if challenged, it would have to show its cheaper procedures were nonetheless substantively conscionable by clear and convincing evidence.

To illustrate this proposal, consider the following example. An employee sues her employer for employment discrimination and files her claim in federal court. The company responds by filing a motion to compel arbitration, attaching the employment agreement which includes a dispute resolution provision that provides that discrimination disputes would be subject to binding arbitration. Under the current law, the employee could try to defeat the motion to compel arbitration by claiming that either the arbitration clause was unconscionable or that the arbitration procedure was inadequate to enforce her statutory rights—with the burden on the employee.[206] Under this proposal, the EEOC would promulgate rules and regulations that set out the procedural requirements for this category of employment discrimination disputes. The rule, for example, could require the appointment of an advocate to inform the selection of an arbitrator.[207] Then the burden would be on the defendant company—rather than the employee—to show that the arbitration process conforms to the applicable rules. If the company's arbitration procedures met the requirements of the applicable rules, then the court would compel arbitration. If the company's arbitration procedures vary from the applicable rules, then the motion to compel arbitration would be denied, and the employee could litigate her claim.[208]

This approach largely conforms to the Supreme Court's interpretation of the FAA—to essentially federalize the law of arbitration. Instead of the Supreme Court policing arbitration on an ad hoc basis—as cases percolate piecemeal through the judicial process at a rate of about seventy-five cases per year (and increasingly fewer from state courts)[209]—this proposal

206. Malin, *supra* note 11, at 302 (citing Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000)).

207. *See infra* subsection III(A)(2)(b).

208. As discussed above, even if the company's procedures do not conform to the applicable rules, the court may still compel arbitration if, and only if, the company can show by clear and convincing evidence that its nonconforming procedures are nonetheless fair and guarantee vindication of the employee's statutory rights.

209. After discretionary certiorari was enacted in 1988 by 28 U.S.C. § 1257, the Supreme Court has reduced its caseload, and the decline has been particularly sharp in cases from state courts. *See* Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 350, 352, 353 tbl.1 (2002) ("Starting in 1990, the numbers began rapidly falling below 100, until by the late 1990s the Court was only deciding seventy or eighty cases per term. . . .

empowers agencies to weigh the various policy concerns and promulgate rules specific to each type of arbitration prospectively. Regulated entities would then participate in the rule making process through notice and comment[210] (as they arguably already do through ex parte contacts with arbitration agencies such as JAMS, AAA, and the NAF).[211] But instead of the companies holding the sword of repeat business over the heads of the arbitration organizations, the agencies would instead be politically accountable to Congress for appropriations and to the President for appointments or removal.[212]

Further, at least one federal agency has already begun moving in the direction of arbitration reform. In D.R. Horton Inc.,[213] the National Labor Relations Board (NLRB) took a novel approach to limiting the use of arbitration clauses to avoid employment class actions. Michael Cuda, a superintendent working for D.R. Horton, joined a class action asserting that he and similarly situated superintendents were misclassified as exempt from the National Labor Relations Act (NLRA).[214] When Cuda and the class's attorney filed for arbitration, D.R. Horton replied that Cuda and the class had failed to provide effective notice because their employment contracts included an arbitration clause that barred class litigation and arbitration, and Cuda filed an unfair labor practices charge.[215] The Board ruled for Cuda and interpreted Section 8(a)(1) of the NLRA to prohibit the use of an arbitration clause as a class action waiver for employment disputes over wages, hours, and other working conditions.[216] The Board reasoned that the right of employees to litigate (or arbitrate) as a class is "concerted action" within the meaning of Section 7 of the NLRA.[217] Thus, an employer like D.R. Horton

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[T]he number of cases from state courts has fallen into the twenties or teens, and the percentage of total cases has fallen as well. Indeed, it appears that the sharp decline of state court cases reviewed has significantly, and perhaps disproportionately, contributed to the decline of the overall docket."); *see also Frequently Asked Questions (FAQ)*, SUPREME COURT, http://www.supremecourt.gov/faq.aspx ("The Court grants [cert] and hears oral argument in about 75–80 cases.").

210. Administrative Procedure Act, 5 U.S.C. § 553(b) (2006).

211. Employers effectively influenced the AAA initially to exclude labor arbitrators from employment arbitrations because of the belief they would favor employees. Lisa B. Bingham & Debra J. Mesch, *Decision Making in Employment and Labor Arbitration*, 39 INDUS. REL. 671, 674 (2000). And more recently, business interests pressured JAMS into abandoning its initial refusal to administer arbitrations with class-action waivers. Adam Klein & Natiya Ruan, *Mandatory Arbitration of Employment Class Action Disputes: From the Perspective of Plaintiffs' Counsel*, *in* U.S. AND CANADIAN ARBITRATION: SAME PROBLEMS, DIFFERENT APPROACHES 142, 150 (Patrick Halter & Payl D. Staudohar eds., 2009).

212. U.S. CONST. art. II, § 2, cl. 2.

213. D.R. Horton, Inc., 357 N.L.R.B. 184 (2012).

214. *Id.* at *1.

215. *Id.*

216. *Id.* at *13.

217. *Id.* at *3 ("To be protected by Section 7, activity must be concerted," and "[w]hen multiple named-employee-plaintiffs initiate the action, their activity is clearly concerted.").

violates Section 8(a)(1) by conditioning employment on an arbitration clause that restricts the right of employees to proceed as a class—notwithstanding the mandate of the FAA and cases like *Concepcion* interpreting it.[218]

Even though the NLRB's decision could have a significant impact—allowing any "employee" within the meaning of the NLRA to bring an employment suit as a class notwithstanding a contrary arbitration clause[219]—its impact is likely to be short-lived. While the Board's contorted interpretation[220] of the NLRA is subject to judicial deference,[221] the Board's decision that the NLRA does not conflict with the FAA on this issue is not—and is instead subject to de novo review.[222] And in *CompuCredit Corp. v. Greenwood*[223] (issued one week *after* the NLRB opinion), the Supreme Court reiterated that for a federal statute like the NLRA to displace the FAA's mandate to enforce agreements to arbitrate by their terms, the text of the federal statute must indicate that displacement by clear statement.[224] Thus, nearly every district court to consider the D.R. Horton decision has declined

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218. *Id.* at *5–12.

219. *See* Delock v. Securitas Sec. Servs. USA, Inc., 4:11-CV-520-DPM, 2012 WL 3150391 (E.D. Ark. Aug. 1, 2012) ("Pick any kind of employment-related claim: race discrimination, unpaid wages, sex discrimination. Under the Horton rationale, no agreement to resolve the claim in arbitration on an individual basis can be enforced if two or more employees assert the claim in concert. That would be a *sweeping change in the law*." (emphasis added)). *But see* D.R. Horton, Inc., 357 N.L.R.B. 184, at *12–13 (2012) ("Only a small percentage of arbitration agreements are potentially implicated by the holding in this case.").

220. After all, "concerted" action is fundamentally distinct from "class" action. The concerted action protection of the NLRA was designed to protect concerted strikes and union organization from employer interference:

> [U]nder prevailing economic conditions . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing . . . and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other *concerted activities* for the purpose of collective bargaining or other mutual aid or protection.

29 U.S.C. § 102 (2006) (emphasis added). An arbitration clause does nothing to stop a group of employees from proceeding concertedly in separate, *parallel* individual arbitrations. A single union representative or employment attorney could *concertedly* represent each employee. Thus, a mandatory individual arbitration clause does not prohibit concerted action at all—it simply prescribes the process.

221. Pattern Makers v. NLRB, 473 U.S. 95, 114 (1985) ("Where the [NLRB's] construction of the NLRA is reasonable, it should not be rejected merely because the courts might prefer another view of the statute." (internal quotation marks omitted)).

222. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 144 (2002).

223. 132 S. Ct. 665 (2012).

224. *See id.* at 669 (quoting Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 226 (1987)).

to follow it,[225] and the case is currently on appeal to the Fifth Circuit.[226] Because of the Supreme Court's clear mandate that arbitration agreements must be enforced "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command,'"[227] the Fifth Circuit will most likely reject the NLRB's view and remand to compel the case to proceed as individual arbitrations.

In addition to the reality that the NLRB's decision is unlikely to stand, the D.R. Horton case is illustrative of how this Note's proposal is superior to the current state of the law. Instead of an agency stretching the meaning of a federal statute, the agency would be authorized to weigh the competing priorities. Instead of concealing policy making and working to distinguish Supreme Court decisions,[228] under this proposal, agencies like the NLRB could instead work openly to balance priorities in a rule making—just as the CFPB is currently doing to explore arbitration's effects on consumers.[229] This process increases transparency and participation, and makes the policy decisions (thereby) more politically accountable.[230] Normal contract

225. *See, e.g.*, Carey v. 24 Hour Fitness USA, Inc., CIV.A. H-10-3009, 2012 WL 4754726, at *2 (S.D. Tex. Oct. 4, 2012) ("The *Horton* decision is neither binding nor subject to deference, and is inconsistent with . . . Supreme Court authority. On that basis, the Court declines to apply the *Horton* decision."); Delock v. Securitas Sec. Servs. USA, Inc., 4:11-CV-520-DPM, 2012 WL 3150391, at *3–4 (E.D. Ark. Aug. 1, 2012) (declining to follow D.R. Horton and collecting cases); Morvant v. P.F. Chang's China Bistro, Inc., 11-CV-05405 YGR, 2012 WL 1604851, at *8–12 (N.D. Cal. May 7, 2012) (declining to follow D.R. Horton); Jasso v. Money Mart Exp., Inc., 11-CV-5500 YGR, 2012 WL 1309171, at *7–10 (N.D. Cal. Apr. 13, 2012) (same). *But see* Herrington v. Waterstone Mortg. Corp., 11-CV-779-BBC, 2012 WL 1242318, at *6 (W.D. Wis. Mar. 16, 2012) ("[B]ecause the Board's interpretation of the NLRA in *D.R. Horton*, is 'reasonably defensible,' I am applying it in this case to invalidate the collective action waiver in the arbitration agreement." (citations omitted)).

226. The briefs are in, and the case is scheduled for oral argument on February 5, 2013. *5th Circuit Court of Appeals Calendar*, U.S. CT. APPEALS FOR FIFTH CIRCUIT, http://www.ca5.uscourts.gov/clerk/calendar/1302/25.htm.

227. *CompuCredit Corp.*, 132 S. Ct. at 669 (quoting Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 226 (1987)).

228. *See, e.g.*, D.R. Horton, Inc., 357 N.L.R.B. 184, at *9–12 (2012) (spending several pages working to distinguish *Concepcion* and other pro-arbitration Supreme Court cases).

229. *See* Consumer Fin. Prot. Bureau, *Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements*, REGULATIONS.GOV (June 23, 2012), http://www.regulations.gov/#!docketDetail;dct=PS;rpp=25;po=0;D=CFPB-2012-0017 (listing comments from interested parties on the study of consumer arbitration); Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Launches Public Inquiry into Arbitration: Bureau to Explore Arbitration's Effects on Consumers (Apr. 24, 2012), http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-public-inquiry-into-arbitration-clauses/ (outlining a proposed study of consumer arbitration).

230. *See* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 435 (1999) (arguing that agency rulemaking, as opposed to adjudication, "requires some degree of public notoriety, which fosters executive and legislative oversight of the policy the rule implements, and thereby makes rules more democratically accountable than ad hoc agency decisions"); *cf. Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981) (Wald, J.) ("The authority of the President to control and supervise executive policymaking is

defenses—such as duress, consideration, fraud in the inducement, or contrary to public policy—would remain. But the general rules of substantive unconscionability (largely gutted by *Concepcion*)[231] and vindication of federal statutory claims would be replaced by the agencies' regulations.

2. Some Examples of Possible Regulations.—Here is a non-exhaustive list of possible reforms that analyzes how these reforms fit into various different types of disputes in different industries.

a. Very Small-Claim Consumer and Employment Disputes.—This is the area central to the Court's opinion in *Concepcion*. The beneficiary of aggregated consumer actions isn't the plaintiff seeking $14; instead it is the public who benefits from deterring broad—but individually small-dollar—corporate conduct. The purpose of the class action contest is deterrence, and therefore—in a sense—consent to arbitrate is irrelevant. The primary issue in these circumstances is deterrence—a public good. But perhaps the most persuasive portion of the *Concepcion* opinion is the argument that class actions are incompatible with arbitration, at least from a consent perspective, because of the increased costs and decreased efficiency.[232]

Consent is usually policed by contract law principles, on which the Court hung its hat in *Concepcion*. But because consent is largely irrelevant where the primary issue is a public good like substantive deterrence, the requirements of a regulation would focus on the primary issues: (1) efficiency and resolution, (2) deterrence, and (3) to a lesser extent, judicial review.

In accomplishing deterrence, some of the rationales for aggregating consumer class actions could apply with equal force in arbitration without the formalities of litigation. For example, to allow individuals the economies of scale provided by class action litigation, a public record could be required. For instance, a company might be required to publish on a website information about disputes such as amounts claimed, grounds asserted, and

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derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking." (citations omitted)).

231. *See Gutting Class Action*, *supra* note 9 (characterizing the *Concepcion* decision as a "devastating blow to consumer rights" and hypothesizing that the decision may bar many consumers from enforcing their rights in court at all).

232. The Court noted,

> [T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751 (2011) (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010)).

win rates. Procedures similar to the procedures of AT&T Mobility LLC might be appropriate, such as enabling "the customer [to] choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and, presumably, punitive damages."[233] These procedures would focus on the goal of making individual litigation cheap and public by enabling free riding while keeping the process of arbitration efficient.

Some more controversial reforms could address the concerns of corporate counsel that, "[e]ven if a business defeats a class arbitration, there is no guarantee that the judgment will have the same preclusive effect that it would have in class litigation."[234] A regulation could require nonmutual issue-preclusive effect,[235] so that the arbitrator is bound to accept an interpretation that a contract term, for example, was not a deceptive or fraudulent trade practice. Since the contract term is uniform in a standard form contract, this could greatly increase efficiency because the company would simply have to show the arbitrator that the same term had been used in the specific consumer's contract. Conversely, if the term was determined to be deceptive, then a consumer could discover this on a website, over the phone show they purchased a particular product during a particular time span, and receive an award.

To the extent that corporate counsel might want expanded judicial review of a possibly claim-preclusive determination, the arbitration procedures themselves or the rules can easily provide for a second layer of arbitral oversight—an arbitral court of appeals—with added specialized expertise.

To the extent that the agency is concerned about the adequacy of "consent," the agency could promulgate federal regulations establishing that arbitration clauses appear on the first page, in 14-point, bold font if it wishes. Then, the applicable corporations would only have to comply with the regulation to have their arbitration procedures upheld.

b. Securities Consumer Disputes.—In securities consumer disputes, where there is likely to be a large disparity between the sophistication of a large securities firm and a consumer, the appointment of a consumer

233. *Concepcion*, 131 S. Ct. at 1744.

234. Brief of the U.S. Chamber of Commerce as Amicus Curiae in Support of Petitioner, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 3167313, at *14.

235. But this may raise due process concerns. *See, e.g.*, Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."). But the Court in *Parklane* noted that "[t]he law of collateral estoppel, like the law in other procedural areas . . . has evolved." *Id.* at 337.

advocate might be appropriate to help with, mainly, the selection of an arbitrator. Therefore, to the extent that critics are concerned with a repeat-player problem,[236] the plaintiff-consumer would get a repeat player of her own—an employee of the agency or even a member of the plaintiffs' bar—to help inform her throughout the process, especially in the selection of the arbitrator. To the extent that an arbitrator wants repeat business, the arbitrator would have to conform to not only securities firms, but also the consumer advocate—mitigating the repeat-player problem.

c. Employment Disputes Under Statutory Schemes.—The concerns in the employment context are different from the concerns in the consumer context. While access to justice remains important in the employment context,[237] the disputes are for, on average, higher dollar amounts. For example, Professor Colvin's 2008 study found that the mean amount claimed was $844,814, the median amount claimed was $106,151, and 75% of claims were for greater than $36,000.[238] This is distinct from the consumer context, where 91.5% of the AAA's disputes in 2005 were for less than $75,000.[239] Therefore, the issues of efficiency and economies of scale are less important, and the facts may require a more probing inquiry than whether a customer purchased a particular product at a particular time according to particular terms.

Access to justice, however, remains critical. One scholar noted, "At a meeting of plaintiffs' attorneys, the estimate was that about 5% of the individuals with an employment claim are able to obtain private counsel."[240] One study concluded that while most employees under "the $60,000 income level cannot get into court, arbitration remains a realistic alternative."[241] Colvin noted, "One of the potential advantages offered by arbitration is that its relative simplicity and speediness could reduce costs to use the system and thereby enhance accessibility."[242] The average cost to litigate an employment dispute that does not proceed to trial is about $10,000.[243] If the case proceeds to trial, the cost rises to about $50,000.[244] Thus, for the

236. *E.g.*, Bingham, *supra* note 16, at 190–91.

237. *See, e.g.*, Maltby, *supra* note 89, at 56 (describing access-to-justice concerns in the employment context).

238. Colvin, *supra* note 182, at 10.

239. AAA CONSUMER ARBITRATION, *supra* note 181, at 48.

240. Theodore J. St. Antoine, *Mandatory Employment Arbitration: Keeping It Fair, Keeping It Lawful*, 60 CASE W. RES. L. REV. 629, 636 (2010).

241. *Id.* at 636–37.

