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ARTICLES

BOOK REVIEWS

Articles

Legal Realism Untamed

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Introduction

Law is not only about hard cases. There are easy ones as well, and understanding law requires awareness not only of litigated and then appealed disputes, but also the routine application of legal rules and doctrine.[1] Upon leaving the courthouse and its domain of difficult controversies, we observe the everyday determinacy of law—the production of clear guidance and uncontested outcomes by straightforward legal language, black-letter law, and the conventional devices of legal reasoning.

One consequence of the existence of easy cases along with hard ones is the alleged marginalization of the skeptical challenges of Legal Realism. Legal Realism is conventionally understood, in part, to question legal doctrine's determinacy and positive law's causal effect on judicial decisions.[2]

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1. Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 407 (1985) [hereinafter, Schauer, *Easy Cases*].

2. How best to understand Legal Realism and its legacy is contested terrain. Some scholars see Realism as focused not principally on legal indeterminacy, but instead on the contingency and nonneutrality of law and its baselines. *E.g.*, BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT *passim* (1998); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 169–212 (1992) (arguing that the most important legacy of Realism is in challenging the claim that legal thought was separate from moral and political discussion); Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 475–95 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE: 1927–1960 (1986) and maintaining that Realism recognizes that, because the state defines transactional rules, law is implicated in every transaction). Others understand it as the ancestor of modern methodologically sophisticated empirical legal studies. *See* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 256–57 (1997) (noting the connection between Realism and the modern attitudinalist model of judicial decision making); Daniel A. Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279, 302 (2001) (reviewing BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000)) (drawing the connection between Realism and contemporary law and economics); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 834 (2008) (characterizing empirical research on judicial decision making as an extension of traditional Realist thought). *See generally* Symposium, *Empirical Legal Realism: A New Social Scientific Assessment of Law and Human Behavior*, 97 NW. U. L. REV. 1075

But if Realism's skepticism about the constraints of positive law applies only to the sliver of legal events that are litigated cases,[3] Legal Realism's challenges can be kept at bay. Realism may remain a valuable corrective to the view that even most appellate cases have a legally right answer, but not as a claim that undermines the routine determinacy of law.[4]

This marginalization of Legal Realism—its *taming*, so to speak—turns out, however, to ignore a central Realist theme: the distinction, in Karl Llewellyn's words, between "paper rules," on the one hand, and "real rules," or "working rules," on the other.[5] For Llewellyn and other Realists, the crux

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(2003) (collecting empirical studies that examine the relationship between law and society in a Realist framework). And still others find in Legal Realism the foundations for pretty much the entire law and society research agenda. *See, e.g.*, Arthur F. McEvoy, *A New Realism for Legal Studies*, 2005 WIS. L. REV. 433, 443–44 (equating the original Realists' commitment to facts, objectivity, and scientific method with a similar commitment in the Law and Society movement); Sally Engle Merry, *New Legal Realism and the Ethnography of Transnational Law*, 31 LAW & SOC. INQUIRY 975, 975–77 (2006) (characterizing traditional Legal Realism and New Legal Realism as the tools through which to analyze law's effect on society); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 92–93 (2009) (discussing the law and society movement's focus on empirical research in the context of its Legal Realist origins). Such nonstandard views of Realism are not, however, my concern here. Rather, this Article is located within the widespread view that the main lines of Legal Realism maintain that legal doctrine, whether because of the indeterminacy of individual rules or the availability of multiple ones, is more malleable, less determinate, and less causal of judicial outcomes than the traditional view of law's constraints supposes. This conventional conception of the core claims of Legal Realism, which is embodied in the work of, *inter alia*, Thurman Arnold, Felix Cohen, Walter Wheeler Cook, Jerome Frank, Karl Llewellyn, Herman Oliphant, Hessel Yntema, and Underhill Moore, is described and adopted in BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 15–118 (2007); EDWIN W. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 537–56 (1953); Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 208–09 (1986); Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 607–10 (2007); G. Edward White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649, 651 (1984). This understanding of Legal Realism is represented more recently in some of the scholarship of Duncan Kennedy, in Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 518 & n.1 (1986), and Mark Tushnet, in MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 120 (2009) ("For the realists, conclusions did not flow from principles: In a mature legal system whose doctrinal space was thickly populated, a judge given a principle articulated in some prior case could faithfully deploy that principle along with others equally available in the doctrinal universe to reach whatever result the judge thought socially desirable."); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 822 (1983) (observing that the Realists showed that with almost any legal rule a diversity of subsequent uses of that rule could still be consistent with the initial articulation of the rule).

3. *See infra* notes 20–23 and accompanying text.

4. *See infra* Part III.

5. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 444–57 (1930) [hereinafter, Llewellyn, *A Realistic Jurisprudence*]; *see also* KARL N. LLEWELLYN, THE THEORY OF RULES 63–76 (Frederick Schauer ed., 2011) (1938) [hereinafter, LLEWELLYN, THE THEORY OF RULES] (discussing the relative unimportance of the "propositional form" of legal rules); Karl N. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1222 (1931) [hereinafter, Llewellyn, *Some Realism About Realism*] (suggesting that "some rules [are] mere paper"). Llewellyn's views on paper and working rules are featured in John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263 (2000).

of their challenge to the traditional view of legal determinacy lay in the fact that the paper rules—the language of statutes and black-letter common law rules—were often poor approximations of the actual rules motivating judicial decisions.[6] Judges do follow rules, Llewellyn and most other Realists insisted, but the rules they follow are often not the ones found in standard legal sources.[7]

The distinction between real and paper rules is well known, but the effect of the distinction upon the supposed marginalization of Legal Realism has remained unnoticed. For when the paper rules do not describe the actual rules that judges use in making decisions, the divergence between paper and real rules will influence the distribution between easy and hard cases. Thus, even if the indeterminacy claims of Realism are limited to the domain of litigated cases, the distinction between paper and real rules determines the makeup of that domain, and accordingly pervades the entirety of law. The gap between paper and real rules, therefore, by producing consequences throughout law and not merely to a small subset of it, reveals the Realist challenge to be more foundational, less marginal, and—importantly—less tamed.