242. Colvin, *supra* note 182, at 9.

243. Maltby, *supra* note 89, at 56.

244. *Id.*

majority of suits—under $100,000—a contingency-fee lawyer probably would not take the case.

That said, employment law is different: As Justice Marshall wrote in *Roth*, "Employment is one of the greatest, if not the greatest, benefits . . . in modern-day life."[245] Further, as the Court recognized in *Gardner-Denver*, the employment relationship is different—subject to vast arrays of protection, from OSHA to Title VII.[246] Therefore, there are two primary concerns: (1) efficiency to maintain low costs, preserving access to justice, and (2) vindication of statutory rights.

One possible requirement is that an opinion, however brief, is issued. This would facilitate an extremely limited judicial review to police—in only the most narrow and egregious cases—the statutory law. To determine whether arbitrators are even *looking at* the correct statutory provision (let alone applying it correctly), a court needs an opinion. Absent this requirement, arbitrators are unlikely to issue an opinion, as it only increases the possibility of a reversal.[247] Another possible requirement is specialization in particular categories of disputes among arbitrators with specific statutory schemes. For instance, Title VII disputes could be adjudicated by one expert decider familiar with the statute and the types of disputes. Also, employees could be provided a repeat player of their own—an employment advocate—to advise their selection of an arbitrator. Finally, because of access-to-justice concerns, there should be some way to divide arbitration fees and to bar arrangements such as loser pays.

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These are simply a handful of examples of how tailored requirements would address the specific policies at issue in different types of disputes. First, these examples demonstrate that all categories of arbitration are *not* created equal—unlike the current proposals for reform in Congress and current proposals for reform in the scholarship that fail to differentiate between different categories of dispute. Second, these examples demonstrate that the determination of the socially optimal requirements of particular dispute-resolution processes depends on sensitive policy determinations that administrative agencies are in a better position to weigh than is the Supreme Court.

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245. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 589 (1972) (Marshall, J., dissenting).

246. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44–45 (1974).

247. United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960) (observing that substantive judicial review "may lead arbitrators to play it safe by writing no supporting opinions"); *cf.* Massachusetts v. EPA, 549 U.S. 497, 533 (2007) ("EPA has refused to comply with this clear statutory command. Instead, it has offered a laundry list of reasons not to regulate. . . . Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change.").

B. *Analyzing the Merits of the Proposal*

In some ways, this proposal conforms to the existing practice. Currently the Supreme Court oversees federal arbitration law, and large corporate interests participate in the Supreme Court through the extensive filing of amicus briefs.[248] Therefore, this proposal simply shifts participation of interested companies to notice-and-comment rule making.

Further, this proposal has the potential of reducing compliance costs. Instead of companies conforming arbitration agreements to the various requirements of state law,[249] a company would only have to conform to the regulation that applies to its industry. This will likely encourage investment in dispute resolution processes, as companies will finally be able to stop ping-ponging between the courts adjudicating various state attempts to regulate arbitration, even after *Concepcion*, *Stolt-Nielson*, and *Rent-A-Center*.[250]

C. *Addressing Some Concerns*

The primary downside of this proposal is cost. Increasing the regulatory burdens of the EEOC and the CFPB will require additional employees with different levels of expertise, and therefore increased appropriations will be needed. However, there is a market failure that warrants this expense. The status quo currently imposes untenable social costs.

Leaving arbitration to be policed by the judiciary will lead to decreased enforcement of statutory schemes designed to protect consumers and will undermine the public policy of statutes. While some small claims will proceed under the robust procedural protections of some companies'

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248. *E.g.*, Brief of DIRECTV, Inc. et al., Amicus Curiae in Support of Petitioner, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 3183855; *cf.* Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEXAS L. REV. 1247 (2011) (arguing that the Supreme Court has turned to amicus briefs in setting antitrust policy to make up for its lack of technical savvy, moving from Article III adjudication towards rulemaking, and arguing for an administrative agency to take over).

249. *See, e.g.*, MO. ANN. STAT. § 435.460 (West 2010) ("Each contract [with an arbitration agrrement] shall include adjacent to, or above, the space provided for signatures a statement, in ten point capital letters: . . . 'THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION'"); TEX. CIV. PRAC. & REM. CODE ANN. § 171.002 (West 2011) ("an agreement [to arbitrate a dispute] . . . in which the total consideration to be furnished by the individual is not more than $50,000" is invalid unless "the parties to the agreement agree in writing to arbitrate; and the agreement is signed by each party and each party's attorney"). *But see* RAU ET AL., *supra* note 149, at 680 ("All such statutes are now presumably dead letters in light of the Supreme Court's . . . decision in Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996).").

250. *See, e.g.*, Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012) (per curiam) (reversing a state supreme court holding that an arbitration clause "adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence").

arbitration protocols, such as AT&T Mobility's in *Concepcion*,[251] it is likely that after *Concepcion*, *Rent-A-Center*, and *Stolt-Nielson*, corporations will scale down their procedural protections. Corporations decreasing their procedural protections will likely cause fewer small claims to proceed because the costs will be high enough that marginal consumers will forgo investing in arbitrating suits individually.

Furthermore, the current state of federal law has generated friction with the states.[252] This has arguably created an environment where state courts do what they can to limit the holding of *Concepcion*, consumers run to state courts, and defendants attempt to seek refuge in the federal courts to enforce their agreements to arbitrate.[253]

The current trend of extending the FAA at the very least implicates important federalism and comity concerns,[254] and will probably result in significant litigation costs for private companies. As states attempt to legislate against arbitration, and state courts and lower federal courts[255]

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251. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011). The Court described the procedures at length:

> The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T's Web site. AT&T may then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT&T's Web site. In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT&T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, requires AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.

Id.

252. *See, e.g.*, *id.* at 1747 (noting that California courts have held contracts to arbitrate unconscionable more often than other contracts); *see also* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 54 (2006) (arguing that California's "mutuality test disfavors arbitration agreements and significantly increases the ability of a party to avoid arbitration").

253. *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1421 (2008) (describing the dialogue between the federal courts and state courts on arbitration under the FAA as a "game").

254. *See, e.g.*, Casarotto v. Lombardi, 886 P.2d 931, 941 (Mont. 1994) (Trieweiler, J., concurring) ("These insidious erosions of state authority and the judicial process threaten to undermine the rule of law as we know it. Nothing in our jurisprudence appears more intellectually detached from reality and arrogant than the lament of federal judges who see this system of imposed arbitration as 'therapy for their crowded dockets.'").

255. *See, e.g.*, Kanbar v. O'Melveny & Myers, 849 F. Supp. 2d 902, 906, 912 (N.D. Cal. 2011) (distinguishing *Concepcion* and holding that the FAA did not preempt California law precluding the

distinguish federal preemption law, private litigants will be forced to litigate preemption case by case. This will impose significant costs on private litigants.[256] Particularly, because unconscionability and preemption doctrines are so malleable, state judges engaging in strategic behavior have virtually unlimited options at their disposal to manipulate doctrine, distinguish preemption cases, and refuse to enforce an agreement to arbitrate.[257] This proposal would eliminate, or at least largely curtail, the so-called unconscionability "game."[258]

Finally, judicial abdication from policing vindication of statutory rights in arbitration will undermine statutory policies in two ways. First, in cases where the plaintiff alleges procedural unfairness impeding effective vindication of statutory rights—such as requiring employee plaintiffs to pay arbitration fees up front—the Supreme Court has mandated that these rules be policed case by case with a heavy burden on the party resisting arbitration to prove an impediment.[259] Further, after *Rent-A-Center*, this decision is for the arbitrator where the arbitration agreement says so.[260] Second, in cases where an employee or consumer arbitrates a statutory claim, there may not be a written opinion analyzing the issue under the appropriate statutory scheme and applying the appropriate legal rules.[261] As one commentator noted, "arbitrators (unlike judges) commonly do not write reasoned opinions attempting to explain and justify their decisions. In fact the American Arbitration Association, which administers much commercial arbitration,

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enforcement of unconscionable provisions of an arbitration agreement between a law firm and its employees including a notice requirement, a confidentiality provision, and an arbitration exemption provision).

256. A less quantifiable, but not insignificant, cost is the cost to federalism, as expanding federal preemption necessarily infringes on the authority of the states. *See, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000) (describing the presumption against preemption as "an important requirement in light of the various safeguards against cavalier disregard of state interests created by the system of state representation in Congress").

257. *See* Bruhl, *supra* note 253, at 1422. Bruhl argues:

> That . . . federal law allows a court to hold an arbitration agreement unconscionable as a matter of state contract law, but only if the court is employing, evenhandedly, the same unconscionability analysis it applies to other contracts. Yet it is extremely difficult for a reviewing court to tell if a decision invalidating an arbitration agreement on unconscionability grounds obeys that rule. This difficulty creates opportunities for lower courts to misapply, or perhaps even manipulate, state contract doctrines so as to nullify arbitration agreements while simultaneously frustrating the ability of reviewing courts to reverse.

Id. (citations omitted).

258. *Id.* at 1421.

259. Malin, *supra* note 11, at 302 (citing Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000)).

260. Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2778–79 (2010).

261. RAU ET AL., *supra* note 149, at 612.

actively discourages arbitrators from doing so."[262] Meaningful judicial review requires an explanation of basis and purpose.[263] Without a written opinion, meaningful judicial review is difficult, if not impossible, and the statutory right may go underenforced without the judicial oversight.

Overall, the benefits of the agency-administered proposal—private litigants, federalism, and the social costs of reduced deterrence—likely exceed the increased costs.

D. Why This Solution Is Superior to Other Proposals

Other arbitration reform proposals will not do the job. For example, Professor Sternlight's proposal to make arbitration binding *only* on the corporation[264] will cause corporations to avoid arbitration clauses. Corporations choose arbitration to trade increased payouts for the prevention of outlier large jury verdicts. Letting plaintiffs bring large claims at trial *and* small claims in arbitration will cost too much and lead to fewer arbitration agreements and therefore less arbitration. Proposals to reform procedure make sense, but procedures should only apply to companies of a sufficient size so that the repeat-player problem and information asymmetries are a realistic presumption.

The Defense Appropriations Rider and the Arbitration Fairness Act of 2011 inappropriately bar the arbitration of claims under Title VII of the Civil Rights Act.[265] Because an expert decider may more effectively adjudicate Title VII claims, this may adversely affect employees. Further, the Defense Appropriations Rider does not go far enough because it only applies to defense contractors doing more than $1 million of business.[266]

Proposals to ban class action waivers in consumer contracts have the attractive appeal of more adequately enforcing substantive deterrence policies, but, as discussed above, such a ban may not be necessary in all contexts. Instead, it should be up to an administrative agency to determine whether the costs of reduced deterrence outweigh the benefits of efficiency. Further, innovative solutions such as a website publishing case files could

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262. *Id.* ("We do not expect that [the arbitrator] will necessarily 'follow the law'—or indeed apply . . . general rules as a guide to his decision.").

263. *Cf.* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) ("We do expect that, if the judicial review which Congress has thought it important to provide is to be meaningful, the 'concise general statement of . . . basis and purpose' . . . will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." (quoting Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968))).

264. *See* Sternlight, *supra* note 130, at 84 ("Here I discuss an alternative response: make arbitration mandatory for the company, but not the 'little guy.'").

265. Department of Defense Appropriations Act, 2010, Pub. L. 111-118, § 8116(a), 123 Stat. 3409 (2009).

266. *Id.*

maintain deterrence or at least mitigate concerns—without the substantial administrative and agency costs of class action litigation.[267]

Finally, any proposal that attempts to enact broad procedural guarantees that are not specifically tailored to the type of disputes fails to adequately consider the differing policies of dispute resolution in different contexts. A $14 dispute for violation of a deceptive trade practices act implicates far different concerns than a dispute for wrongful termination under Title VII for $100,000 in back pay. The Arbitration Fairness Act would require litigation in both cases. Professor Malin's proposal would treat both cases the same, impose due process constraints, and ban class actions. And Professor Cole's proposal would only ban class actions (which is not in and of itself a necessary step in all circumstances) without addressing due process concerns in other areas. These proposals are therefore both overinclusive and underinclusive. The best solution balances the competing priorities. The Consumer Financial Protection Bureau and the Equal Employment Opportunity Commission—empowered by new legislation—would be in the best positions to achieve socially optimal private adjudication.

IV. Conclusion

Arbitration is a problem in consumer and employment contracts because of a lack of procedural fairness, and in the small claim consumer class action context because of reduced substantive deterrence. The unconscionability doctrine of contract law is ill equipped and largely irrelevant to police many of these concerns, particularly substantive deterrence. Competing and multifarious state laws increase costs for national corporations and lead to conflicts with federal law. Consumer and employee arbitration should not be abolished, however, because arbitration is advantageous for a substantial percentage of consumers and employees. Therefore, new legislation and administrative regulation should ensure procedural fairness and maintain substantive deterrence, while encouraging investment. The most important point of this Note is to argue that the reforms must be tailored to the specific type of dispute by a body capable of balancing the competing policies to reach optimal dispute-specific procedural guarantees, and that the best form of governance to balance these concerns is an administrative agency.

—George Padis

267. *See, e.g.*, Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 472–74 (2000) (describing one particular agency cost where multiple class actions are filed in different jurisdictions leading to "reverse auctions").

More Flies with Honey: Encouraging Formal Channel Remittances to Combat Money Laundering*

> "An effective [anti-money laundering] program requires sound risk management," a point which I wholeheartedly agree with, but we must also be cautious that in our pursuit of A&L compliance, we do not use such a heavy hand that we end up pushing currently monitored transactions underground into a shadowy world of illicit transactions.[1]

I. Introduction

For thirteen years, Cheng Chui-ping ran a small restaurant and clothing store in New York's Chinatown.[2] Her restaurant on 47 East Broadway was located "directly across the street from a branch of the Bank of China."[3] Outwardly, Ping lived a simple life—"[d]uring lunch hours she would chop vegetables, wash dishes and wait on tables . . . . Occasionally she could be seen tottering down the street struggling with bales of clothes, dragging them into her general-merchandise store."[4] Despite her plain appearance, Ping was one of the world's most notorious snakeheads—the head of a gang that specializes in trafficking Chinese people.[5] But for many people, Ping is a saint—not a criminal. Over the course of her career, she helped smuggle thousands of immigrants into the United States—giving them a new start in a new country. Ping's restaurant also became a major competitor to the Bank of China—she used her connections in mainland China to send money from those she smuggled to their families back home.[6] A woman who used Ping's services explained: "The Bank of China took three weeks, charged a bad foreign-exchange rate and delivered the cash in yuan. Sister Ping delivered the money in hours, charged less and paid in American dollars. It was a better service."[7] According to Steven Wong, an anti-snakehead activist, "things became so bad that the [Bank of China] began offering color

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1. *Regulation of Money Service Businesses: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 111th Cong. 2 (2010) [hereinafter *Regulation Hearing*] (statement of Rep. Hensarling, Member, H. Subcomm. on Fin. Insts. & Consumer Credit).
2. Edward Barnes, *Two-Faced Woman*, TIME, July 31, 2000, at 48, 48.
3. *Id.* at 49.
4. *Id.* at 48.
5. *Id.*
6. *Id.* at 49.
7. *Id.* (internal quotation marks omitted).

televisions and prizes to those who used them to transfer money."[8] But people still preferred Ping's restaurant.

This story illustrates a basic truth about the money transfer business—many consumers, especially immigrants, opt to send money through institutions like Ping's restaurant rather than with banks or Western Union-style money transmitters.[9] And for good reason. As Ping's restaurant illustrates, these businesses, known as "informal value transfer systems" (IVTS), often provide excellent service. IVTS tend to be cheaper, quicker, and provide greater anonymity than formal channels.[10] But IVTS may also have a darker side—the anonymity they provide make them susceptible to abuse by criminals trying to hide drug money and other illicit funds.[11] Since the 9/11 terrorist attacks, IVTS have received special attention[12] because policy makers have come to believe that terrorists use IVTS to covertly move the funds that finance their activities around the globe.[13]

Crafting an appropriate response to IVTS is no simple matter. Too weak a response would give criminals carte blanche to exploit IVTS for illicit purposes. But burdensome regulatory regimes drive money services underground and tend to lead to the proliferation, rather than the reduction, of IVTS and other underground banking systems.[14] Flight away from regulated channels is no small concern—the philosophy behind U.S. anti-money laundering (AML) laws is that financial institutions are in the best

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8. *Id.*

9. *See* R. Barry Johnston, *Work of the IMF in Informal Funds Transfer Systems*, *in* REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS 1, 3 (2005) ("[R]emittances are very important to migrant workers who send money home and [informal funds transfer] systems represent an important source of income for some countries.").

10. *See id.* at 2 (discussing the anonymity that is a characteristic of IVTS); Adil Anwar Daudi, Note, *The Invisible Bank: Regulating the* Hawala *System in India, Pakistan and the United Arab Emirates*, 15 IND. INT'L & COMP. L. REV. 619, 627–29 (2005) (characterizing *hawala* systems as providing higher quality service and charging lower fees than traditional banks).

11. *See* Johnston, *supra* note 9, at 2 (discussing how the anonymity component of IVTS leaves them susceptible to use by criminals).

12. *See, e.g.*, Amos N. Guiora & Brian J. Field, *Using and Abusing the Financial Markets: Money Laundering as the Achilles' Heel of Terrorism*, 29 U. PA. J. INT'L L. 59, 62–63 (2007) (discussing the role of IVTS within the context of money laundering by terrorists); Daudi, *supra* note 10, at 619–21 (chronicling the increased attention IVTS received after the 9/11 terrorist attacks); Walter Perkel, Note, *Money Laundering and Terrorism: Informal Value Transfer Systems*, 41 AM. CRIM. L. REV. 183, 188 (2004) (arguing for an incentive-based strategy to encourage IVTS dealers to comply with registration requirements); Matthew J. Rosenbaum, Note, *A Paper Chase in a Paperless World: Regulating Informal Value Transfer Systems*, 50 COLUM. J. TRANSNAT'L L. 169, 215 (2011) (proposing the implementation of legislation and an incentive-based scheme to reduce the likelihood of terrorists benefiting from IVTS). *See generally* Smriti S. Nakhasi, Comment, *Western Unionizing the* Hawala*?: The Privitization of* Hawalas *and Lender Liability*, 27 NW. J. INT'L L. & BUS. 475 (2007) (discussing the Middle Eastern IVTS and ways to address their capacity to be used to funnel illicit funds).

13. *See* Guiora & Field, *supra* note 12, at 76–77 (explaining that, in part, American scrutiny of IVTS increased in response to the fact that two of the 9/11 hijackers received over $120,000 in funds from a country known for its robust IVTS).

14. *See infra* notes 110–13.

position to detect money laundering.[15] To that end, policy makers charge private actors with implementing policies that deter money laundering, maintaining records that law enforcement can use to catch criminals, and reporting suspicious transactions to the authorities.[16] Patronage of underground banking services undermines this scheme because these businesses rarely keep adequate records for the purposes of an investigation, and it leads to the commingling of legitimate and illegitimate funds, making criminally derived funds harder to track.[17] Our current sanction-based regime seeks to elicit compliance with AML laws through the imposition of penalties.[18] But this approach has serious deficiencies—simply put, detecting IVTS, much less collecting enough evidence to prosecute the individuals that committed the underlying crime that generated the funds, is extremely difficult.[19] But these sanctions and the climate they create can disrupt the flow of legitimate transactions, in particular remittances, sent home by immigrants.[20] The current sanction-based regime has done little to deter terrorists and other criminals, but may have succeeded in harming legitimate consumers.[21]

This Note seeks to address these problems, particularly in the remittance context, by proposing that policy makers focus on encouraging consumers to use formal, transparent money transfer channels. Reducing legitimate demand for underground services would decrease the popularity of underground firms and thus the opportunity for criminals to exploit them. Further, if consumers have viable alternative options to underground firms, vigorous enforcement becomes far less problematic. Ultimately resolving the challenges that these channels present is only possible if formal channels can compete with underground firms; otherwise, the demand for underground services will continue to undermine the U.S. AML scheme. This Note argues that the best approach to money laundering is making compliance easier and cheaper. I propose the United States simplify its current regulatory regime through the enactment of a national scheme that seeks to make formal channels more competitive.[22]

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15. *See infra* note 86.

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

17. *See* PETER REUTER & EDWIN M. TRUMAN, CHASING DIRTY MONEY: THE FIGHT AGAINST MONEY LAUNDERING 102 (2004) (stating that "[t]he larger the flow of legitimate funds through unregulated channels, the harder it is to find money laundering through the same mechanisms"); Kevin West, *The Money Laundering Regulatory Challenge Facing Somali Remittance Companies*, *in* REMITTANCES AND ECONOMIC DEVELOPMENT IN SOMALIA: AN OVERVIEW 33, 36 (Samuel Munzele Maimbo ed., 2006) (explaining that the "cost of compliance clashes directly with the business model of the Somali Remittance Companies").

18. *See infra* subpart III(A).

19. *See infra* Part IV.

20. *See infra* subpart IV(A).

21. *See infra* section IV(A)(3).

22. Other commentators have rejected enforcement as a viable long-term solution to underground firms. For proposals that argue for greater use of microfinance, see Charles B.

II. Remittances

This Part discusses what remittances are, why the reader should care about them, and how they work.

A. What Are Remittances and Why Are They Important?

Remittances are traditionally defined as cross-border payments of relatively low value sent by a worker living abroad to her family or friends in her country of origin.[23] They are (and will likely continue to be) important to the global economy. First, remittances are significant because of their sheer volume. The World Bank estimates that migrants sent home more than $440 billion in 2010.[24] Remitters in the United States alone sent $48.3 billion abroad in 2009, making it the top remittance-sending country in the world.[25] To put those numbers in perspective, the volume of remittances sent from the United States dwarfs what the nation contributes in official foreign development aid.[26]

Remittances have increasingly drawn attention from scholars and economists because of their potential to benefit developing countries.[27] The consensus among scholars is that remittances help developing countries by reducing poverty and encouraging development, although there is frequent disagreement over the magnitude of these positive effects.[28] Remittances provide significant value as a poverty-reduction tool because they help poorer households purchase basic necessities.[29] A study by the Inter-

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Bowers, *Hawala, Money Laundering, and Terrorism Finance: Micro-Lending as an End to Illicit Remittance*, 37 DENV. J. INT'L L. & POL'Y 379 (2009); Darren Keyes, *Protecting the Peace While Profiting the Poor: Microfinance and Terrorist Financing Regulation*, 12 LAW & BUS. REV. AMS. 545 (2006). For a proposal that operators of IVTS be induced to comply with regulations, see Perkel, *supra* note 12, at 207–11.

23. *See* Ezra Rosser, *Immigrant Remittances*, 41 CONN. L. REV. 1, 3 (2008) (defining remittances as "the money that migrants send home to their families" (footnote omitted) (internal quotation marks omitted)).

24. WORLD BANK, MIGRATION AND REMITTANCES FACTBOOK 2011 x (2d ed. 2011), *available at* http://siteresources.worldbank.org/INTLAC/Resources/Factbook2011-Ebook.pdf. The World Bank believes the $440 billion figure would be "significantly larger" if unrecorded flows through informal channels were included. *Id.*

25. *Id.* at 15.

26. *See* Carol Adelman, *Global Philanthropy and Remittances: Reinventing Foreign Aid*, 15 BROWN J. WORLD AFF. 23, 23–24 (2009) (estimating that the volume of U.S. remittances is three and a half times the amount of public foreign aid it contributes).

27. *See* Guiora & Field, *supra* note 12, at 81 n.82 (documenting multiple works written on the role of remittances in developing countries).

28. *See, e.g.*, Adelman, *supra* note 26, at 23 ("Regarding remittances, the World Bank and other studies are clear that the funds sent back by migrants to their families and to community development projects are one of the strongest poverty reduction forces in poor countries."). *But see* Richard H. Adams, Jr. & John Page, *Do International Migration and Remittances Reduce Poverty in Developing Countries?*, 33 WORLD DEV. 1645, 1646 (2005) (exploring scholarly debate regarding how costs associated with migration may decrease the positive effects of remittances).

29. Rosser, *supra* note 23, at 13 (explaining that remitters are motivated by family maintenance and that remittances are used for basic needs such as food, medicine, and shelter); *see* Adams &

American Development Bank found that a substantial portion of remittance-receiving families in Mexico spent their funds on food, shelter, health care services, and education.[30] Another study estimates that extreme poverty is 35% less likely in remittance-receiving households compared to nonreceiving households.[31] Scholars also champion remittances as a potential development tool. Studies have concluded that remittances have at least a modest positive effect on a country's GDP.[32] Remittance flows are also associated with greater engagement in the financial sector, savings, and investment by a population that traditionally eschews formal banking services.[33] Some scholars even theorize that remittances confer broader economic benefits on the receiving country by improving its creditworthiness and expanding its access to capital.[34] But scholars also recognize that calculating the precise macroeconomic effects of remittance flows is a complex endeavor and that the impact of remittances will frequently vary from country to country. For example, the World Bank has concluded that poorer recipients tend to use remittances on necessities while relatively wealthier recipients use more of their funds for investments and savings.[35] While commentators may disagree on the extent that remittances positively affect a developing country's economy, there is a broad consensus that remittances do benefit developing countries and that policy makers should

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Page, *supra* note 28, at 1660 (finding that every 10% increase in per capita remittances sent to a developing country leads to a 3.5% reduction in extreme poverty, defined as living on less than $1 a day). *But see* PABLO FAJNZYLBER & J. HUMBERTO LÓPEZ, CLOSE TO HOME: THE DEVELOPMENT IMPACT OF REMITTANCES IN LATIN AMERICA 12–15, 58 (2007) (arguing that the effects of remittances on poverty will vary depending on the socioeconomic status of the remitter's family and what kind of economic opportunities the migrant lost by leaving her country of origin).

30. The study found that 78% of remittances were spent on household goods, 8% went to savings, 7% went to education, and 6% went to the purchase of luxury goods, real estate, or for investment purposes. INTER-AM. DEV. BANK, SENDING MONEY HOME: REMITTANCE TO LATIN AMERICA AND THE CARIBBEAN 23 (2004).

31. FAJNZYLBER & LÓPEZ, *supra* note 29, at 13.

32. *Id.* at 18 (finding only a modest 0.27% growth in per capita GDP associated with an increased remittance volume).

33. *Id.* at 57.

34. Remittances can improve a country's creditworthiness if they are included in a country's goods and services debt-to-export ratio, a factor used to calculate a country's indebtedness. WORLD BANK, GLOBAL ECONOMIC PROSPECTS: ECONOMIC IMPLICATIONS OF REMITTANCES AND MIGRATION 100–01 (2006), *available at* http://www.ssrc.org/workspace/images/crm/new_publication_3/%7B663ad211-f951-de11-afac-001cc477ec70%7D.pdf. Remittances can also affect a country's ability to borrow through arrangements that securitize loans with future remittance flows. *Id.* at 101–03.

35. FAJNZYLBER & LÓPEZ, *supra* note 29, at 24. Fajnzylber and López found "significant heterogeneity" in their study of Latin American countries. *Id.* at 58. This suggests the effects of remittances will vary from country to country and that generalizations about their impact should be taken with a grain of salt. For a nuanced discussion of the economic effects of remitting, see Rosser, *supra* note 23, at 11–27.

therefore promote remitting behavior.[36] Thus, this Note proceeds on the assumption that remittances provide a social good and should be encouraged.

B. How Do Remittances Work?

While scholars have dedicated substantial attention to the economic effects of remittances, the ways that these funds actually travel across borders have received less attention. For example, how does money travel from the hands of a migrant worker in New York to her family in China? Our hypothetical remitter faces a wide array of choices—anything from having the money delivered by hand, to sending the funds by international wire at her local bank, to using PayPal. The remainder of this Part will discuss some of the more common remittance-transfer mechanisms.

1. MSBs.—Historically, money service businesses (MSBs), nonbank firms that specialize in money transfer services rather than the provision of traditional financial products, have dominated the U.S. remittance market.[37] They typically operate through a network of agents that operate out of brick-and-mortar businesses, such as grocery or convenience stores.[38] MSB-initiated transfers typically involve the agent receiving the consumer's cash (and a transaction fee), after which the agent transmits the funds to one of the MSB's partner institutions, with which the MSB will have a contractual relationship,[39] located in the destination country.[40]

As a remittance-transfer mechanism, MSBs have several notable characteristics: Relative to banks or credit unions, they make funds available quickly,[41] and they appeal to recent immigrants because they provide an alternative to using more formal financial institutions.[42] But, one distinct

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36. *See* FAJNZYLBER & LÓPEZ, *supra* note 29, at 46 (observing that studies involving remittances usually conclude by advising policy makers to facilitate and increase remittance flows); Adams & Page, *supra* note 28, at 1660 (urging policy makers "to take efforts to reduce the current high transaction costs of remitting" to "increase the poverty-reducing impact of international remittances").

37. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON THE USE OF THE AUTOMATED CLEARINGHOUSE SYSTEM FOR REMITTANCE TRANSFERS TO FOREIGN COUNTRIES 4 (2011) (observing that "[h]istorically, consumers have largely chosen to send remittance transfers through money transmitters").

38. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194, 6195 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005).

39. Thus, MSBs are in contractual privity with all of the institutions that handle money, which allows the firm to exert control over the transaction from its start to finish. *Id.* at 6195–96; *see also* State v. W. Union Fin. Servs., Inc., 208 P.3d 218, 219 (Ariz. 2009) (describing the MSB–customer relationship of a typical Western Union wire money transfer).

40. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. at 6196.

41. *See id.* ("Funds sent through a money transmitter are generally available in one to three business days, although same day delivery may be available, often for a higher fee.").

42. *Remittances: Access, Transparency, and Market Efficiency—A Progress Report: Hearing Before the Subcomm. on Domestic & Int'l Monetary Policy, Trade, & Tech. of the H. Comm. on Fin. Servs.*, 110th Cong. 35 (2007) (testimony of Tom Haider, Vice President and Chief Compliance Officer, MoneyGram International, Inc.) (testifying that "[u]n-banked consumers who

disadvantage of MSBs are their costs—the fees imposed by providers and exchange-rate markups[43] are often substantial relative to the size of the transfer.[44] But commentators have recently observed that increased competition and new technology have led to a decline in the cost of remitting through MSBs, ameliorating some of these problems.[45]

Technological innovations deserve special mention. Recently, a new breed of MSB that utilizes Internet and mobile phone technology has emerged. Services like PayPal and Xoom allow consumers to send funds directly to "online wallets" or bank accounts and some even offer cash pickup.[46] These services are convenient, fast, and cheap relative to traditional MSBs.[47] Perhaps an even more promising trend is offering mobile-based remittances. For example, M-PESA, a Kenyan service, "allows users to deposit money into an account stored on their cell phones, to send balances using SMS technology to other users (including sellers of

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are new to the U.S. generally are not quick to open a bank account, but rather tend to move towards a banking relationship over time" and that "[i]n the meantime, those individuals still need the services of a money transmitter").

43. *See In re* Mex. Money Transfer Litig., 267 F.3d 743, 745 (7th Cir. 2001) (explaining that money transfer companies profit from buying pesos at the interbank exchange rate while customers pay a higher rate); Plamen Nikolov, Results from a Survey of New York State Licensed Money Transmitters 12 (July 2006) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=924428 (finding that nine out of ten MSBs operating out of New York State apply an exchange rate markup).

44. *See* Electronic Fund Transfers (Regulation E), 77 Fed. Reg. at 6196 (identifying two components of the cost of a money transfer—fees and the exchange rate applied to the transfer); MANUEL OROZCO, ATTRACTING REMITTANCES: PRACTICES TO REDUCE COSTS AND ENABLE A MONEY TRANSFER ENVIRONMENT 10–11 (2002) (noting that "[t]ransfer costs incurred by customers continue to be significant" and that "[e]xchange rate mark-ups and speculation continues"); DILIP RATHA & JAN RIEDBERG, WORLD BANK, ON REDUCING REMITTANCE COSTS 17 (2005) (arguing that, with the exception of a few well-established remittance corridors, there is little competition in the remittance industry, meaning providers have free reign to charge high prices for their services). For remitters sending small sums of money, the costs of transmitting through an MSB "can be prohibitively high due to a minimum fee charged by most service providers." Caroline Freund & Nikola Spatafora, *Remittances: Transaction Costs, Determinants, and Informal Flows* 5 (World Bank, Policy Research Working Paper No. 3704, 2005).

45. *See* MANUEL OROZCO, THE REMITTANCE MARKETPLACE: PRICES, POLICY AND FINANCIAL INSTITUTIONS 2 (2004), *available at* http://www.pewhispanic.org/files/reports/28.pdf (explaining that the costs of remitting $200 to Mexico had fallen from 15% of the amount sent to around 7% since the late 1990s); Lenora Suki, Competition and Remittances in Latin America: Lower Prices and More Efficient Markets ¶ 46 graph 5, ¶ 49 (Feb. 2007) (unpublished manuscript), *available at* http://www.oecd.org/daf/competition/prosecutionandlawenforcement/38821426.pdf (observing that "the differential between maximum and minimum prices of money transfer among cities" has shrunk but that the costs of sending funds stills varies considerably).

46. *Transfer Money with PayPal*, PAYPAL, https://www.paypal.com/cgi-bin/webscr?cmd=xpt/Marketing_CommandDriven/general/International_Money_Transfer-outside; *see also International Money Remittance Service—Xoom Quick Remit Payments*, XOOM, https://www.xoom.com/remittance (offering home delivery, bank deposit, and traditional cash pickup services).

47. For example, Xoom makes money available for cash pick up in Mexico almost instantly for around $5. *Mexico Fee Calculator*, XOOM, https://www.xoom.com/mexico/fees?currencyCode=MXN#.

goods and services), and to redeem deposits for regular money."[48] Mobile phone use is exploding in many countries, and it is quickly becoming easier to obtain a cell phone than a bank account in the developing world.[49] The convenience, ubiquity, and cost of mobile-phone-based transfers give them the potential to revolutionize the way people send remittances. While Internet- and mobile-phone-based remittances show significant promise, remitters in the United States do not yet widely use these services.[50] A likely explanation for this lack of enthusiasm is that recent immigrants are much less likely to use the Internet than the average American, and the mobile-phone-based money transfer services currently available in the United States require access to bank accounts and a nontrivial degree of familiarity with technology.[51]

2. Depository Institutions.—Consumers can also use banks and credit unions to send remittances. These depository institutions can send money abroad in two ways—wire transfers or Automated Clearing House (ACH) transactions.[52] Both involve the transmittal of electronic instruction messages between institutions (or chains of institutions)[53] that "cause the institutions to make the required bookkeeping entries and make the funds available" to the recipient.[54] Depository-institution-initiated transfers differ from MSB-initiated transactions in two significant ways: by sending money through chains of banks with correspondent relationships, funds can reach

48. William Jack & Tavneet Suri, The Economics of M-PESA 5 (Aug. 2010) (unpublished manuscript) *available at* http://www.mit.edu/~tavneet/M-PESA.pdf.