The question I address is as fundamental as it is simple: What makes hard cases hard, and easy ones easy? The answer is empirical, varying with time, place, and area of law. But Legal Realism in its untamed version not only directs us to this question, but also suggests that the answer to the empirical question might, in some contexts and in some domains, challenge the standard view of how law works even in its routine and nonlitigated operation.

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6. *See* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 32 (1973) (quoting a letter from Arthur Corbin observing that actual legal rules differed from the rules "in print"); *see also* Nathan Isaacs, *Some Thoughts Suggested by the Restatements, Particularly of Contracts, Agency, and Trusts*, 8 AM. L. SCH. REV. 424, 428 (1936) (referring to "dry rules"). And the distinction between paper and real rules was captured earlier in Roscoe Pound's enduring distinction between law in the books and law in action. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

7. H.L.A. Hart accused the Realists of seeing rules solely as predictions and not as internalized guides or bases for criticism, H.L.A. HART, THE CONCEPT OF LAW 137–38 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994), but the charge does not stick. *See, e.g.*, LLEWELLYN, THE THEORY OF RULES, *supra* note 5, at 46, 51–62 (describing the rule-based feelings of lawyers and judges and distinguishing commands from predictions); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 840 (1935) (claiming that judges will apply the rules they think reasonable); Llewellyn, *A Realistic Jurisprudence*, *supra* note 5, at 444 (acknowledging that rules influence judicial behavior); *see also* Dagan, *supra* note 2, at 647–48 (noting that rule-oriented Realism is "not a contradiction in terms"); Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory*, *in* THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 12, 24, 40–41 (Jody S. Kraus & Steven D. Walt eds., 2000) (describing Llewellyn's commitment to rule-based decisions).

I. Legal Realism—Some Basics

The perspective variously known as legal realism, Legal Realism,[8] or American Legal Realism[9] is widely understood to pose a substantial challenge to a traditional conception of law and legal (especially judicial) decision making. Of course there are almost as many traditional views about legal decision making as there are viewers, but a prominent one holds that official legal materials such as statutes and reported court cases can generate straightforward, mechanical, or logically entailed[10] applications in the vast majority of instances.[11] And even if the production of legal outcomes is not

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8. People tend to believe their own descriptions of most things to be realistic. Consequently, the capitalization of Legal Realism designates a school of thought rather than an attribute. Moreover, the capitalization distinguishes Legal Realism as a school of thought about law from various perspectives characterized as realist in meta ethics, metaphysics, and other branches of philosophy. The distinction is important, because realism in philosophy identifies positions supporting the existence of mind-independent entities, and thus of mind-independent reality. *See, e.g.*, LYNNE RUDDER BAKER, THE METAPHYSICS OF EVERYDAY LIFE: AN ESSAY IN PRACTICAL REALISM (2007) (offering a realist position in metaphysics); Colin McGinn, *An A Priori Argument for Realism,* 76 J. PHIL. 113, 114 (1979) (same); Peter Railton, *Moral Realism*, 95 PHIL. REV. 163, 165 (1986) (arguing for a form of moral realism). Insofar as Legal Realism stresses the role of the judge or other legal decision maker in identifying and making law, and thus insofar as Legal Realism questions the existence or importance of judge-independent law, see G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 155 (1976) ("Realism eventually took the step of equating law with the idiosyncratic judgments of judges and other lawmakers . . . ."), Legal Realism is more in contrast to than consistent with most versions of philosophical realism.

9. Note that this is *American* Legal Realism, as distinguished from the Scandinavian Realism, of, for example, AXEL HÄGERSTRÖM, INQUIRIES INTO THE NATURE OF LAW AND MORALS (Karl Olivecrona ed., C.D. Broad trans., 1953); A. VILHELM LUNDSTEDT, LEGAL THINKING REVISED: MY VIEWS ON LAW (1956); KARL OLIVECRONA, LAW AS FACT (1939); ALF ROSS, ON LAW AND JUSTICE (1958). More generally, see MICHAEL MARTIN, LEGAL REALISM: AMERICAN AND SCANDINAVIAN (1997) and Jes Bjarup, *The Philosophy of Scandinavian Legal Realism*, 18 RATIO JURIS 1 (2005). On some topics the two Realisms are compatible, but their agendas diverge sufficiently that distinguishing them from each other is more important than seeing them as different branches of the same perspective. *See* Gregory S. Alexander, *Comparing the Two Legal Realisms—American and Scandinavian*, 50 AM. J. COMP. L. 131, 132 (2002) (arguing that "Scandinavian and American Legal Realism seem to have been nearly opposite jurisprudential movements").

10. In saying "logically entailed," I refer not to deduction, the process by which particular outcomes are generated by a general rule, but to *subsumption*, pursuant to which decision makers decide whether a particular act or event is included within a rule. The judge or police officer deciding whether an automobile traveling at eighty miles per hour is violating the sixty-five-miles-per-hour speed limit begins with the particular observation and then assesses whether the particular falls under—is subsumed by—the rule. She does not begin with the rule and then determine which particular outcomes might, in the abstract, be deduced from that rule.