49. *See* KAS KALBA, THE GLOBAL ADOPTION AND DIFFUSION OF MOBILE PHONES 28 (2008) (observing that most countries in Africa have enjoyed an annual increase in the number of mobile phone subscriptions of over 100% since 2000); Supriya Singh, *Mobile Remittances: Design for Financial Inclusion*, 5623 LECTURE NOTES COMPUTER SCI. 515, 516 (2009) (explaining that mobile-phone-based remittances "will particularly suit receivers in rural unbanked area[s] [that] lack . . . access to bank accounts").

50. *See* MANUEL OROZCO ET AL., IS THERE A MATCH AMONG MIGRANTS, REMITTANCES AND TECHNOLOGY? 3 (2010) (concluding that "limited advances have been made in increasing migrant use of technology in the last four years").

51. *Id.* at 14 (lamenting the fact that PayPal Mobile, Amazon's TextPayMe, and Obopay all market themselves to a tech-savvy and financially literate Generation X and Y audience).

52. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194, 6196–98 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005). The main difference between wires and ACH transactions is that the sending bank can initiate a wire instantly while ACH transactions are sent in batches at predetermined times of the day. *Intro to the ACH Network*, NACHA, https://www.nacha.org/Intro2ACH.

53. Electronic funds transfers can be quite complex and involve many credits, debits, and settlements between multiple depository institutions. *See* FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF THE TREASURY, FEASIBILITY OF A CROSS-BORDER ELECTRONIC FUNDS TRANSFER REPORTING SYSTEM UNDER THE BANK SECRECY ACT 55–57 (2006) [hereinafter FEASIBILITY OF A CROSS-BORDER ELECTRONIC FUNDS TRANSFER REPORTING SYSTEM] (explaining the fundamentals of the funds-transfer process and the increased complication in cross-border transfers, which often require the originator and beneficiary banks to form "correspondent" relationships with at least one go-between bank).

54. *Id.* at 55.

almost any bank in the world, and bank-initiated transactions will often involve money moving through institutions with which the originating bank has no contractual relationship.[55]

From a consumer's perspective, other notable aspects of banks as a remittance mechanism include their cost, security, and formality. As with MSBs, fees and exchange rates comprise the main costs of transferring the funds; however, the intermediary and beneficiary institutions may also charge "lifting fees" for handling the money.[56] Additionally, banks typically charge flat fees for transactions, and because remittance transfers usually involve small sums of money, those fees are often relatively large compared to the size of the transfer.[57] Wire transfers benefit consumers because they provide a secure means of sending money abroad because banks deposit the funds directly into the recipient's bank account rather than requiring the recipient to handle cash.[58] But, consumers may be hesitant to remit through banks or credit unions because of a lack of familiarity with the formal banking system or out of fear of drawing attention to their immigration status.[59] As such, banks and credit unions make up only a small part of the remittance market.[60]

A promising alternative to traditional bank offerings are services offered by the Federal Reserve that are targeted at immigrants. Directo a México is a collaboration between the Federal Reserve and the Banco de México.[61] The program allows U.S. financial institutions to pre-open accounts for the

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55. *See id.* at 55–57 (explaining that banks' correspondent relationships "expedite the transfer of funds across international borders" and noting that "banks that do not have a correspondent relationship can still transfer funds if they can establish a chain of banks that do have such a relationship").

56. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. at 6197.

57. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 37, at 4 ("Wire transfer fees are usually flat fees that may vary based on the destination country but not usually by the amount of the transfer."); Robert Suro & Sergio Bendixen, *The Remittance Process and the Unbanked*, *in* BILLIONS IN MOTION: LATINO IMMIGRANTS, REMITTANCES AND BANKING 5, 13 (2002) (explaining that remitters that used bank accounts to remit expressed dissatisfaction with the costs and that some consumers lacked an understanding that "numerous small transactions can prove expensive when flat fees are charged for each transaction").

58. Suro & Bendixen, *supra* note 57, at 12 (discussing an interview where a remitter explained that, "[i]n my country, when you send money it's very dangerous because everyone knows the places where people pick up the money. They rob people and steal their money. But if I send it . . . from bank to bank, I don't think that anything would happen to them").

59. *See* APPLESEED, BANKING IMMIGRANT COMMUNITIES: A TOOLKIT FOR BANKS AND CREDIT UNIONS (2006) (citing immigration status and lack of familiarity with formal banking systems as barriers to the use of banks for remittance services).

60. The Federal Reserve estimates that no more than 3% of remittances sent to Latin America travel through banks or credit unions. *Directo A México Frequently Asked Questions*, FED. RES. BANK SERVICES, http://www.frbservices.org/files/help/pdf/DirectoMexicoFAQ.pdf. *But see* Laura Sonderup, *The Business of Immigrant Markets: Providing Access to Financial Services*, 60 CONSUMER FIN. L. Q. REP. 503, 503 (2006) (claiming that "at least fifteen percent of immigrants in the U.S. send money home using financial institutions and that market share appears to be increasing").

61. *Directo A México Frequently Asked Questions*, *supra* note 60.

recipient at any Mexican bank affiliated with Bansefi, a government-run bank dedicated to providing financial services to low-income individuals.[62] Further, sending funds through Directo a México is a low-cost option for remitting—the Federal Reserve charges the originating financial institution a mere $0.67 per transaction.[63] It also recently introduced its FedGlobal Latin America service, which, unlike traditional account-to-account-based services, allows funds to be sent to trusted third parties in the recipient's country.[64] The flexibility to send funds to nonbank institutions or open bank accounts for the recipients is important because many potential recipients in Latin America lack access to traditional banking services.[65] These services are also appealing to consumers because of their relatively low cost.[66]

3. IVTS.—Remitters can also use IVTS—money transfer firms that operate in place of or alongside the formal banking system.[67] While these systems are known by a variety of names,[68] they serve the same basic function as formal channels—transferring currency from an individual in one country to another. The most well-known IVTS is *hawala*, a money-transfer mechanism that originated in India hundreds of years ago.[69] In a typical *hawala* transaction:

> Clients hand in their cash and request an equivalent amount to be delivered in local or, more rarely, another specified currency.

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62. *Directo a México and Beneficiary Account Registration Frequently Asked Questions*, FED. RES. BANK SERVICES, http://www.frbservices.org/help/directo_a_mexico.html. The "Cuenta con Tu Gente" accounts are entry-level savings accounts with no fees. *Id.* They require the account holder to maintain a minimum balance of 50 pesos (about $5) and pay interest. *Id.*

63. *Federal Reserve's Key Policies for the Provision of Financial Services*, BOARD GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/paymentsystems/pfs_feeschedules.htm (last updated Aug. 10, 2012). Transactions sent through Directo a México also benefit recipients because the recipient receives pesos based on the wholesale exchange rate, regardless of the size of the transaction. *Directo a México and Beneficiary Account Registration Frequently Asked Questions*, *supra* note 62.

64. BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 37, at 10.

65. *See* FAJNZYLBER & LÓPEZ, *supra* note 29, at 37 (citing data showing that Latin America has the lowest number of bank branches per area, which presumably contributes to the inaccessibility of traditional banking services).

66. *See, e.g.*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 37, at 14 (noting that the FedGlobal Mexican Service was created to provide a lower-cost means for making remittance payments).

67. LEONIDES BUENCAMINO & SERGEI GORBUNOV, INFORMAL MONEY TRANSFER SYSTEMS: OPPORTUNITIES AND CHALLENGES FOR DEVELOPMENT FINANCE 1 (2002). IVTS are not necessarily black-market transactions—in many countries, IVTS operate alongside the formal money transfer industry. *See, e.g.*, Gusmao v. GMT Group, Inc., No. 06 Civ. 5113, 2009 WL 1174741, at *23 (S.D.N.Y. May 1, 2009) ("[A]t all relevant times, every money transmitter in Brazil except Western Union operated in the parallel market. Unlike a true black market, the parallel exchange market was highly visible, with rates routinely being quoted on Brazilian television and published in newspapers and other government publications." (citation omitted)).

68. FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF THE TREASURY, INFORMAL VALUE TRANSFER SYSTEMS 1 (2003) [hereinafter INFORMAL VALUE TRANSFER SYSTEMS].

69. BUENCAMINO & GORBUNOV, *supra* note 67, at 1.

> Hawaladars (hawala operators) and those acting as their agents accept cash on their premises—usually some other business, such as a corner store . . . . In most cases, no fees are discussed. Rather, the transaction cost is factored into the quoted exchange rate or the amount that will be delivered overseas in local currency for their U.S. dollars, pounds, dirhams, riyals, etc.
>
> At the end of each day, hawaladars consolidate all deals into ledgers for each agent and counterpart they do business with, including a running balance. The funds transfer requests are organized into payment instruction sheets—containing the amounts and the name, address, and telephone number of the recipient—and faxed to counterparts in other parts of the world. . . .
>
> . . . Each hawaladar keeps a pool of cash, which enables payments as soon as instructions arrive. Thus, local cash is typically used for payments on behalf of overseas clients. In this way, actual fund transfers are minimized . . . .[70]

The preceding is merely an example of *hawala*, one type of IVTS. But the term IVTS is expansive and can include many types of transactions, including everything from simple hand delivery of funds to exotic transactions involving the structuring of the precious metal trade.[71]

So why do consumers bother with IVTS? Why not just send money through banks or MSBs? Scholars and economists have largely concluded that consumers choose IVTS because of deficiencies in the formal sector. The most likely explanation is that, in many cases, IVTS are simply the cheapest way to send money abroad.[72] High fees, dual exchange rates, and lack of competition in many corridors make IVTS cheaper than formal channels.[73] IVTS operations can also pass on significant savings to their customers because they often avoid the bureaucracy, burdens, and costs of

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70. Nikos Passas, *Formalizing the Informal? Problems in the National and International Regulation of Hawala*, *in* REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS, *supra* note 9, at 8–9.

71. NIKOS PASSAS, INFORMAL VALUE TRANSFER SYSTEMS, TERRORISM AND MONEY LAUNDERING 25–27 (2003). For a more in-depth discussion of the various types of IVTS mechanisms, see SEC'Y OF THE U.S. DEP'T OF THE TREASURY, A REPORT TO THE CONGRESS IN ACCORDANCE WITH SECTION 359 OF THE UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT OF 2001 (USA PATRIOT ACT) 19–22 (2002) [hereinafter REPORT TO CONGRESS].

72. MOHAMMED EL QORCHI ET AL., THE INT'L MONETARY FUND & THE WORLD BANK, INFORMAL FUNDS TRANSFER SYSTEMS: AN ANALYSIS OF THE INFORMAL HAWALA SYSTEM 16 (2003) (finding that the costs of transferring money in a *hawala* system is about 2%–5% of the total transfer); Suki, *supra* note 45, ¶ 39 (estimating that formal sector remittances would be increased by 50%–100% if the costs of using formal sectors approximated that of the informal sector); Passas, *supra* note 70, at 9–10, tbls.2.1 & 2.2 (analyzing data collected from the U.A.E. and concluding that *hawala* is the cheapest option for sending money).

73. Suki, *supra* note 45, ¶ 40–41.

complying with U.S. regulations.[74] Another plausible explanation is that formal channels present certain logistical deficiencies IVTS can overcome.[75] Many countries lack the ability to physically distribute money, and, when such institutions do exist, they are concentrated in cities, making it difficult for rural recipients to physically obtain their money.[76] In extreme cases, IVTS may be the only realistic way to send money abroad.[77] Socioeconomic and cultural factors may also explain the demand for IVTS. Financial illiteracy, cultural and language barriers, and bad experiences with financial services can all lead to distrust of formal channels.[78] Immigrants may work long or odd hours, making banks an inconvenient method of transmitting money; remitters might also fear using depository institutions because of their immigration status.[79] By contrast, IVTS often come recommended by other members of the remitter's community and the operator likely shares the language and culture of the sender.[80]

Despite the many advantages they provide for individual consumers, widespread use of IVTS may come with significant costs. Most importantly, depending on how they are structured, IVTS can obscure the global movement of funds and serve as a vehicle for money laundering that can be exploited by terrorists, drug dealers, tax evaders, arms dealers, and other criminals.[81] The anonymity these systems provide makes them susceptible to

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74. *See* OLE E. ANDREASSEN, REMITTANCE SERVICE PROVIDERS IN THE UNITED STATES: HOW REMITTANCE FIRMS OPERATE AND HOW THEY PERCEIVE THEIR BUSINESS ENVIRONMENT 9 (2006) (explaining that for remittance firms, "[t]he four largest obstacles to doing business are related to the regulatory regime in the U.S.").

75. *See* Suki, *supra* note 45, ¶ 98 (commenting on logistical difficulties facing formal financial institutions in developing countries).

76. *See id.* ¶ 17 ("Receivers in rural areas often have poor access to distribution points associated with lower cost options. They may pay high transportation costs to collect their transfers in the most convenient, albeit not the least costly, fashion.").

77. For example, the Somali banking infrastructure and political system presently lack the capacity to safeguard transmitted funds, making the use of formal channels a practical impossibility for remitters seeking to transfer funds to Somalia. *See* Sibel Kulaksiz & Andrea Purdekova, *Somali Remittance Sector: A Macroeconomic Perspective*, *in* REMITTANCES AND ECONOMIC DEVELOPMENT IN SOMALIA, *supra* note 17, at 5, 5–8 (explaining that Somalia lacks a functioning central government, much less a commercial banking system capable of handling money transfers); EL QORCHI ET AL., *supra* note 72, at 21 (noting that even international aid organizations use *hawalas* to send money to countries like Somalia and Afghanistan).

78. Suki, *supra* note 45, ¶ 40; *see also* Rosenbaum, *supra* note 12, at 179 (explaining that IVTS may be appealing to consumers because they are often based on trust and a shared language and culture).

79. ANDREASSEN, *supra* note 74, at 2.

80. *See* EL QORCHI ET AL., *supra* note 72, at 16–17 (arguing that "[l]anguage barriers, trust among community members, solidarity amongst migrants facing the same situation, and cultural considerations enhance the development of informal networks").

81. *See* Daudi, *supra* note 10, at 632 (explaining that proceeds generated from *hawalas* are difficult to detect and that, because they are built on trust, *hawala* transactions generate few records, meaning that law enforcement has little or no paper trail to follow in a money laundering investigation); Perkel, *supra* note 12, at 202 (citing the canceling of debts as an example of ways IVTS dealers can effectively cloak their operations).

abuse. In the aftermath of the 9/11, commentators have singled out IVTS as especially vulnerable to being used as a vehicle for terrorist financing.[82]

III. Anti-Money Laundering Laws and IVTS

This Part addresses the money laundering threat IVTS pose. More specifically, it briefly surveys current U.S. AML law and discusses the ways that IVTS interact with that scheme.

A. Current U.S. AML Law

The 9/11 attacks led to a renewed interest in regulating the transfer of money for law enforcement and national security purposes.[83] This new focus stems from the theory that one of the most effective ways governments can combat terrorism is by depriving individuals of the money they need to fund their operations.[84] But lawmakers came to the conclusion that pre-9/11 criminal financing laws were too weak to stop the cross-border flow of money that supports terrorism.[85] To that end, policy makers revised federal AML laws and directed law enforcement to place new emphasis on enforcement.

The core philosophy behind U.S. AML law has always been that financial institutions are better positioned than the government to detect money laundering and other financial crimes.[86] Congress's initial foray into the regulation of criminal financing, which at bottom adopted a private-sector-oriented approach and remains the centerpiece of U.S. AML law today, was the Bank Secrecy Act of 1970 (BSA).[87] Congress passed the BSA primarily to help law enforcement identify tax evaders, but in the following years, Congress expanded the Act to address money laundering

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82. *See infra* notes 83–85, 100 and accompanying text.

83. *See Examining Treasury's Role in Combating Terrorist Financing Five Years After 9/11: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 109th Cong. 3 (2006) (statement of Daniel L. Glaser, Deputy Assistant Secretary for Terrorist Financing and Financial Crimes, U.S. Department of the Treasury) ("[O]ver the last 5 years, we have witnessed a revolution in the role the finance ministries can play in international security affairs.").

84. *See id.* at 1 (opening statement of Sen. Richard Shelby, Chairman, S. Comm. on Banking, Hous., & Urban Affairs) (explaining that one of the most important aspects of the national anti-terrorism strategy is constricting "the means by which terrorist organizations and their supporters raise[] and move[] the money required to carry out their attacks").

85. *See* JOHN ROTH ET AL., NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., MONOGRAPH ON TERRORIST FINANCING: STAFF REPORT TO THE COMMISSION 3 (2004) (observing that money laundering controls in place before 9/11 were largely focused on drug trafficking and large-scale financial fraud and were not adequate to detect or prevent terrorist financing).

86. *Id.* at 54; *see also* Richard K. Gordon, *Losing the War Against Dirty Money: Rethinking Global Standards on Preventing Money Laundering and Terrorism Financing*, 21 DUKE J. COMP. & INT'L L. 503, 511–12 (2011) (explaining that the private sector's role is screening potential criminal customers out of the financial institution, providing information to law enforcement, and reporting suspicious transactions to law enforcement).

87. Pub. L. No. 91-508, 84 Stat. 1114–36 (codified as amended in scattered sections of 12 & 15 U.S.C.).

activities.[88] The BSA combats money laundering activity by imposing various requirements on financial institutions, including MSBs.[89] First, financial institutions must develop an AML program that includes internal policies, procedures, and controls.[90] To ensure that these institutions have the information they need to effectively detect money laundering, BSA regulations require financial institutions to "know" their customers so the institution can understand what sorts of transactions its customers typically make.[91] With this knowledge, financial institutions should have the capacity to detect suspicious transactions. When an institution does notice unusual activity, it must submit a Suspicious Activity Report (SAR) to the Financial Crimes Enforcement Network (FinCEN).[92] The BSA also requires financial institutions to maintain records of certain transactions and submit currency reports when customers initiate transactions involving over $10,000.[93] Policy makers imposed these recordkeeping requirements on institutions so that, if a suspicious transaction does occur, law enforcement officials will have a paper trail to follow.[94] This model of AML regulation is best suited to detecting attempts at laundering drug proceeds or other crimes that involve large amounts of cash because such schemes give financial institutions many chances at detecting irregularities, especially through the use of specialized software that tracks anomalous patterns.[95]

The U.S. AML regime attempts to elicit compliance with these requirements through the imposition of civil and criminal penalties. By the late 1980s, the BSA had begun to push money launderers out of banks, but policy makers increasingly feared that criminals were turning to MSBs for

88. REPORT TO CONGRESS, *supra* note 71, at 6–9.

89. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-212, BANK SECRECY ACT: FINCEN AND IRS NEED TO IMPROVE AND BETTER COORDINATE COMPLIANCE AND DATA MANAGEMENT EFFORTS 6 (2006) [hereinafter BANK SECRECY ACT: FINCEN AND IRS] (characterizing the BSA's framework as imposing "record keeping and reporting requirements [in order] to create a paper trail of financial transactions that federal agencies can trace to deter illegal activity and apprehend criminals").

90. 31 U.S.C. § 5318(a)(2) (2006); 31 C.F.R. § 1022.210 (2011).

91. For example, it would not be suspicious for a Walmart-sized business to regularly make large cash deposits, but it would be suspicious for an individual on a fixed income to suddenly make a similar deposit. ROTH ET AL., *supra* note 85, at 55.

92. 31 C.F.R. § 1022.320.

93. Transfer and Reorganization of Bank Secrecy Act Regulations, 75 Fed. Reg. 65,812, 65,817 (Oct. 26, 2010) (to be codified at 31 C.F.R. § 1010.311); REPORT TO CONGRESS, *supra* note 71, at 7–8.

94. *See* 31 C.F.R. § 1010.410(e) (detailing the substantial records a nonbank financial institution must keep about transmittors or recipients when involved in a transmission of $3,000 or more); REPORT TO CONGRESS, *supra* note 71, at 16–17 (concluding that improving compliance with current reporting requirements would substantially alleviate problems investigators face when tracking suspicious transactions).

95. *See* ROTH ET AL., *supra* note 85, at 56 (observing that, "[a]s a result of the BSA regime, most money launderers, drug dealers, and high-level fraudsters understand that trying to pump massive amounts of cash through a U.S. bank is fraught with peril").

their money laundering needs.[96] In response to this threat, Congress enacted two *malum prohibita* crimes—running an MSB that does not comply with state licensing laws and failing to participate in a newly enacted federal registry of MSBs.[97] Both laws came with criminal penalties and possible jail time.[98] However, Congress included a stringent scienter requirement in 18 U.S.C. § 1960, the statute containing these new regulatory offenses, making prosecutions difficult.[99]

The 9/11 attacks ended the era of lax enforcement of these laws. In the aftermath of the attacks, policy makers focused special attention on IVTS because of their perceived susceptibility to abuse by terrorists.[100] Congress strengthened § 1960 to provide prosecutors with better tools for convicting IVTS operators that do not comply with the BSA. While it had been a crime to run an unlicensed or unregistered MSB since the mid-1990s, the USA PATRIOT Act removed the *mens rea* requirements from § 1960, making noncompliance with the state licensing and federal registration requirements strict liability offenses.[101] All but four states require MSBs to obtain licenses, meaning that the licensing requirement applies to virtually every MSB.[102]

Section 1960 also criminalizes failure to comply with a complicated federal registration requirement.[103] The registration scheme requires MSB principals to provide information about their business and to register in a public database. The registration scheme has been characterized as relatively complex because it imposes slightly different requirements on businesses that provide similar services.[104] Further, the registration scheme requires only

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96. *See* S. REP. NO. 101-460, at 13–15 (1990) (explaining the growing trend of criminals using MSBs to launder funds); Stephen Labaton, *Unassuming Storefronts Believed to Launder Drug Dealers' Profits*, N.Y. TIMES, Sept. 25, 1989, at A1 (discussing "small inner-city businesses through which recent immigrants send money to relatives" being used to send "billions of dollars to drug dealers in South America and Asia").

97. Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 1512, 106 Stat. 3672, 4057–58 (codified as amended at 18 U.S.C. § 1960 (2006)); Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 408(c), 108 Stat. 2160, 2252 (codified as amended at 18 U.S.C. § 1960(b)(1) (2006)).

98. 18 U.S.C. § 1960(a) (2006).

99. *See, e.g.*, United States v. Velastegui, 199 F.3d 590, 593 (2d Cir. 1999) (observing that § 1960 "makes it a federal crime to *knowingly* operate a money transmitting business in violation of state law" (emphasis added)).

100. *See* INFORMAL VALUE TRANSFER SYSTEMS, *supra* note 68, at 3 ("Because IVTS provides security, anonymity, and versatility to the user, the systems can be very attractive for misuse by criminals.").

101. 18 U.S.C. § 1960(b)(1)(A)–(B).

102. *See infra* Table 1 and note 193 (listing Montana, New Mexico, South Carolina, and Utah as states that do not require MSBs to obtain licenses).

103. 18 U.S.C. § 1960(b)(1)(B).

104. BANK SECRECY ACT: FINCEN AND IRS, *supra* note 89, at 12–13. The registration requirement only applies to firms that provide less than $1,000 in money services per day. *Id.* This condition is extremely difficult to verify, making it difficult to know whether a given business must register or not. *Id.*

principals, not agents, to register.[105] In practice, the distinction between these two types of entities is often unclear.[106]

B. Interaction Between AML Laws and IVTS

This subpart addresses two ways that IVTS interact with the U.S. regulatory regime—IVTS tend to undermine AML regulations, and operators and consumers can use them to avoid burdensome government regulations. These considerations should play a role in crafting a money laundering policy.

As discussed above, private sector cooperation is crucial to the success of the U.S. AML regulatory scheme.[107] IVTS that comply with AML laws can provide a valuable source of information for law enforcement.[108] On the other hand, noncompliant firms undermine the U.S. regulatory scheme because they do not take the steps necessary to provide law enforcement with the information it needs to successfully trace criminals.[109] The more money that flows through compliant, transparent institutions, the easier it is for law enforcement to track criminals. So, for the U.S. system to be effective, remittance firms must be encouraged (or coerced) into compliance.

The second observation is that overregulation of formal remittance channels stands in the way of broad compliance with AML laws. The regulation of the remittance industry requires a delicate balancing because the high compliance costs and reduced efficiency created by overregulation cause consumers and operators to move away from formal channels and towards "underground" remittance providers.[110] Experimentation with strict regulation in other countries has largely shown that if policy makers create a burdensome regulatory regime, sending money through formal channels

105. 31 C.F.R. § 1022.380 (2011).

106. BANK SECRECY ACT: FINCEN AND IRS, *supra* note 89, at 12.

107. *See supra* note 86 and accompanying text.

108. *See* REPORT TO CONGRESS, *supra* note 71, at 15 (discouraging the outlawing of IVTS because it would "deprive[] law enforcement of potentially valuable information"); Passas, *supra* note 70, at 14 (warning that unsuccessful regulation of IVTS can shift demand towards "less well known informal value transfer methods and thus less transparency and traceability of transactions").

109. *See supra* note 94.

110. *See Regulation Hearing*, *supra* note 1, at 2 (cautioning against the use of "such a heavy hand that we end up pushing currently monitored transactions underground into a shadowy world of illicit transactions"); Abdusalam Omer & Gina El Koury, *Regulation and Supervision in a Vacuum: The Story of the Somali Remittance Sector*, *in* REMITTANCES: DEVELOPMENT IMPACT AND FUTURE PROSPECTS 227, 240 n.6 (Samuel Munzele Maimbo & Dilip Ratha eds., 2005) (arguing that overregulation could "force some smaller companies that are financially incapable of compliance underground, and therefore farther away from the monitoring and enforcement efforts of the host country regulators"); West, *supra* note 17, at 34 ("Over-regulation could result in remittance companies going underground to conduct their business, while under-regulation will provide an avenue for criminals to utilize the remittance system to move their illicitly obtained proceeds, or to finance criminal activity.").

becomes too expensive and consumers flock to underground services.[111] Flight away from compliant institutions undermines the U.S. AML regime because it means that fewer funds travel through transparent channels and produce the information that law enforcement needs.[112] Further, the more consumers use IVTS and commingle their funds with those derived from crimes, the more complex and burdensome an investigation becomes.[113] Thus, when regulating the remittance industry, policy makers must remember that a regulatory regime can go too far and actually become counterproductive if it causes businesses and consumers to stop using formal channels. This observation applies to jurisdictions that regulate remittances for consumer protection or other purposes—compliance with these regulations necessarily includes expenses that will increase the cost of doing business and can ultimately lead to a flight from formal channels.[114]

IV. Problems with the Current AML Regime and Other Regulations

This Part argues that the current AML regime does not effectively coerce compliance. The implication of this failing is that IVTS provide a viable alternative to regulated channels, which undermines U.S. AML law. Worse, the current system not only fails to coerce compliance with AML laws, but it also imposes costs on remittance providers—costs that make formal channels less competitive, further encouraging the use of IVTS. This Part also addresses other regulations affecting money transfer and notes that those laws also impose unnecessary costs on remittance providers, further harming the competitiveness of the formal sector.

A. Failure of the Current AML Scheme

In theory, the U.S. system coerces compliance with AML laws through sanctions.[115] Well-publicized investigations and prosecutions should "send shockwaves throughout the [IVTS] community, coercing compliance with fairly meager reporting requirements."[116] But the current U.S. approach—

111. *See e.g.*, Raúl Hernández-Coss, *Comparing Mature and Nascent Remittance Corridors: U.S.-Mexico and Canada-Vietnam*, *in* REGULATORY FRAMEWORKS FOR HAWALA AND OTHER REMITTANCE SYSTEMS, *supra* note 9, at 17, 26 ("[T]he behavior and policies of the Vietnamese government and regulations also play a critical role in influencing whether senders transmit funds formally or informally.").

112. *See* REUTER & TRUMAN, *supra* note 17, at 102 (worrying that "increased regulation in the formal economy is likely to increase reliance on the informal economy" and that excluding those consumers from formal channels "makes tracing money that much more difficult").

113. *See id.* ("The larger the flow of legitimate funds through unregulated channels, the harder it is to find money laundering through the same mechanisms.").

114. *See id.* at 101 ("Notwithstanding the economic and social benefits of the AML regime, the general public incurs costs from the increased regulation in the form of reduced efficiency and higher charges.").

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

116. Guiora & Field, *supra* note 12, at 89.

imposing sanctions on firms that fail to comply with the BSA[117]—both fails to induce compliance and imposes unnecessary costs on legitimate businesses. Thus, current AML law does not effectively encourage compliance with AML laws and may actually discourage compliance by imposing unnecessary costs on compliant firms, making them less competitive relative to IVTS.

1. IVTS Are Difficult to Find.—Before a noncompliant institution can be sanctioned, it must be identified. Unfortunately, finding IVTS is a difficult task. The "nearly infinite number of variations in IVTS transactions" means that there is rarely a common pattern or set of facts that indicate the presence of an IVTS operation.[118] Further, many of the transfer mechanisms used in IVTS make avoiding law enforcement scrutiny relatively easy.[119] Investigators also have difficulty identifying IVTS because operators frequently provide money transfer services out of another legitimate business, which further shields their money transfer activities from outside scrutiny.[120] In addition, the existence of IVTS is rarely publicized outside of operators' communities, further sheltering them from government-imposed sanctions.[121] Safe from oversight, these firms have little incentive to saddle themselves with the expense of complying with U.S. AML or consumer-protection regulations.[122] The relative ease with which IVTS can avoid prosecution explains why policy makers should be concerned with firms moving underground in response to an overly burdensome regulatory regime—IVTS can easily avoid detection, and thus criminal sanctions do little to induce compliance.

2. Investigations of Noncompliant Firms Rarely Provide Useful Information.—Even when law enforcement manages to identify noncompliant IVTS, they face challenges during investigations. The government's investigation of al-Barakaat typifies this difficulty. Al-Barakaat, an international remittance network, transferred money through a hybrid form of *hawala*, which involved the use of banks to conduct parts of its activities.[123] The FBI had been aware of the organization's existence as

117. *See supra* notes 87–99 and accompanying text.

118. Perkel, *supra* note 12, at 202.

119. *See id.* (observing that "[i]nflating or deflating invoice prices for legitimate export/import businesses" can hide IVTS transactions).

120. *See* Guiora & Field, *supra* note 12, at 63 (noting that IVTS are difficult to locate and monitor because operators frequently engage in many other legitimate business ventures).

121. Alan Lambert, *Organized Crime, Terrorism, and Money Laundering in the Americas: Underground Banking and Financing of Terrorism*, 15 FLA. J. INT'L L. 9, 15 (2002).

122. *See* Rosenbaum, *supra* note 12, at 188–89 (explaining that FinCEN has registered "only a small fraction" of the existing IVTS brokers (internal quotation marks omitted)); *cf.* Perkel, *supra* note 12, at 206–07 (expressing the belief that only an incentive-based approach can lead to IVTS compliance with AML regulations).

123. ROTH ET AL., *supra* note 85, at 67–69.

early as 1996 because banks the organization used had been filing SARs documenting its activities.[124] After raiding al-Barakaat offices around the country, law enforcement officers seized records and froze nearly $1.1 million in assets.[125] A lengthy investigation ensued. However, summarizing the results of the investigation, the 9/11 Commission explained that, "notwithstanding the unprecedented cooperation by the UAE, significant FBI interviews of the principal players involved in al-Barakaat (including its founder), and complete and unfettered access to al-Barakaat's financial records, the FBI could not substantiate any links between al-Barakaat and terrorism."[126]

First, the al-Barakaat raids illustrate how much easier it is to trace money that flows through formal channels. Federal agents became aware of al-Barakaat's activities long before 9/11 because the banks it used had filed SARs alerting law enforcement to the fact that it was conducting suspicious activities.[127] On the other hand, the investigation of al-Barakaat was enormously complicated and time-consuming, yet found no evidence of criminal activities, in part because of the complexity of the investigation.[128] Investigators rarely succeed in gleaning useful information from the noncompliant firms they investigate. Investigations are difficult because noncompliant firms have no uniform standard for record keeping, so records may lack the details investigators need to trace the transactions, and operators may not keep records period.[129] Further, operators may keep records in foreign languages or codes that investigators cannot understand.[130] Even when IVTS operators keep sufficiently detailed records, IVTS are often complex and can take many different forms, meaning that officers often have difficulty tracing the flow of money without the exhaustion of significant resources.[131] The complexity of the al-Barakaat network made the investigation time-consuming and resource intensive; it involved an analysis of over 2 million pages of records, several trips to the U.A.E., and many interviews.[132]

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124. *Id.* Al-Barakaat members used U.S. banks to wire batches of money to the United Arab Emirates. *Id.*

125. *Id.* at 80.

126. *Id.* at 84.

127. *Id.* at 69.

128. *See id.* at 82 (noting that constraints on time and resources precluded a full audit of al-Barakaat's records).

129. *See* REPORT TO CONGRESS, *supra* note 71, at 10 (explaining that "ledgers are often insubstantial and in idiosyncratic shorthand" and that records can be useless because they reveal "nothing about transactions, amounts, time, and names of people or organizations"). The Report goes on to explain that, in cases where "hawaladars know that their clients are breaking the law, no notes or records are kept at all." *Id.* at 11. Hawaladars may make it a general policy not to ask questions about their customers and, as such, may have no useful information for law enforcement. *Id.*

130. *Id.* at 11–12.

131. *Id.* at 11.

132. ROTH ET AL., *supra* note 85, at 81–82.

In fact, such investigations "can take years before investigators understand the intricate financial transactions involved."[133] Investigations of IVTS are complicated, time intensive, and difficult, largely because investigators have no familiarity with the business under investigation. The system works far better when a financial institution that possesses an intimate familiarity with its transactions, business, and customers can direct law enforcement to suspicious transactions. As such, voluntary compliance produces far better results than investigations.

3. Are the Costs of a Sanctions-Based System Reasonable?—Finally, compliance with AML regulations takes time and money—costs that businesses pass on to consumers. A 2006 study of seventy-three remittance providers from around the country revealed that firms report AML compliance as one of their primary expenses, with 50% of interviewed firms reporting that they hire outside contractors in order to meet AML standards.[134] And such significant expenditures are rational for MSB operators because even minor violations can lead to prosecution[135] due to the government's policy of "aggressively prosecut[ing] unlicensed money transmitters to deprive terrorists and other criminals a potential vehicle to facilitate their crimes."[136] Aggressive enforcement by the government can even involve the freezing of funds, harming remittance-sending consumers and their families and friends.[137]

Expecting businesses and consumers to bear those costs might be reasonable depending on the value society receives in return. But it is less than clear that our sanction-based system provides adequate returns. Commentators have called FinCEN's efforts at registering MSBs ineffective.[138] FinCEN estimates that there are between 160,000 and 200,000 MSBs currently operating around the country.[139] However, despite a host of prosecutions and fines, as of January 4, 2013, only 38,859 firms had

133. *Id.* at 82.