11. "Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer . . . ." C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871). Langdell recognized, however, that the identification of such principles and doctrines was a matter of induction from particular decisions and not deduction from abstract generalities, see C.C. Langdell, *Classification of Rights and Wrongs (Part I)*, 13 HARV. L. REV. 537 (1900); C.C. Langdell, *Classification of Rights and Wrongs (Part II)*, 13 HARV. L. REV. 659 (1900), and thus it is mistaken to accuse him of believing the entirety of legal decision making to be deductive or mechanical.

strictly a matter of syllogistic deduction, a softer version of the traditional view holds that legal outcomes are still the constrained product of legal doctrine and legal materials alone.[12] This is roughly the position embodied in the writings of William Blackstone,[13] Edward Coke,[14] and other celebrants of common law reasoning.[15] And it can be found more recently in the thinking of Americans such as Eugene Wambaugh[16] and John Zane.[17] According to this tradition, judges, employing accepted methods of statutory or case interpretation and thereby discovering the real and immanent law through "artificial reason,"[18] can identify the decisions mandated by existing

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12. A sophisticated version of this view is presented in NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 19–52 (reprint 1997), and subsequently elaborated in NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING (2005); *see also* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 273 (2008) (describing traditional formalism as committed to judicial decisions based on "legal materials alone").

13. 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

14. 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON 97b (Charles Butler ed., 1985) (1628) (describing the "artificial" reason of the common law). For explication of Coke's idea, see Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEXAS L. REV. 35 (1981) and John Underwood Lewis, *Sir Edward Coke (1552–1633): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory*, 84 LAW Q. REV. 330 (1968).

15. See, for example, MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND (Charles M. Gray ed., 1971) (1713), although Hale was more receptive than Blackstone or Coke to the influence of nonlegal factors on legal decisions. For a useful explanation of the pertinent views of Blackstone, Coke, and Hale, see GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 4–13, 19–27 (1986) and ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 23–32 (1998).

16. EUGENE WAMBAUGH, THE STUDY OF CASES: A COURSE OF INSTRUCTION (2d ed. 1894).

17. John M. Zane, *German Legal Philosophy*, 16 MICH. L. REV. 287, 338 (1918) ("Every judicial act resulting in a judgment consists of a pure deduction."). Neither Zane nor Wambaugh are much remembered, but they genuinely exemplify views about judicial decision making often castigated as "mechanical" or, more commonly but more ambiguously, "formalistic." As Anthony Sebok observes, much writing in the Realist tradition, from the 1930s to the present, has aimed at caricatured and typically nonspecified targets. SEBOK, *supra* note 15, at 83. And when the targets are named, as with Joseph Beale and to some extent Langdell, their actual views turn out to differ substantially from the ones they are taken to hold or represent. On Beale, see Joseph H. Beale, Jr., *The Development of Jurisprudence During the Past Century*, 18 HARV. L. REV. 271, 278 (1904) (recognizing the impossibility of complete codification). On Langdell, see *supra* note 11. Wambaugh and Zane, among others (for example, see Paul E. Treusch, *The Syllogism*, *in* READINGS IN JURISPRUDENCE 539 (Jerome Hall ed., 1938)), may now be forgotten, but they are authentic representatives of the class of thinking the Realists sought to challenge. Indeed, even Roscoe Pound's scorn in Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908), is not what it seems. He did not deny the possibility of largely deductive application of preexisting legal rules (on which, see Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988)), but instead insisted that such application, without regard to social consequences, was undesirable.

18. *See supra* note 15. On the nature of the Realists' "target," see also WILFRID E. RUMBLE, AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS 49 (1968). Brian Tamanaha identifies some instances in which Realist insights can be found prior to the rise of Realism, and others in which so-called formalists were aware of the nonmechanical aspects of judging. *See* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 71–89 (2010) (identifying Realist ideas in legal discourse as early as the 1870s). But as with any distinction, even multiple counterexamples on one or the other side do not

law. Because such decisions are produced, by application of methods widely shared among legal professionals, legal decision making does not require recourse to the judge's extralegal attitudes or opinions.

The most important of Realism's multiple facets is its denial of this traditional view. Virtually all Realists take themselves as repudiating the belief that official legal sources and legal doctrine alone produce the uncontroversial—at least among trained legal professionals—outcomes that the traditional view imagines.[19] Rather, most versions of Realism maintain that legal doctrine ordinarily does not determine legal outcomes without the substantial influence of nonlegal supplements, supplements whose existence and application are variable and manipulable.[20] To the extent that this is so, legal outcomes will often then be the product not exclusively or even predominantly of official law, but primarily of something else. What constitutes this something else varies among Realists, with some believing it

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undercut the plausibility of a probabilistically accurate distinction. It is sometimes warm in January (in the northern hemisphere) and cold in June, but January is still, in general, colder than June. So too here, and the suggestion that pre-twentieth century views about legal constraints were little different from those advanced by the Realists would make the entire Realist challenge pointless. Perhaps that is so, but to claim that Arnold, Cook, Douglas, Frank, Llewellyn, Oliphant, Sturges, Yntema, and many others were all aiming at a phantom target seems a stretch. Indeed, the very persistence of the Realists' target, see *infra* Part IV, makes identifying the difference between Realism and its opponents of continuing importance.