134. *See* ANDREASSEN, *supra* note 74, at 10 (stating that among surveyed firms, 40% reported that AML was "one of their main expenses," and 50% reported that "they hire outside expertise in order to meet their AML standards").

135. *See, e.g.*, United States v. Habbal, No. 01:05CR083, 2005 WL 2674999, at *5–6 (E.D. Va. Oct. 17, 2005) (sentencing a *hawala* operator to prison time for failure to comply with state licensing requirements, despite the fact that he had complied with the federal registration scheme).

136. *Virginian Pleads Guilty to Illegal Fund Service*, WASH. TIMES, July 8, 2005, http://www.washingtontimes.com/news/2005/jul/8/20050708-114803-4452r/.

137. *See* ROTH ET AL., *supra* note 85, at 100–01 (discussing the possibility that freezing assets may harm innocent parties).

138. *See* Courtney J. Linn, *One-Hour Money Laundering: Prosecuting Unlicensed Money Transmitting Businesses Under 18 U.S.C. § 1960*, 8 U.C. DAVIS BUS. L.J. 137, 150 (2007) (stating that FinCEN's effort to register MSBs has identified only "a small fraction of even the most conservative estimates of the total number of such businesses"); Rosenbaum, *supra* note 12, at 188–89 (calling registration requirements part of a "systemic problem" in the regulatory framework).

139. Linn, *supra* note 138, at 150.

registered with FinCEN.[140] These low numbers may suggest that sanctions do little to coerce compliance.[141] Without that broad compliance, the BSA is unlikely to be effective.

Even when working as intended, our current AML laws may do little to stop terrorists from moving money. The U.S. AML model excels at identifying attempts at laundering large volumes of money—for example, proceeds from drug sales.[142] Unfortunately, much smaller sums of money can finance terrorist attacks.[143] Further, transactions that finance terrorists look almost identical to consumer transactions, meaning that financial institutions have no useful guidance for distinguishing between terrorist-initiated and legitimate transactions.[144] Considering this evidence of the limited efficacy of AML law, it becomes doubly important to weigh the returns a sanction-based system provides relative to the costs it imposes on legitimate firms.

4. Unbanking MSBs.—AML regulatory scrutiny and corresponding sanctions imposed on banks have created a collateral problem—the unbanking of MSBs. On May 13, 2004, FinCEN fined Riggs Bank $25 million, in part for its weak oversight of high-risk transactions, including "check cashers and money remitters."[145] That fine began an era of bank regulators pressuring banks to monitor remittance firms for compliance with the BSA.[146] This pressure was applied because banks, like other financial institutions, are themselves subject to the BSA and are required to monitor

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140. *MSB Registrant Search Web Page*, FINCEN, www.fincen.gov/financial_institutions/msb/msbstateselector.html (last updated January 4, 2013).

141. *Cf.* REPORT TO CONGRESS, *supra* note 71, at 10 (cataloging various obstacles law enforcement faces in the investigation of IVTS); Gordon, *supra* note 86, at 537–38 (arguing that sanctions do not provide enough incentive for financial institutions to do a good job of implementing AML regulations); Perkel, *supra* note 12, at 200–06 (discussing the limited efficacy of enforcement and prosecution when it comes to the use of illicit IVTS).

142. *See supra* note 95 and accompanying text.

143. *See, e.g.*, ROTH ET AL., *supra* note 85, at 52 (noting that the bombings of the U.S. embassy in East Africa cost around $10,000 and the 9/11 attacks cost $400,000–$500,000).

144. *Id.* at 56–57. FinCEN has determined that looking at the sender's national origin, race, religion, and other similar factors can help identify transactions intended for terrorist use. *Id.* at 57. But permitting financial institutions to use those types of factors would basically legitimize racial profiling, which would be an objectionable, if not unconstitutional, solution.

145. *In re* Riggs Bank, N.A., No. 2004-01, at 2–3, 8 (Dep't of Treasury, Fin. Crimes Enforcement Network May 13, 2004), *available at* http://www.fincen.gov/news_room/ea/files/riggsassessment3.pdf. The same action involved punishing Riggs for laundering funds for Chilean dictator Augusto Pinochet. *See* Press Release, U.S. Dep't of Justice, Riggs Bank Enters Guilty Plea and Will Pay $16 Million Fine for Criminal Failure to Report Numerous Suspicious Transactions (Jan. 27, 2005), *available at* http://www.justice.gov/tax/usaopress/2005/txdv050530.html ("The guilty plea is in connection with Riggs' repeated and systemic failure accurately to report suspicious monetary transactions associated with bank accounts owned and controlled by Augusto Pinochet . . . .").

146. *See* Aaron R. Hutman et al., *Money Laundering Enforcement and Policy*, 39 INT'L LAW. 649, 653–64 (2005) (noting that after the enforcement action against Riggs Bank banks are more inclined to file SARs).

their customers for money laundering activities by applying a level of scrutiny commensurate with the level of money laundering risk each customer presents.[147] Regulators have determined that MSBs almost universally present a heightened money laundering risk. For example, the Office of the Comptroller of the Currency requires depository institutions to verify that MSBs have met their registration and licensing requirements and even suggests that banks visit MSBs at their places of business to ensure they have implemented adequate AML programs.[148] Thus, banks must apply heightened scrutiny to their MSB accounts. This has led to charges that banks are being "forced to act as de facto regulators" of MSBs.[149]

An added wrinkle is the fact that not all MSBs have registered with FinCEN and that agents are not required to register, meaning that banks do not always have an easy way of knowing whether a business is an MSB.[150] The complex definition of MSB under FinCEN regulations makes verification of the fact that a firm is an MSB almost impossible without an on-site inspection of the business.[151] Thus, verifying that a firm is an MSB, much less its money laundering risk, requires significant bank resources. This puts depository institutions in a difficult position—they must either endure the costs of supervising MSBs and risk regulatory scrutiny or they can simply stop serving MSBs. Many banks have chosen the latter.[152] But this decision in turn places stress on MSBs, who now have substantial difficulty obtaining banking services, making their services more expensive.

A recent controversy over the closure of Minnesota-based *hawalas* demonstrates that this problem is alive and well. Minnesota is home to the largest Somali-American population in the country.[153] Until recently, the local *hawalas* provided remittance services for the Somali immigrants.[154] In

147. FIN. CRIMES ENFORCEMENT NETWORK ET AL., INTERAGENCY INTERPRETIVE GUIDANCE ON PROVIDING BANKING SERVICES TO MONEY SERVICES BUSINESSES OPERATING IN THE UNITED STATES 6 (2005).

148. OFFICE OF THE COMPTROLLER OF THE CURRENCY, AL 2004-7, BANK SECRECY ACT/ANTI-MONEY LAUNDERING: GUIDANCE ON MONEY SERVICES BUSINESS CUSTOMERS (2004).

149. *See Regulation Hearing*, *supra* note 1, at 3 (statement of Rep. Bachus, Member, H. Comm. on Fin. Servs.) (bemoaning the lack of an effective MSB regulatory regime).

150. BANK SECRECY ACT: FINCEN AND IRS, *supra* note 89, at 12.

151. *Id.* at 12–13.

152. *See An Update on Money Services Businesses Under Bank Secrecy and USA PATRIOT Regulation: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 109th Cong. 9 (2005) (statement of William J. Fox, Director, Financial Crimes Enforcement Network) ("[M]oney services businesses of all types and sizes are losing their bank accounts at an alarming rate."); FIN. CRIMES ENFORCEMENT NETWORK, GUIDANCE TO MONEY SERVICES BUSINESSES ON OBTAINING AND MAINTAINING BANKING SERVICES 3–5 (2005) (discussing steps money service businesses can take to obtain bank accounts); Linn, *supra* note 138, at 150–51 ("Faced with regulatory and law enforcement pressures—and the banking community's inability to identify money transmitting businesses—banks have begun to terminate banking relations with their money transmitting business customers.").

153. Allie Shah, *Cash-to-Africa Services Frozen*, STARTRIBUNE, Dec. 29, 2011, http://www.startribune.com/local/minneapolis/136396028.html.

154. *Id.*

December 2011, the *hawalas* closed because the last bank that had kept them as customers closed their accounts.[155] Without the use of banking services, the *hawalas* were unable to send funds to Africa. More problematic is the fact that the *hawalas* had been in compliance with all relevant state and federal laws.[156] Nevertheless, the community development bank that had made banking services available to the *hawalas* determined that it lacked the capacity to ensure that funds wired by the bank did not end up in the hands of terrorists.[157] The fear of liability by a bank that believed it could not screen its customers to the satisfaction of regulators thus led to the canceling of a service that some believe was preventing "a humanitarian crisis in East Africa."[158] This saga illustrates the unintentional effects that sanctions and regulatory oversight can have on the remittance marketplace.

Nor is this phenomenon isolated to Minnesota or *hawalas*. A 2006 study of licensed MSBs in New York state found that nearly two-thirds of firms surveyed had to switch banks within the last year because their bank accounts had been closed.[159] Even MoneyGram, one of the largest MSBs in the country, recently had its accounts closed by Bank of America.[160] The sanction-based system of compliance has led to banks rejecting MSBs and IVTS as customers, making it far more difficult for these companies to provide service to their customers.[161] This in turn harms the federal AML scheme by disincentivizing the use of, or in the case of the Minnesota *hawalas*, eliminating the use of, a transparent, formal means of transferring money.[162]

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155. *Id.*

156. Press Release, SAMSA USA, Vital Lifeline to Millions of Somalis Could Be Cut Off by December 30, 2011 (Dec. 27, 2011) http://www.samsausa.org/index.php?option=com_content&view=article&id=61&Itemid=72 (asserting that members of the Somali American Money Services Association "are fully compliant with all applicable state and federal laws and regulations including all relevant provisions of the Bank Secrecy Act and the USA Patriot Act").

157. *See* Rupa Shenoy, *Bank to End Wire Transfers to Hawalas; Somali Community Scrambles*, MINN. PUB. RADIO (Dec. 2, 2011), http://minnesota.publicradio.org/display/web/2011/12/02/hawala-shutdown/ (explaining that the bank discovered a vulnerability that "could allow someone to use the bank to send funds that end up supporting terrorism").

158. *Id.*

159. Nikolov, *supra* note 43, at 23.

160. *See Bank Secrecy Act's Impact on Money Services Businesses: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 109th Cong. 37 (2006) (statement of Philip W. Milne, President and CEO, MoneyGram International, Inc.) (explaining that Bank of America had ended its "global banking relationship that generated millions of dollars in fees annually" with MoneyGram two months earlier because of its status as a money transmitter).

161. *See id.* (explaining that MoneyGram agents have lost bank accounts and that MoneyGram has had to negotiate special accounts at banks and even hire armored cars, increasing its operating costs).

162. *Id.* at 43 (statement of David Landsman, Executive Director, National Money Transmitters Association, Inc.) ("[A]ttempts to protect the banking system from the risk [licensed remittance companies] pose have backfired badly by threatening to destroy the best ally law enforcement has in the fight against money laundering.").

In conclusion, the current system does not effectively coerce compliance with federal law. But there is another way to ensure firms comply with federal AML law. Currently, consumers choose IVTS because they are cheaper and often provide a better service than formal channels. But this need not be the case. If compliant firms provide an equally cheap and effective service, consumers would not need to resort to IVTS for their remittance needs. This Note thus proposes that the best way to fight money laundering is not by trying to coerce compliance, but by making certain that consumers use formal, transparent channels of remitting by ensuring that services provide a service that competes with IVTS.[163] The best first step towards ensuring that formal channels are competitive is ensuring that our regulatory system does not impose unnecessary costs on remittance providers.[164] Remedying the problems and costs imposed by current AML law is an important first step towards making formal channels more competitive, but there are also other regulations affecting remittance providers that prevent formal remittance providers from being competitive. Those laws are discussed below.

B. Other Regulations Impacting Remittance Providers

As discussed in subpart IV(A), federal AML law can place an onerous burden on remittance providers in exchange for a questionable return. But remittance providers are also subject to a wide array of state (and now federal) consumer protection and safety-and-soundness laws. This subpart briefly surveys those laws and argues that, while they generally serve useful functions, lack of coordination and uniformity imposes additional unnecessary burdens on remittance providers.

1. Dodd-Frank 1073 and Consumer Protection.—Until recently, "[t]here have been limited federal consumer protections for remittance senders."[165] Section 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act[166] contains the first attempt at such a scheme. Congress enacted § 1073 to protect consumers from being "overcharged or

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163. *See Anti-Money Laundering: Blocking Terrorist Financing and Its Impact on Lawful Charities: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 111th Cong. 10 (2010) (statement of Daniel L. Glaser, Deputy Assistant Secretary for Terrorist Financing and Financial Crimes, U.S. Department of the Treasury) ("Frankly, the broader solution to the issue is more of a systemic, almost generational solution of making sure that there is affordable financial services provided to all communities throughout the world."); Nakhasi, *supra* note 12, at 495–96 (arguing that the *hawala* should be integrated into a more transparent system rather than assaulted on the front or back end of transactions).

164. *See supra* notes 110–14 and accompanying text.

165. Richard Cordray, *Making a Difference in the Lives of Immigrants and Others Who Send Money Abroad*, CONSUMER FIN. PROTECTION BUREAU (Feb. 14, 2012), http://www.consumerfinance.gov/blog/making-a-difference-in-the-lives-of-immigrants-and-others-who-send-money-abroad/.

166. Pub. L. No. 111-203, § 1073, 124 Stat. 1376, 2060–67 (2010).

not having the[ir] funds reach intended recipients."[167] To that end, Dodd-Frank modifies the Electronic Fund Transfer Act in order to implement several consumer protections.[168] First, the law requires operators of remittance firms[169] to disclose all of the costs that will affect the consumer's transaction, even those that will occur outside the country or those that are beyond the provider's control (for example, a tax imposed by a foreign government).[170] Section 1073 also sets out procedures that require remittance providers to investigate and resolve errors.[171] The regulations implementing § 1073 also hold the provider strictly liable for the errors committed by its agents and for errors committed by third parties not under the provider's control.[172] After the transaction is complete, the provider must give the consumer a receipt that includes the same information and the date on which the funds will be available for pick up.[173] Finally, the regulations give consumers a thirty-minute window to cancel their transaction.[174]

The effect of § 1073 on the remittance marketplace is uncertain and may well be net neutral. This is because different aspects of the law may both enhance and restrict the competitiveness of the U.S. remittance market. On the one hand, the disclosure regime will help eliminate the practice of providing incomplete pricing information to remittance-sending consumers.[175] Upfront, uniform disclosure of the costs of remitting will benefit consumers because it facilitates informed decision making[176] and will make it easier for consumers to shop around, enhancing competition across

167. S. REP. NO. 111-176, at 179 (2010).

168. Dodd-Frank Act § 1073.

169. Section 1073 adopts a broad definition of remittance and applies to almost all of the transactions discussed in Part II. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194, 6207–10 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005). It excludes non-"electronic" transfers, as that term is defined in the E-Sign Act, and therefore excludes some of the IVTS-style transactions discussed in subpart II(C). For example, the regulations implementing § 1073 explicitly explain that the law does not cover the mailing of funds or hand delivery by a courier because neither transfer is "electronic." *Id.* at 6208. On the other hand, IVTS transactions that involve bank wires or prepaid cards probably do count as remittance transfers for the purpose of § 1073. *Id.*

170. *Id.* at 6219–26.

171. *See id.* at 6249–51 (defining error to include bookkeeping or computational mistakes, instances where the receiving institution makes anything less than the total disclosed to the sender available to the recipient, a failure to have the funds ready for pick up by the date disclosed to the sender, and even cases where the receiving institution allows funds to be fraudulently picked up).

172. *See id.* at 6265–66 (adopting strict liability for agent errors).

173. *Id.* at 6203.

174. *Id.* at 6194.

175. *See* Suro & Bendixen, *supra* note 57, at 9 (explaining that the institutions that receive remittances charge fees to convert dollars into the local currency and charge additional service fees, and that as a result, consumers are often "surprised that the amount of money delivered to their relatives [is] less than they had expected" and "unaware of the total costs prior to the transaction").

176. *See* Cordray, *supra* note 165 (arguing that "the clarity that can come from [the] disclosures will inform consumer decisions and instill confidence").

the entire remittance marketplace.[177] Further, disclosure of the date of the arrival of the funds effectively lowers the costs of transferring money for recipients because it helps eliminate uncertainty for the recipient.[178] Finally, the error-resolution and strict liability provisions help consumers because they place the costs of rectifying mistakes on remittance providers—the party who is in a better position to bear the costs of errors and has a better understanding of the transmission process, and therefore, has a better chance of fixing the problem.[179]

But complying with the new provisions will cost both time and money. The costs of providing disclosures and resolving errors will increase costs for all remittance providers.[180] Those costs may be especially high for banks and credit unions that use open-network systems.[181] Currently, depository institutions that use wire or ACH services have no way of knowing what intermediary institutions may handle the funds they send.[182] Because they lack relationships with the institutions that handle the funds, it may be difficult (if not outright impossible) for banks and credit unions to disclose

177. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-204, INTERNATIONAL REMITTANCES: INFORMATION ON PRODUCTS, COSTS, AND CONSUMER DISCLOSURES 45 (2005) ("[W]ith the wide variety of remittance products and with information presented at different times and not always in the remitter's native language, it is difficult for the remitter to compare the different products and providers to determine the most convenient and cost-efficient method to send funds home."); Dilip Ratha, *Leveraging Remittances for Development*, *in* MIGRATION, TRADE, AND DEVELOPMENT 173, 183 (James F. Hollifield et al. eds., 2006) ("Requiring greater disclosure on fees from remittance service providers would help [consumers] make informed choices."); Raúl Hernández-Coss, *The U.S.–Mexico Remittance Corridor: Lessons on Shifting from Informal to Formal Transfer Systems* 41 (The World Bank, Working Paper No. 47, 2005), *available at* http://siteresources.worldbank.org/EXTAML/Resources/396511-1146581427871/US-Mexico_Remittance_Corridor_WP.pdf ("Measures to ensure transparent pricing help consumers to choose rationally among their remittance options and spur competition among service providers.").

178. *Cf.* ROSEMARY VARGAS-LUNDIUS & MARCELA VILLARREAL, INTERNATIONAL MIGRATION, REMITTANCES AND RURAL DEVELOPMENT 18 (2008) (explaining that the cost of remitting is higher for "receivers in rural areas because of the long distances they have to travel to collect the money").

179. *See* Electronic Fund Transfers (Regulation E), 77 Fed. Reg. at 6249 ("[T]he Bureau believes that where neither a sender nor a remittance transfer provider are necessarily at fault, a provider generally is in a better position than a sender to identify, and possibly recover from, the party at fault.").

180. *Cf.* Letter from Dillon Shea, Assoc. Dir. for Regulatory Affairs, Nat'l Ass'n of Fed. Credit Unions, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 6 (July 22, 2011) (arguing that the proposed disclosures "will create considerable new administrative burdens and will likely prove quite costly").

181. *Id.* at 1 ("Virtually all of the proposed disclosures may be easy to provide in a closed system but will be exceedingly difficult for credit unions that rely on open network systems to provide.").

182. Letter from Michael S. Edwards, Senior Assistant Gen. Counsel, Credit Union Nat'l Ass'n, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 4 (July 22, 2011) ("The originating credit union . . . has no way of knowing how many additional correspondent institutions will be involved in the transfer, . . . the 'lifting fees' those institutions charge, the taxes charged by other countries, or . . . any currency conversion that will occur . . . .").

the total costs of a transfer or how long it will take the funds to arrive.[183] In fact, smaller depository institutions have claimed that they will drop out of the remittance business altogether rather than attempt to comply with § 1073.[184] Congress anticipated this problem and included a five-year, temporary exception during which institutions that use open-network systems can provide good-faith estimates and still satisfy the disclosure requirement.[185] But it is less than clear whether it is technically possible (much less financially feasible) for (especially smaller) depository institutions to alter their business practices during this reprieve so that they can fully comply with § 1073. If the costs of complying with the disclosure requirement are significant or depository institutions drop out of the remittance business, the result will be decreased competitiveness.[186]

The error-resolution procedures and cancellation period are also important consumer protections. But forcing remittance firms to internalize the costs of their mistakes will likely lead to those costs being passed along to consumers, resulting in an overall more expensive product. Thus, the ultimate effect of § 1073 is unclear at best—the policy has the potential to help or hurt the overall competitiveness of the remittance industry.

2. State Safety-and-Soundness Laws.—State law also regulates the conduct of nonbank remittance providers, most commonly through licensing requirements. State licensing laws require remittance firms to demonstrate and guarantee their financial stability and thus serve a safety-and-soundness function. Because banking regulators already monitor depository institutions for safety and soundness, state laws typically do not require banks and credit unions to obtain MSB licenses.[187] To qualify for a license to operate as an MSB, a firm must first submit financial information for its state regulator to

183. *See* Letter from Robert G. Rowe, III, Vice President & Senior Counsel, Am. Bankers Ass'n, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 3 (July 22, 2011) (arguing that it would be "virtually impossible" for banks using open network systems to provide the required disclosures and extremely difficult to investigate alleged errors).

184. *See id.* ("Instead of helping consumers, the proposed regulation would make it very difficult, if not impossible, for smaller banks to continue providing a service to customers that need it."); *Some CUs Could Be Forced Out of Remittances*, CUNA (Apr. 10, 2012), http://www.cuna.org/newsnow/12/wash040912-2.html ("[S]ome credit unions will be forced to stop offering remittances if they are required to comply with the disclosure requirements as stated in the final rule.").

185. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194, 6241–42 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005).

186. *See, e.g.*, Press Release, Fed. Home Loan Bank of N.Y., FHLBNY to Stop Processing International Wire Transfers at Year-End (Nov. 20, 2012), *available at* http://www.fhlbny.com/news-events/press-releases/prior-releases/2012/press112012.aspx ("With the looming regulatory hurdles being placed on [processing international wires by § 1073], we have concluded that it is prudent for the Bank to no longer offer [international wires] at year-end." (internal quotation marks omitted)).

187. *E.g.*, WASH. REV. CODE ANN. § 19.230.020 (West 2007).

scrutinize.[188] The granting of a license is also typically contingent on the firm maintaining a minimum net worth and posting a bond or other security to guarantee its outstanding payments.[189] These requirements protect consumers from financially unstable companies and serve as a barrier to entry against firms with questionable business practices.[190] Much like the federal AML scheme discussed in Part III, state licensing laws attempt to coerce firms into compliance through sanctions; typically banking regulators can impose civil and criminal penalties on firms that operate without a license or that provide misleading or false information during the licensing process.[191]

Commentators frequently characterize state licensing regulations as an "uncoordinated patchwork."[192] This criticism is fair. Taken at a high level of generality, licensing laws have similar requirements and seek to achieve similar objectives. But a closer look reveals that almost every state imposes a slightly different set of hoops for an aspiring MSB to jump through. Below is a list of each state's bonding, licensing, and net worth requirements, the aspects of state law most likely to serve as a barrier to entry into the money transfer marketplace. Many states attempt to provide some flexibility by not requiring a fixed bonding or net worth requirement and instead provide for a range of fees. Unless otherwise noted, the states that list a range of fees vary their requirements based on the number of locations or outlets the MSB operates within the state.

188. *E.g.*, WYO. STAT. ANN. § 40-22-111 (2011) (requiring the firm to submit its "most recent audited consolidated annual financial statement" and the "number of payment instruments" the firm sold within the state in the last quarter).

189. *E.g.*, N.C. GEN. STAT. § 53-208.5, 53-208.8 (2011).

190. *See* UNIF. MONEY SERVS. ACT § 203 cmt. (2000) ("The bond and net worth requirements are safety and soundness measures designed to protect the public, but also to deter companies that have questionable solvency or business practices from entering the market.").

191. *E.g.*, N.C. GEN. STAT. § 53-208.24, 53-208.26 (2011).

192. Passas, *supra* note 70, at 12.

State	Bonding Requirement	Licensing Fee Requirement	Net Worth Requirement
Alabama	$10,000 to $50,000	$250 + $5/location to $500	$5,000
Alaska	$25,000 to $125,000	$500 + $100/location	$25,000
Arizona	$25,000 to $500,000	$1,500 + $25/location + $25/delegate to $4500	$100,000
Arkansas	$50,000 to $300,000	$750	$250,000
California	$250,000 to $7,000,000	$5,000	N/A
Colorado	$1,000,000 to $2,000,000	$7,500	$50,000 to $100,000
Connecticut	$300,000 to $1,000,000	$2,250	$100,000
Delaware	$25,000 to $250,000	$230 + $4.60/location	$100,000
D.C.	$50,000 to $250,000	$500 + $25/location to $2,500	$100,000 to $500,000
Florida	$50,000 to $2,000,000	$375 + $38/location	$100,000 to $2,000,000
Georgia	$50,000 to $250,000	$2,000	N/A
Hawaii	$1,000 to $500,000	$2,000 + $300/location to $15,000	$1,000
Idaho	$10,000 to $500,000	$100	$50,000 to $250,000
Illinois	$100,000 to $2,000,000	$100 + $10/location	$35,000 to $500,000
Indiana	†	$1,000	$100,000
Iowa	$50,000 to $300,000	$500 + $10/location to $5,000	$100,000 to $500,000
Kansas	$200,000 to $500,000	$100 + $10/agent	$250,000
Kentucky	$500,000 to $5,000,000	$250 to $500	$500,000
Louisiana	$25,000	$325 + $25/location	$100,000
Maine	$100,000	$500 to $2,500	$100,000 to $500,000
Maryland	$150,000 to $1,000,000	$4,000	$150,000 to $500,000
Massachusetts	§	Varies year to year	N/A
Michigan	$500,000 to $1,500,000	Varies year to year	$100,000 to $1,000,000
Minnesota	$25,000 to $250,000	$4,000	$25,000 to $500,000
Mississippi	$25,000 to $250,000	$750	$25,000 to $250,000
Missouri	$100,000	$100	*
Montana	N/A	N/A	N/A
Nebraska	$100,000 to $250,000	$1,000	$50,000
Nevada	$10,000 to $250,000	$200 to $400	$100,000
New Hampshire	$100,000	$500 to $5,000	††
New Jersey	$25,000 to $900,000	No more than $1,000	$50,000 to $400,000
New Mexico	N/A	N/A	N/A

State	Bonding Requirement	Licensing Fee Requirement	Net Worth Requirement
New York	$500,000	$3,000	N/A
North Carolina	$150,000 to $250,000	$1,000 + $10/location to $5,000	$100,000 to $500,000
North Dakota	$150,000 to $500,000	$400	$100,000
Ohio	$300,000 to $2,000,000	Varies year to year	$500,000
Oklahoma	$50,000 to $500,000	$5000 + $50/location	$275,000 to $3,000,000
Oregon	$25,0000 to $150,000	$1,000	$100,000 to $500,000
Pennsylvania	$1,000,000	$1,000	$500,000
Rhode Island	$50,000 to $150,000	$360	N/A
South Carolina	N/A	N/A	N/A
South Dakota	$100,000 to $500,000	No more than $1000	$100,000
Tennessee	$50,000 to $800,000	$250 to $500	$100,000 to $500,000
Texas	$300,000 to $2,000,000	$2,500	$100,000 to $500,000
Utah	N/A	N/A	N/A
Vermont	$100,000 to $500,000	$500 + $25/location	$100,000
Virginia	$25,000 to $1,000,000	$750	$200,000 to $1,000,000
Washington	$10,000 to $550,000	$1,000	$10,000 to $3,000,000
West Virginia	$300,000 to $1,000,000	$1,000 + $20/location to $10,000	$50,000 to $1,000,000
Wisconsin	$10,000 to $300,000	$500 + $5/location to $1,500	N/A
Wyoming	§§	$3,000	$25,000

Table 1. Bonding, Licensing Fee, and Net Worth Requirements.[193]

† The lesser of (a) the number of locations, minus one, multiplied by $10,000, plus $200,000, or (b) $300,000.

§ Twice the weekly amount transmitted, but no less than $50,000.

* Equal to all the unpaid funds.

†† Lesser of average daily outstanding money transmissions for the prior calendar year or $1,000,000.

§§ $10,000 or two-and-half times the total outstanding payments, up to $500,000.

193. ALA. CODE §§ 8-7-7, 8-7-9 (2002); ALASKA STAT. §§ 06.55.104, 06.55.107 (2010); ALASKA ADMIN. CODE tit. 3, § 13.840 (2012); ARIZ. REV. STAT. ANN. §§ 6-126(30), 6-1205, 6-1205.01 (2007); ARK. CODE ANN. §§ 23-55-202, 23-55-204, 23-55-207 (2012); CAL. FIN. CODE §§ 2032, 2037 (West Supp. 2013); COLO. REV. STAT. ANN. §§ 12-52-107 to -109 (West 2010); COLO. CODE REGS. § 701-7:MO4 (2012) CONN. GEN. STAT. ANN. §§ 36a-599, 36a-602, 36a-604 (West 2004 & Supp. 2012); DEL. CODE ANN. tit. 5, §§ 2305, 2309–10 (2001); D.C. CODE §§ 26-1004, 26-1007–08 (2001); FLA. STAT. ANN. §§ 560.143, 560.209 (West 2012); GA. CODE ANN. § 7-1-683 (Supp. 2012); GA. COMP. R. & REGS. 80-5-1.02 (2011); HAW. REV. STAT. ANN. §§ 489D-6–7, 489D-10 (LexisNexis 2009); IDAHO CODE ANN. §§ 26-2905, 26-2908–09 (2000); 205 ILL. COMP. STAT. ANN. 657/20, 657/30, 657/45 (West 2007); IND. CODE ANN. §§ 28-8-4-24, 28-8-4-27, 28-8-4-32 (West 2010); IOWA CODE ANN. §§ 533C.202–03, 533C.206 (West 2011); KAN. STAT. ANN. § 9-509 (Supp. 2011); KAN. ADMIN. REGS. § 17-22-1 (2012); KY. REV. STAT. ANN.

Although state licensing laws provide valuable protections for consumers, there is room for improvement in the current scheme. Presently, remittance firms that aspire to operate in multiple states are subject to the hodgepodge of state licensing requirements described above.[194] For MSBs, licensing requirements present the single largest barrier to entry into the money transfer industry and present a significant cost for established firms.[195] These firms note that the costs of posting multiple bonds and complying with multiple nonconforming reporting and record-keeping laws can present significant costs.[196] The heterogeneous scheme places a particularly large burden on new Internet-based businesses because they must obtain licenses in forty-six states and Washington, D.C.[197] Not complying with this regulatory mishmash gives underground firms a significant competitive advantage that they can pass along to consumers, ultimately disincentivizing compliance.

3. Taxes and Self-Deportation Policies.—In recent years, the United States has become increasingly embroiled in a debate about the future of its

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§§ 286.11-011, 286.11-013, 286.11-017 (LexisNexis 2007); LA. REV. STAT. ANN. §§ 6:1035, 6:1037 (2005); ME. REV. STAT. ANN. tit. 32, §§ 6105, 6107, 6108 (1999); MD. CODE ANN., FIN. INST. §§ 12-406, 12-411–12 (LexisNexis 2011); MASS. GEN. LAWS ANN. ch. 169, §§ 2, 3 (West 2003); MICH. COMP. LAWS ANN. §§ 487.1013–14 (West Supp. 2012); MINN. STAT. ANN. §§ 53B.05, 53B.08–09 (West 2012); MISS. CODE ANN. §§ 75-15-9, 75-15-11, 75-15-15 (Supp. 2012); MO. ANN. STAT. §§ 361.711, 361.715, 361.718 (West 2000 & Supp. 2012); NEB. REV. STAT. § 8-1004, 8-1006 (2009); NEV. REV. STAT. §§ 671.050, 671.070, 671.100 (2011); N.H. REV. STAT. ANN. § 399-G:5 (Supp. 2011); N.J. STAT. ANN. §§ 17:15C-5, 17:15C-7–8 (West 2001); N.Y. BANKING LAW § 18-a, 643 (McKinney 2008 & Supp. 2012); N.C. GEN. STAT. §§ 53-208.5, 53-208.8–.9 (2011); N.D. CENT. CODE §§ 13-09-04–05, 13-09-08 (2009); OHIO REV. CODE ANN. §§ 1315.05, 1315.07, 1315.13 (West Supp. 2012); OKLA. ADMIN. CODE §§ 85:15-3-2(c), -3, -6 (2012); OR. REV. STAT. §§ 717.215, 717.225, 717.230 (2011); 7 PA. CONS. STAT. ANN. § 6106 (West 1995); R.I. GEN. LAWS §§ 19-14-4, 19-14-6 (Supp. 2011); S.D. CODIFIED LAWS §§ 51A-17-6, 51A-17-8, 51A-17-16 (Supp. 2012); TENN. CODE ANN. §§ 45-7-205, 45-7-208–09 (2007); TEX. FIN. CODE ANN. 151.307–08 (West 2006); 7 TEX. ADMIN. CODE § 33.27 (2012); VT. STAT. ANN. tit. 8, §§ 2506–07, 2510 (2009); VA. CODE ANN. §§ 6.2-1904–06 (2010); WASH. REV. CODE ANN. §§ 19.230.040–60 (West 2007 & Supp. 2012); W. VA. CODE ANN. §§ 32A-2-5, 32A-2-8, 32A-2-10 (LexisNexis 2011); WIS. STAT. ANN. §§ 217.05–06 (West 2009); WYO. STAT. ANN. §§ 40-22-105–06, 40-22-109 (West 2007).

194. *See Regulation Hearing*, *supra* note 1, at 5 (statement of Joe Cachey, Chief Compliance Officer, Western Union Company) (bemoaning the "current regulatory chaos" that MSBs face); RATHA & RIEDBERG, *supra* note 44, at 6 (discussing the "wide variation in the regulatory requirements of bonding and net worth among 30 states in the United States"); Passas, *supra* note 70, at 12–13 (identifying an "uncoordinated patchwork" of state law requirements as a shortcoming of the current U.S. regime).

195. *See* ANDREASSEN, *supra* note 74, at 10 (explaining that remittance firms report licensing and bonding requirements as major obstacles to conducting their business); *id.* at 14 (citing licensing as the biggest barrier to entry for new players in the remittance marketplace).

196. *See id.* at 9–10 (showing that most firms find licensing and bonding requirements in the United States to be a major obstacle in the remittance marketplace).