19. *See* LEITER, *supra* note 2, at 21–23; Altman, *supra* note 2, at 206 n.4 (expanding on Realist themes of legal indeterminacy and the role of officials in shaping legal doctrine); Dagan, *supra* note 2, at 610 (describing Legal Realism's rejection of "reductionist understandings of law"); Tushnet, *supra* note 2, at 122; *see also* KALMAN, *supra* note 2, at 7 (1986) (concluding that Realists shared the belief that "legal rules were not the sole factor in the decisional process"); Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111, 112 (2010) (stressing that Realism challenges even sophisticated versions of formalist accounts of adjudication); G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1, 34–35 (1997) (emphasizing the rule-skepticism of the Realists).

20. The malleability and manipulability of legal doctrine is the central theme of, for example, JEROME FRANK, LAW AND THE MODERN MIND (1930) [hereinafter, FRANK, LAW AND THE MODERN MIND]; K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1951) [hereinafter, LLEWELLYN, THE BRAMBLE BUSH]; Dagan, *supra* note 2, at 614 (referring to "doctrinal multiplicity"); Kennedy, *supra* note 2, at 558–59 (exploring multiple doctrinal avenues a judge has the freedom to pursue); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 395–96 (1950) [hereinafter, Llewellyn, *Remarks on the Theory of Appellate Decision*] (famously describing the proliferation of canons of statutory construction); Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 362 (1925) ("[J]udges have recourse to a great many devices. They relate back. They presume. They impute. They take judicial notice. They refuse to take judicial notice. They construe. They charge with knowledge. They impress trusts. And they don't always do this in the same way. What one judge reaches by presumption, another will, by relation."); and White, *supra* note 2, at 651 ("The Realists demonstrated . . . that for every principle there existed a potential counter-principle . . . ."). And on the malleability of determinations of fact, see especially JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 16 (1949) [hereinafter, FRANK, COURTS ON TRIAL] ("For whenever there is a question of the credibility of witnesses . . . then, unavoidably, the trial judge or jury must make a guess about those guesses.").

to reside in the ideological or policy preferences of judges,[21] others committed to the proposition that it is the judge's view of the complete array of facts presented by individual cases,[22] and still others maintaining that most

21. Although Llewellyn had his particularistic and fact- and case-specific moments (*see, e.g.*, KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS, 59–61, 121–25, 206–08 (1969) (discussing "Situation-Sense"); Llewellyn, *A Realistic Jurisprudence*, *supra* note 5, at 457 ("What is true of some persons as to some law will not hold of other persons, even as to the same or similar law."); Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEXAS L. REV. 169, 199 n.190 (1989) (discussing "Llewellyn's tendency toward particularism"); Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 470 (1987) ("The merchant rules are grounded in Llewellyn's belief that legal rules must relate to the facts and must fit the realities of the transactions they govern." (footnote omitted))), he more often stressed the role of the judge in seeking to reach, albeit in small steps, the best solution to a general social problem. *See* LLEWELLYN, THE THEORY OF RULES, *supra* note 5, at 87–102 (describing the goals of the "legal order"); TWINING, *supra* note 6, at 369 (observing that Llewellyn recognized the need for "principles to guide action"); William Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 329, 347–49 & n.55 (1985) (questioning strongly particularistic understandings of Realism). MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 193–94 (1988), describes the "policy emphasis" and reliance on "policy considerations" of Realism, and conceiving Realism in terms of a judge's general (rather than case-specific) policy or ideological preferences is highlighted throughout Kennedy, *supra* note 2, as well. Realism's focus on policy is also discussed in JOHN BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS 227 (1983) ("Once it was shown that precedents did not hold all the answers, it was almost taken for granted that judges must act similarly to legislators."); ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 143–44 (1982) ("[The Realists] maintained that in predicting the law we should take into account the judge's background, his ideology, and anything else that might bear on the predicted outcome, whether or not it was 'legal' in nature."); E.W. THOMAS, THE JUDICIAL PROCESS: REALISM, PRAGMATISM, PRACTICAL REASONING AND PRINCIPLES 4–6 (2005) (discussing the policy-making role of judges).

22. *See, e.g.*, Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 284 (1929) (describing the fact-based nature of a judge's initial reaction to a case); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 75 (1928) (regretting the shift from deciding each case on its facts); *see also* LEITER, *supra* note 2, at 21–24, 29–30, 109–11 (focusing on how the Realists sought to locate the facts of particular cases within "situation types"); Brian Leiter, *American Legal Realism*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50, 52–53 (Martin P. Golding & William A. Edmundson eds., 2005) ("In particular, all the Realists endorsed what we may call 'the Core Claim' of Realism: in deciding cases, judges respond primarily to the stimulus of the facts of the case, rather than to legal rules and reasons."). It is important to distinguish the Realist attention to facts from the frequent but arguably idiosyncratic Realist focus on the importance of the particular array of facts presented in particular cases. Focusing on "situation types" is not particularistic, because the very idea of a type suggests decisions according to larger categories, or, if you will, rules. Thus, when Leon Green produced the classic Realist casebook—LEON GREEN, THE JUDICIAL PROCESS IN TORT CASES (1931)—he organized the book around categories such as "firearms," "surgical operations," "trees, noxious growths, fences," "persons using ways [and] streets," and, alarmingly, "play, practical jokes, [and] conduct with reference to women." But although these were not the traditional categories of tort law, they were categories nonetheless, and Green's point was that a case's location within the nontraditional category was more explanatory of the outcome than were traditional tort categories such as negligence and strict liability or traditional tort concepts such as causation and foreseeability. Green's prototypical Realist point was that the actual categories of decision were not the categories of traditional doctrine, but he still insisted that categories had a causal effect on outcomes. By contrast, the true Realist particularists were more skeptical of *any* categorizations or abstractions, believing that outcomes were produced by a judge's reactions to the unique array of facts in any particular case. Frank is the paradigmatic particularist, as can be seen in

important in legal decision making are the conscious or subconscious personal predilections, biases, and idiosyncrasies of particular adjudicators.[23] But although the Realists differed about what "really" mattered in judicial decision making, they were all committed to the view that what mattered was something other than, or at least much more than, positive law, legal rules, legal doctrine, and legal reasoning as traditionally conceived. The core of Legal Realism thus challenges the view that traditional legal sources and methods play a substantial role in the cause and explanation of judicial decisions.