197. *See* Press Release, Thomas P. Vartanian, The Future of Electronic Payments: Roadblocks and Emerging Practices (Sept. 19, 2000) (explaining that nationwide conformity with money transmitter laws imposes significant burdens on anyone contemplating the development of electronic payment products and networks).

national immigration policy. Some states have come to believe that the federal government is either incapable of or unwilling to enforce immigration laws.[198] These states have taken it upon themselves to try to encourage immigrants to "self-deport" by having state police enforce federal immigration laws and by attempting to create an otherwise hostile climate for immigrants.[199] This strategy has led to the passage of laws that will affect remittances directly, through the imposition of taxes, and indirectly, through the creation of a general anti-immigrant climate.

The most direct way that state law can affect remittances (besides perhaps outlawing the practice all together) is through the imposition of a tax. For example, Oklahoma currently imposes a $5 tax on all cross-border money transfers of less than $500 and an additional 1% fee for all transactions over $500.[200] Other states have considered imposing similar assessments.[201] It is unlikely that Oklahoma hoped to generate revenue by enacting its remittance tax; rather, the tax's purpose—discouraging the practice of remitting[202]—is merely one shot in a larger war over U.S. immigration policy and the status of illegal immigrants.[203]

State self-deportation policies may also affect remittance flows, albeit more indirectly. These policies have gained popularity as an alternative to the traditional, enforcement-based model of fighting illegal immigration. The concept is relatively simple—deporting the 11 million illegal immigrants currently living in the United States is a practical impossibility. So instead, states have opted to try to induce them to leave by making life difficult.[204] Alabama recently passed a bill known as H.B. 56 that exemplifies this approach.[205] It requires law enforcement to question suspected illegal immi-

198. Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1674 (2011).

199. *See* Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155, 160 (2008) (explaining that statutes like Arizona's employment verification law led to tens of thousands of self-deportations).

200. OKLA. STAT. ANN. tit. 63, § 2-503.1j (West Supp. 2012).

201. *E.g.*, H.B. 2677, 50th Leg., First Reg. Sess. (Ariz. 2011) (levying an assessment on international money wire transfers); S.B. 268, 80th Leg., Reg. Sess. (Tex. 2007) (imposing a fee for money transmissions to destinations outside the United States).

202. *See* Rosser, *supra* note 23, at 40 (arguing that a tax on remittances would amount to a sin tax).

203. Under the Oklahoma law, a remitter is entitled to a tax credit equal to the fee imposed if she files an Oklahoma tax return. OKLA. ADMIN. CODE § 710:50-15-111 (2011). The implication is thus that the tax falls only on undocumented remitters that do not otherwise file taxes. *See* Sean Murphy, *Oklahoma Lawmaker Defends Wire Money Transfer Tax*, SALON.COM (Apr. 12, 2010), http://www.salon.com/2010/04/12/ok_mexico_trade_flap/ (explaining that the drafter of the Oklahoma tax statute justified the law in part because it burdens mostly illegal immigrants and traffickers from Mexico).

204. Julia Preston, *Romney's Plan for 'Self-Deportation' Has Conservative Support*, CAUCUS, N.Y. TIMES (Jan. 24, 2012, 5:37 PM), http://thecaucus.blogs.nytimes.com/2012/01/24/romneys-plan-for-self-deportation-has-conservative-support/.

205. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, ALA. CODE §§ 31-13-1–30 (Supp. 2012).

grants and bars noncitizens from engaging in certain transactions and from receiving some types of benefits.[206] Anecdotal evidence suggests that self-deportation policies will affect remitting behavior. For example, the radio program *This American Life* recently aired a story about H.B. 56.[207] In one part of the program, an undocumented worker named Carolina explained that she had tried to pick up a gift of money sent to her by her mother at a MoneyGram located in a Walmart.[208] Carolina explained that the clerk refused to give her the money because she could not prove her immigration status, even though no federal or state law (or even a policy of Walmart or MoneyGram) makes proof of citizenship a prerequisite to picking up funds.[209] Others may face the same difficulties as Carolina—when they try to send money abroad, they may be turned away. Immigrants that have negative experiences similar to Carolina's, or even negative experiences unrelated to money transfer services, may become discouraged with or distrustful of formal institutions like banks and may increasingly turn to IVTS or underground channels to conduct money transfers.

Oklahoma-style taxes on remittance transfers and Alabama-style self-deportation laws are a bad idea from an AML perspective because they actively encourage the use of informal channels. Economists have regularly argued that the liberalization of the economy (i.e., removal of trade barriers) effectuates the move from informal to formal channels of remitting.[210] Presumably, the higher costs of remitting in tax-imposing jurisdictions like Oklahoma will discourage at least some consumers from transmitting money through taxed channels. This is particularly true because under Oklahoma's scheme, transfers of under $500 are taxed at a fixed rate which may represent a significant cost to the remitter depending on the size of the transaction.[211] The World Bank estimates that the average cost of sending $200 from the United States was $13.86 (6.93% of the principal) in the third quarter of 2011; that same transaction would cost $18.86 (9.43% of the principal) or

206. *See* John W. Hargrove & Jennifer J. McGahey, *Alabama's New Immigration Law: Nuts and Bolts for Alabama Employers*, 73 ALA. LAW. 122, 124 (2012) (describing the various restrictions that the Alabama law imposes).

207. *This American Life: Reap What You Sow*, Chicago Public Media (Jan. 27, 2012).

208. *Id.*

209. *Id.*

210. *See* John Gibson et al., How Cost-Elastic Are Remittances? Estimates from Tongan Migrants in New Zealand 1–2, 12–13 (Dec. 14, 2005) (unpublished manuscript), *available at* http://siteresources.worldbank.org/DEC/Resources/PEBGibsonMcKenzieRohorua.pdf (discussing the results of a study of remittances sent to the Pacific Islands that found that remittances have a negative cost elasticity, which means that a reduction in costs will lead to an increase in the behavior). Presumably, because an Oklahoma-style tax increases the cost of transferring money for the remitter, the volume of remittances sent in jurisdictions adopting taxes would decrease. *See* BUENCAMINO & GORBUNOV, *supra* note 67, at 9 ("There is . . . a strong case for the removal of taxes on remittances from overseas."); Rosser, *supra* note 23, at 40 (arguing that taxes will "lead to a deliberate movement away from formal channels towards informal remittance channels").

211. *See supra* note 200 and accompanying text.

36% more in Oklahoma.[212] Thus, remittance taxes dramatically increase the cost of sending money abroad, and remitters in tax-imposing jurisdictions will almost certainly attempt to avoid the relatively higher costs of remitting by seeking out informal channels for transmitting funds.[213] From a purely AML perspective, Oklahoma should drop the tax and other states should refrain from passing similar laws. Alabama-style self-deportation laws also create a problem because they make life more difficult for immigrants that are already often hesitant to participate in formal banking. Self-deportation laws may further discourage remitters from using formal channels for their remittance needs.

V. A National Solution

The previous section argued that the best way to ensure the effectiveness of U.S. AML law is eliminating the flow of funds through underground channels by making formal channels a better option for consumers. This final Part provides a brief prescription. Presently, MSBs and other remittance providers face a complex regulatory system. They must answer to the CFPB, FinCEN, the IRS, face de facto regulatory scrutiny from their banks, and depending on the geographic reach of the firm, up to forty-six state banking agencies. Instead of this patchwork of regulation, Congress should assign a single regulator with responsibility for regulating the entire money transmission industry, including banks and IVTS.[214]

A. Proposed National Scheme

More specifically, the statute creating the single regulator should assign that agency the various regulatory responsibilities related to remittance providers that other agencies currently hold. The agency's primary responsibility would be issuing a money-transmitter license similar to those currently issued by states. The national license would work in much the same way as the current state licenses do—in order to transmit money, a

212. This calculation is based solely on the effect of adding a $5 flat fee to the U.S. average found at WORLD BANK, REMITTANCE PRICES WORLDWIDE 2 tbl.1 (2011).

213. *See* DAVID LANDSMAN, THE NAT'L MONEY TRANSMITTERS ASS'N, NMTA REPORT ON THE NEW MONEY TRANSMITTER FEE IN OKLAHOMA 6 (2009), *available at* http://nmta.us/site/DocsPosted/Oklahoma/OK_Tax_White_Paper.pdf (bemoaning the fact that "[m]ost of the transactions lost to licensees will not go to banks, but rather, to alternate (unlicensed) channels"); Sanket Mohapatra, *Taxing Remittances Is Not a Good Idea*, PEOPLE MOVE, WORLDBANK (Dec. 18, 2010, 1:42 AM), http://blogs.worldbank.org/peoplemove/node/1320 (arguing that remittance taxes will "drive these money flows underground" and noting that maintaining these taxes is difficult because remitters "can resort to using informal channels").

214. There is already evidence of movement in this direction. A bill proposed by Representative Spencer Bachus would have created a department of MSB compliance within the Treasury Department. Money Services Business Compliance Facilitation Act of 2009, H.R. 4331, 111th Cong. (2009). The bill would charge the new department with ensuring that state and federal regulators coordinate standards for MSB licensing and registration and would permit approved self-regulatory organizations to create registration standards. *Id.* § 2(a).

remittance provider would first need to be licensed. The agency would grant licenses only if the firm complied with the AML, consumer protection, and safety-and-soundness laws the new agency would be charged with enforcing. These provisions would look quite similar to their current incarnations, as discussed in Part III, but with changes to address the deficiencies discussed in Part IV.

First, remittance providers would remain subject to the BSA. Remittance providers would still need to screen for suspicious transactions and provide data law enforcement would need for investigations. But the new act would remove the *malum prohibita* crimes created by 18 U.S.C. § 1960. Instead, the new regulator would simply have the power to deny or revoke the license of a remittance provider that is out of compliance. However, the new agency would not be permitted to follow the often harsh path currently followed by FinCEN—it would focus on education and outreach and could only revoke a license when a provider knowingly failed to comply with regulations. Further, the current complex registration requirements would be removed altogether—AML compliance would be enforced solely through the licensing procedures. Education, culturally sensitive outreach, and greater simplicity would encourage buy-in from IVTS, leading to more money flowing through transparent channels while avoiding imposing unnecessary harm on consumers.

The statute would also need to address the problem of unbanking of MSBs. In July of 2009, Representative Carolyn Maloney proposed the Money Services Business Act of 2009.[215] The Act would have created a certification process whereby an MSB could certify that it and its agents comply with the BSA.[216] The Act would then hold that banks have no obligation to review certified MSBs for BSA compliance.[217] The implementing statute should contain a similar provision in order to ensure that banks are no longer charged with the de facto obligation of regulating MSBs. This would allow MSBs to more easily obtain banking services, making them more competitive.

The agency would also have responsibility for implementing the safety-and-soundness regulations currently enforced by various state banking agencies and the consumer protection provisions of § 1073 of Dodd-Frank currently administered by the CFPB. The implementing statute would create uniform, nationally applicable safety-and-soundness standards that the remittance provider would need to meet in order to obtain its license. It would also contain a preemption clause that would expressly preempt state law. This would eliminate the hodgepodge of national laws remittance providers currently navigate and replace them with a set of uniform standards. Applying for one license with one standardized requirement

215. H.R. 2893, 111th Cong. (2009).
216. *Id.* § 3(a).
217. *Id.*

would greatly reduce costs for remittance providers while still shielding consumers from firms with unsavory business practices. Reducing the costs of complying with safety-and-soundness regulations would provide particular benefits for Internet-based and national remittance providers, making these firms more competitive.

As discussed above, the effects of § 1073 are less than clear.[218] Thus, the implementing statute would largely retain § 1073, but would charge the agency with monitoring the law's implementation and efficacy. But one aspect of the law has a special potential to stifle competition. The implementing statute should create a permanent exception for banks and other providers that utilize open-network systems and allow these institutions to provide good-faith estimates of the fees that will be charged. Disclosures containing estimates would help consumers shop around while still ensuring that these institutions remain competitive.

Finally, a federal scheme would be unable to change the various state anti-immigration laws. But the new regulator, consistent with its goal of encouraging competition in the remittance marketplace, should advocate against the passage of similar laws and place pressures on states like Alabama and Oklahoma so that those laws are repealed.

B. Industry-Related Policy Changes

Further, the new agency should encourage competitiveness in the formal channels by encouraging consumers to remit through banks and Internet-based firms. Currently, remitters rarely choose these methods, but they have the potential to compete directly with IVTS, and thus their use should be encouraged.

1. Enhancing Bank Competitiveness.—Currently, banks make up a relatively small proportion of the remittance marketplace.[219] However, this need not necessarily be the case. The Philippine National Bank and other commercial banks have long played a role in the remittance industry and account for between a third and half of the Filipino remittance market.[220] If U.S. banks were as competitive, they could potentially account for a similar percentage.

One of the largest barriers depository institutions face is mistrust from immigrant communities.[221] By contrast, IVTS are often appealing to consumers precisely because of this trust element.[222] Thus, an important step forward is to try to ensure that banks are more trusted among immigrant

218. *See supra* section IV(B)(1).

219. *See supra* note 60.

220. Kevin Mellyn, Worker Remittances as a Development Tool Opportunity for the Philippines ¶ 40 (June 13, 2003) (unpublished manuscript).

221. *See generally* APPLESEED, *supra* note 59.

222. *See supra* note 80 and accompanying text.

communities. It is important that immigrants that come to a bank have a positive experience and feel comfortable. The new agency could promote positive experiences by providing bilingual literature to banks or even by conducting outreach in communities with large immigrant populations.[223] It could also publicize the fact that federal law allows banks to accept alternative forms of identification such as the Matrícula Consular when opening accounts.[224]

While reaching out to customers is an important first step, banks also need to have the ability to compete with IVTS. However, the traditional bank offering—international wire transfers—are intended for commercial transactions and are a relatively expensive way to send money abroad.[225] Instead, the new statute should encourage the use of the Federal Reserve's significantly less expensive ACH programs.[226] First, the agency could try to convince banks that, while giving customers access to programs like Directo a México would be unlikely to profit the institution directly, it would help the bank build relationships with customers that would ultimately open accounts and use other profitable products.[227] The new statute could also reward banks for offering these services through Community Reinvestment Act (CRA) credits.[228] The new statute could memorialize this policy and explicitly contain a provision that grants banks CRA credits. The new law could even provide more dramatic incentives such as direct subsidization or tax breaks for banks that develop successful, low-cost remittance services.

2. Mobile-Phone- and Internet-Based Services.—New technologies have provided new ways for consumers to send remittances that have the

223. Sonderup, *supra* note 60, at 506; *see also* APPLESEED, BANKING IN A GLOBAL MARKET 17–18 (2009) (explaining that bank staff may need to be trained to spend more time with new remittance customers to make them feel comfortable as well as understand the banking system in customers' destination countries).

224. *See* APPLESEED, *supra* note 59, at 36 (explaining that banks can accept foreign identifications).

225. *See* Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194, 6197 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005) (noting that historically wire transfers have been used for large transactions); *supra* note 57 and accompanying text.

226. *See Intro to the ACH Network*, *supra* note 52 ("Rather than sending each payment separately, ACH transactions are accumulated and sorted by destination for transmission during a predetermined period. This provides significant economies of scale."); *supra* note 52 and accompanying text.

227. *See* APPLESEED, *supra* note 223, at 38 (explaining Pinnacle Bank's rationale for adopting the Directo a México service).

228. The purpose of the CRA is to encourage financial institutions "to help meet the credit needs of the local communities in which they are chartered." 12 U.S.C. § 2901 (2006). The CRA achieves this purpose by requiring bank examiners to assign the bank a rating that affects its ability to merge with other institutions based on whether it provides services to all segments of a community. Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 517 (2005).

potential to make remitting cheaper and more convenient for consumers.[229] Avoiding policies that would limit the growth of these industries should be a priority for the new regulator.[230] Promoting new technologies is important because transactions conducted through the Internet or mobile phones are inexpensive for consumers and leave a sufficient paper trail for governments to follow when combating money laundering, and the adoption of these services could give formal channels that utilize them a significant advantage over IVTS. While IVTS often provide an excellent service to consumers, mobile-phone- or Internet-based remittances likely provide a better value still. As such, an important part of the new agency's role should be ensuring there are no regulatory obstacles that inhibit the development of these technologies.

VI. Conclusion

Combating money laundering, including money laundering that occurs through IVTS, is an important national security objective. But noncompliant IVTS obstruct the implementation of an effective AML scheme because they attract legitimate transactions, making illegal transactions more difficult to identify, and do not provide adequate paper trails for law enforcement. Considering the ease with which IVTS can avoid detection, sanctions are not an adequate solution. Instead, policy makers should strive to induce voluntary compliance by making our regulatory scheme simpler, and make our formal channels more competitive by reducing the burdens of regulatory compliance through a single, national regulator.

—Colin Watterson

229. *See* Colin C. Richard, *Mobile Remittances and Dodd-Frank: Reviewing the Effects of the CFPB Regulations*, 12 U. PITT. J. TECH. L. & POL'Y 1, 4–5 (2012) (discussing the lower price of mobile remittances compared to cash-based options).

230. For example, under Dodd-Frank § 1073, providers at brick-and-mortar stores are required to provide written disclosures, but disclosures can be provided in electronic form for transactions conducted over the Internet and on the consumer's mobile phone or via text message when a transaction is conducted entirely over a mobile phone. Electronic Fund Transfers (Regulation E), 77 Fed. Reg. 6194, 6216 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005).

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