II. Realism Tamed

Realism is thus a claim about law's (legal) indeterminacy and about the insufficiency of formal or positive law to explain judicial decision making. But a common rejoinder is that Realism confuses how law operates at its indeterminate edges with the overall character of legal guidance.[24] Because there are easy cases and straightforward applications of law, it is said, and because such cases and applications rarely wind up in court, the determinate

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FRANK, LAW AND THE MODERN MIND, *supra* note 20; Jerome Frank, *Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption that Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17, 47 (1931) ("[T]here is prevalent a gravely mistaken notion that legal rules control and cause decisions"); Jerome Frank, *Are Judges Human? Part Two: As Through a Class Darkly*, 80 U. PA. L. REV. 233, 242 (1931) [hereinafter, Frank, *Are Judges Human II*] (discussing the overarching importance of every case's particular facts); and Jerome Frank, *Say It with Music*, 61 HARV. L. REV. 921, 922 (1948) (stressing that every judicial decision is a function of both legal rules and the facts of the case). Realism as a whole is characterized as particularistic in BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 18–19 (1984), and in William W. Fisher III, *The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights*, *in* A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW—1791 AND 1991, at 266, 268–95 (Michael J. Lacey & Knud Haakonssen eds., 1991). And see also WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS vii (1942), urging smaller categories of analysis so as best to capture the diversity of human experience and conduct.

23. See especially FRANK, LAW AND THE MODERN MIND, *supra* note 20; Theodore Schroeder, *The Psychologic Study of Judicial Opinions*, 6 CALIF. L. REV. 89, 89 (1918). More recently, see Shai Danziger, Jonathan Levav, & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. 6889 (2011) (finding that judicial parole decisions varied with the amount of time between a judge's meal and decision).

24. Most influential is HART, *supra* note 7, at 135–47. Hart maintained that the Realists were "disappointed absolutist[s]," *id.* at 139, whose identification of uncertainty in the area of law's "open texture" led them to overlook the fact that "the life of the law consists to a very large extent in the guidance both of officials and private individuals." *Id.* at 135. Similar claims can be found in Altman, *supra* note 2, at 207; Benjamin Nathan Cardozo, *Jurisprudence*, 55 N.Y. STATE BAR ASS'N RPTR. 263, 290 (1932); Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 IND. L. REV. 57, 71 (2003); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1914–16 (2009); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 496–97 (1987). On Cardozo's views, see also Marcia J. Speziale, *The Experimental Logic of Benjamin Nathan Cardozo*, 77 KY. L.J. 821 *passim* (1989). And see also Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 MICH. L. REV. 2075, 2077–78 (1993) (describing but not endorsing the view that theory and policy are relevant only in the 10% of cases that are genuinely difficult).

and predictable side of law is invisible to those who equate law with the field of litigated disputes, or, even worse, of reported appellate decisions.

The invisibility of the routine operation of clear law is largely a function of what is nowadays labeled the "selection effect."[25] The basic idea is uncomplicated: If the law (and the predicted outcome in court) applicable to a dispute is clear, then one side will expect to win and the other to lose. Under such conditions, the rational expected loser will settle or otherwise refrain from litigation in order to avoid a costly but futile courtroom battle.

The corollary of the reluctance of expected losers to litigate is that disputes that are *not* settled prior to litigation or judgment emerge as a nonrandom and unrepresentative sample of legal events. Rather, the disputes that wind up in court are disproportionately those in which two opposing parties holding mutually exclusive positions each believe that litigation is worthwhile. And normally this will be the case only when the law or the facts are unclear. Because the field of litigated cases thus systematically

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25. The scholarship on the selection effect is vast, the canonical modern source being George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). The Priest–Klein hypothesis about the nature of the disputes that are settled or litigated has spawned a substantial literature, much of it focused on challenging or supporting Priest and Klein's claim that the selection effect will incline towards a 50% win rate for plaintiffs in the cases that do not settle and thus wind up being tried to judgment. *See generally* Lucian Arye Bebchuk, *Litigation and Settlement under Imperfect Information*, 15 RAND J. ECON. 404 (1984) (exploring the effect of information asymmetries on the 50% hypothesis); Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990) (offering ways of testing the 50% hypothesis); Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187 (1993) (arguing that variations in win-rate percentages can be explained by "the informational requirements of the relevant legal standard"); Daniel Kessler et al., *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233 (1996) (reconciling the selection hypothesis with observed plaintiff win rates of less than 50%); George L. Priest, *Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes*, 14 J. LEGAL STUD. 215 (1985) (defending the 50% hypothesis); Richard L. Revesz, *Litigation and Settlement in the Federal Appellate Courts: Impact of Panel Selection Procedures on Ideologically Divided Courts*, 29 J. LEGAL STUD. 685, 707–08 (2000) (discussing the Priest–Klein hypothesis in the context of panel composition); Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 493 (1996) (concluding "it does not seem appropriate to regard 50 percent plaintiff victories as a central tendency, either in theory or in fact"); Joel Waldfogel, *The Selection Hypothesis and the Relationship between Trial and Plaintiff Victory*, 103 J. POL. ECON. 229 (1995) (finding support for the 50% hypothesis in the relationship between trial rates and plaintiff win rates); Donald Wittman, *Is the Selection of Cases for Trial Biased?*, 14 J. LEGAL STUD. 185 (1985) (proposing "a different modeling of the distribution of litigant estimates of outcomes that leads to contrary conclusions about the litigation process"). That question is theoretically and empirically important, but for purposes of this Article all we need is the core insight that the cases that go to trial are a nonrandom and disproportionately indeterminate sample of legal events. On this basic point, useful analyses include RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21 (3d ed. 1986); Jonathan P. Kastellec & Jeffrey R. Lax, *Case Selection and the Study of Judicial Politics*, 5 J. EMPIRICAL LEGAL STUD. 407 (2008); Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315 (1999); Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988); Ahmed E. Taha, *Judge Shopping: Testing Whether Judges' Political Orientations Affect Case Filings*, 78 U. CIN. L. REV. 1007 (2010).

under-represents the easy cases and over-represents the hard ones, generalizing about all applications of law from the unrepresentative set of litigated cases is a serious error.

The selection effect operates throughout the litigation process. Expected losers prior to trial will disproportionately settle or succumb rather than litigate, and thus lawsuits will ordinarily be filed and then tried to judgment only when both parties believe they have chances to win. Similarly, losers at trial will typically not appeal unless they believe there is some likelihood of prevailing on appeal, and the field of appellate decisions thus selects for difficult cases at the edges of law even more than the field of cases tried to verdict. Indeed, although the selection-effect literature treats the dispute as the starting point of the legal process, in fact selection takes hold even earlier. When the law is clear, a dispute will typically not even arise, and the very fact of a dispute is itself law-dependent. Because I would prefer to pay my taxes later than April 15 (or not at all), the Internal Revenue Service and I have opposing preferences. But the law is so clear (at least in my case) that it would not occur to me that I had a "dispute" with the IRS. Only when parties with opposing preferences can each make a nonpreposterous reference to a legal or other norm would the conflict of preferences even ripen into a "dispute" in the first place.

Because litigation and appeal disproportionately select for events in which the law is indeterminate, or in which there are opposing defensible accounts of the facts, drawing conclusions about law in general from this unrepresentative class of hard cases exaggerates law's indeterminacy, so it is said. If Realism's claim is based on the class of litigated cases, it is either not a claim about all or most of law, or, if it is such a claim, then it is a mistaken one.

Interestingly, the view that Realism is about hard cases and not law in general is supported by the writings of some of the Realists themselves. Llewellyn, for example, stressed early on that his views about the malleability of legal rules were applicable only to the "case[s] doubtful enough to make litigation respectable."[26] And Max Radin emphasized that his contributions to Realism were to be understood as located in the context solely of "marginal cases."[27]

Such statements reveal there to be little difference between the Realists' actual views and what H.L.A. Hart in *The Concept of Law* intended as a criticism of Realism.[28] Hart, misreading the Realists[29] as insisting that law

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26. Llewellyn, *Some Realism About Realism*, *supra* note 5, at 1239. A similar qualification is offered in LLEWELLYN, THE BRAMBLE BUSH, *supra* note 20, at 58 (observing that litigated cases bear the same relationship to the underlying pool of disputes "as does homicidal mania or sleeping sickness, to our normal life").

27. Max Radin, *In Defense of an Unsystematic Science of Law*, 51 YALE L.J. 1269, 1271 (1942); *see also* Matthew C. Stephenson, *Legal Realism for Economists*, 23 J. ECON. PERSP. 191, 197 (2009) (locating Realist perspectives within the universe of hard cases).

28. HART, *supra* note 7, at 135–47.

was pervasively indeterminate and that legal rules were routinely unable to straightforwardly generate legal results, accused them of being narrowly focused only on hard appellate cases. If the Realists had recognized the ubiquity of plain rule-generated outcomes, Hart argued,[30] they would not have made the claims he understood them as making about law and legal rules in general.

Thus a widespread view, interestingly held by Hart and the Realists alike, is that law has a straightforward operation in most nonlitigated instances of legal application, but that in litigated disputes, especially in appellate cases,[31] legal determinacy often disappears. Hart and the Realists disagreed about the size of this domain of indeterminacy, but they agreed about its existence. And in this domain—the penumbra and not the core, in Hart's terminology[32]—Hart and others believed that judges exercise legislature-like discretion,[33] Llewellyn thought that judges seek to further the internal goals of the legal system and external policy goals, and Jerome Frank[34] and other Realists opined that psychological or other personal factors are at work.[35] But in focusing on judges and litigated cases, all seemed to believe that the routine operation of law in its uncontested and unlitigated aspect remained largely untouched by properly understood Realist claims.

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29. Which he did in multiple ways. *See* LEITER, *supra* note 2, at 17–18 (explaining that Hart "misread the Realists as answering philosophical questions of conceptual analysis" when in fact the Realists were "not explicitly concerned with analyzing the 'concept' of law as it figures in everyday usage"); *id.* at 59–60 (arguing that "[o]nly by (wrongly) construing the Realist theory of adjudication as a conceptual theory of law could Hart make it seem that Positivism and Realism are opposed doctrines").

30. *See supra* note 24.

31. And especially in the Supreme Court, where the ideological valence of the issues and the miniscule number of cases actually decided presents the selection effect at its acme. *See generally* Frederick Schauer, *The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4 (2006) (analyzing the Supreme Court's decisional agenda). This extreme manifestation of the selection effect is implicit in Chief Justice Charles Evans Hughes's comment to Justice William O. Douglas that "you must remember one thing. At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections." WILLIAM O. DOUGLAS, THE COURT YEARS, 1939–1975, at 8 (1980).

32. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–08 (1958).

33. HART, *supra* note 7, at 125–32; *see also* BELL, *supra* note 21, at 226–30 (describing the "interstitial legislator" model); HANS KELSEN, PURE THEORY OF LAW 348–56 (Max Knight trans., 1967) (arguing that "every law-applying act is only partly determined by law"); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 180–209 (1979) (arguing that judges rely on their own moral judgments to decide "unregulated" disputes).

34. FRANK, COURTS ON TRIAL, *supra* note 20, at 146–57; Frank, *Are Judges Human II*, *supra* note 22, 241–42.

35. *See* EDWARD STEVENS ROBINSON, LAW AND THE LAWYERS 167–91 (1935) (arguing that the concepts of jurisprudence must be assessed under the lens of psychological and sociological analyses); FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955, at 29–30 (1955) (discussing the contributions of the Justices as individuals); SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY 52–53 (2005) (identifying Thurman Arnold's contributions to the Realist movement); Schroeder, *supra* note 23 (applying modern analytic psychology to understand judicial opinions).

Any understanding that renders Realism compatible with Hart's attack on it, and that leaves so much of the traditional picture untouched, seems so far from the common radical and threatening portrayal of Realism[36] that we can label it "Tamed Realism". Tamed Realism, prominent in the literature,[37] might instead be described as bounded, peripheral, or interstitial, each term highlighting that Realist claims are most plausible when relegated to the indeterminate edges of law, and become less so with respect to all legal rules in all applications. I characterize this understanding of Realism as "tamed" in order to situate it with respect to the common belief that Realism threatens the traditional picture of law. But if Realism is restricted to a narrow subset—appellate cases, or even litigated cases—of the complete set of legal events, it becomes less threatening to a traditional picture of how law in its entirety operates.

III. The Challenge of (Even) Tamed Realism

Understanding the Realist challenge as tamed or bounded hardly makes it unimportant. After all, the view that judicial decision making is substantially determined by positive law traditionally conceived,[38] even in

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36. *See* HART, *supra* note 7, at 135–47 (criticizing Realists for "ignor[ing] what rules actually are in any sphere of real life"); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 694 (1987) (noting the Realists' "corrosive skepticism about legal rules and doctrine"); Charles Fried, *A Meditation on the First Principles of Judicial Ethics*, 32 HOFSTRA L. REV. 1227, 1243 (2004) (decrying the "corrosive and degraded" features of "realism, deconstruction and various other French diseases"); Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 499 (2011) (describing the "radical indeterminacy inherent in the legal realist conception of law"); Paul J. Mishkin, *The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 68 (1965) (lamenting the "corrosive effect" of Realism); Suzanna Sherry, *Democracy and the Death of Knowledge*, 75 U. CIN. L. REV. 1053, 1062 (2007) (associating Legal Realism with postmodern rejections of truth and objectivity); Brian Z. Tamanaha, *Balanced Realism on Judging*, 44 VAL. U. L. REV. 1243, 1258 (2010) (noting that Realists are "often portrayed" as "radicals about judging"); W. Bradley Wendel, *Impartiality in Judicial Ethics: A Jurisprudential Analysis*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305, 315 (2008) (observing the "radical indeterminacy thesis" of the Realists).

37. *See* FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 137–38 (2009) (limiting the Realist challenge to hard cases); Ken Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 296–97 (1989) (identifying the difference between indeterminacy in appellate cases and the normal indeterminacy of law); Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1226–27 (2009) (criticizing Ronald Dworkin for failing to recognize that most applications of law do not involve disagreement); Brian Leiter, *Legal Indeterminacy*, *in* 1 LEGAL THEORY 481, 485 (1995) [hereinafter, Leiter, *Legal Indeterminacy*] (accepting the existence of easy cases, agreeing with Andrei Marmor, that easy cases are those in which "the facts . . . [of the case] fit the core of the pertinent concept-words of the rule in question [with the result that] the application of the rule is obvious and unproblematic" (quoting ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 126 (1992)), and maintaining that easy cases are those in which legal interpretation operates by the "plain meaning of the words" of a legal rule, and in which the "standard instances picked out by the concept the words stand for are uncontroversial").

38. Of course if the very notion of law, and what counts as law, is understood broadly enough, then the contention that nonlegal factors play a role in legal decision making becomes almost

litigated or appealed cases, is widespread,[39] and has been for centuries.[40] Although every dispute differs at least slightly from its predecessors, and although applying even precise statutory language to a new situation requires some degree of interpretation, the traditional view supposes that the techniques of legal reasoning point to correct outcomes even in cases that wind up in appellate courts.[41] Even with the demise of the belief that judicial decision making is typically mechanical,[42] a persistent view, one dominant prior to the Realists, is that even nonmechanical judicial decisions are based overwhelmingly on the law.[43] Even now, standard works on legal reasoning focus on appellate cases, the implicit message being that even for these cases some answers and methods are *legally* better than others.[44]

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impossible. LEITER, *supra* note 2, at 11. When the domain of law is defined to include not only positive law traditionally conceived, but also a host of moral, policy, and political factors, then the claim that legal decision making typically involves nonlegal factors becomes uninterestingly false precisely because what the Realists understood as nonlaw has been redefined as law. But if, with the Realists and others (*see, e.g.*, Scott J. Shapiro, *Law, Morality, and the Guidance of Conduct*, 6 LEGAL THEORY 127 (2000) (defending exclusive positivism)), we understand law as a domain of sources and inputs substantially narrower than those otherwise accepted within the society for, say, moral or policy decisions (on the contours of that domain, see Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1910 (2004) [hereinafter, Schauer, *The Limited Domain of the Law*]), then the extent to which judges make decisions only or presumptively on the basis of such material becomes a question about which it is possible to engage in serious empirical inquiry, and about which the Realists and the "traditionalists" are in genuine disagreement.

39. *See, e.g.*, CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 66–67 (1991) (arguing that traditional techniques of legal reasoning are substantially constraining); *see also* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 909 (1992) (noting the way in which judicial intuitions are constrained by traditional methods of legal reasoning); James Gordley, *Legal Reasoning: An Introduction*, 72 CALIF. L. REV. 138, 140 (1984) (maintaining that legal reasoning can produce judicial outcomes even when rules are vague or lacking); Lawrence C. Marshall, *Intellectual Feasts and Intellectual Responsibility*, 84 NW. U. L. REV. 832, 843 (1990) (approving the public's "expectation that judges will decide most cases on the basis of neutral principles derived from traditional methods of legal reasoning").

40. BLACKSTONE, *supra* note 13; COKE, *supra* note 14; WAMBAUGH, *supra* note 16; Zane, *supra* note 17. Indeed, the Realists' targets understood Realism as a genuine challenge. *See* SAMUEL WILLISTON, SOME MODERN TENDENCIES IN THE LAW 154 (1929) (defending deductive reasoning as a part of legal decisions); George K. Gardner, *An Inquiry into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1, 41 (1932) (supporting the use of precedent for resolving legal disputes despite the uncertainties that it creates).

41. *See* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 40–41 (1983) (discussing the use of conceptual order and formality in the classical legal system).

42. *See* PATTERSON, *supra* note 2, at 181–82 (describing the rejection of a mechanical approach by Cardozo, Holmes, and Kantorowicz).

43. *See supra* notes 39–41.

44. *See, e.g.*, STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 25 (2d ed. 1995) (explaining analogical reasoning in the common law); BRIAN L. PORTO, THE CRAFT OF LEGAL REASONING 19 (1998) (explaining common law adjudication in terms of case-specific legal reasoning); GLANVILLE WILLIAMS, LEARNING THE LAW 92–93 (A.T.H. Smith ed., 13th ed. 2006) (describing the characteristically legal process of identifying the *ratio decidendi* of a case). Earlier, Roscoe Pound had characterized the traditional view as follows:

> The jurist was to find universal principles by analysis of the actual law. He had nothing to do with creative activity. His work was to be that of orderly logical

The traditional view of legal decision making in cases not explicitly governed by existing law reaches its pinnacle in Ronald Dworkin's sophisticated version.[45] In denying that judges exercise discretion in any conventional sense of that word,[46] and in maintaining that judging is a search for the "right answer" to any legal controversy,[47] Dworkin, although acknowledging disagreement in practice,[48] nevertheless offers an argument compatible with the traditional view that law governs even those events about which it seems, on the surface, to be silent. Or, put differently, law controls the hard cases as well as the easy ones. More pervasively, the traditional view is seen in the ubiquitous practice, especially in the United States, of accusing judges who have reached disagreeable results in appellate cases of having made technical legal errors or "mistakes" rather than of having the wrong substantive views.[49]

> development of the principles reached by analysis of what he found already given in the law . . . . [T]he jurist was [to exercise] a . . . restricted function so far as he could work with materials afforded exclusively by the law itself.

ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 53–54 (1922).

45. RONALD DWORKIN, LAW'S EMPIRE (1986); Ronald Dworkin, *No Right Answer?*, *in* LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 55 (P.M.S. Hacker & Joseph Raz eds., 1977) [hereinafter Dworkin, *No Right Answer*].

46. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31–39, 68–71 (1977).

47. RONALD DWORKIN, JUSTICE IN ROBES 41–43 (2006) [hereinafter DWORKIN, JUSTICE IN ROBES]; RONALD DWORKIN, A MATTER OF PRINCIPLE 119–45 (1985); Dworkin, *No Right Answer*, *supra* note 45.

48. DWORKIN, JUSTICE IN ROBES, *supra* note 47, at 42–43.

49. *See, e.g.*, Bruce Ackerman, *Off Balance*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 192, 196 (Bruce Ackerman ed., 2002) (contending that there was "no legally valid reason" for the Supreme Court's decision in *Bush v. Gore*); Jack M. Balkin, Bush v. Gore *and the Boundary between Law and Politics*, 110 YALE L.J. 1407, 1413–31 (2001) (criticizing the legal analysis in *Bush v. Gore*); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 924 (1973) (accusing the Supreme Court of "mistak[ing] a definition for a syllogism" in *Roe v. Wade*); Owen Fiss, *The Fallibility of Reason*, *in* BUSH V. GORE, *supra*, at 85, 95 (arguing that the Supreme Court's error in *Bush v. Gore* was in misapplying the conventional disciplining rules of legal interpretation); Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1235 (2012) (claiming that the Supreme Court's error in *Ohio v. Roberts* "was in ignoring the text"); Jessica A. Roth, *Alternative Elements*, 59 UCLA L. REV. 170, 187 n.55 (2011) (alleging that the Supreme Court's mistake in a criminal procedure case was in using the wrong analogy); Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1182 (2003) (attributing death penalty outcomes to judicial "mistakes" and "confusion"). The same phenomenon exists for decisions that are applauded rather than criticized. *See, e.g.*, Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1450 (2000) (describing *United States v. Virginia* as the "logical culmination" of previous decisions). Most recently, much of the commentary on both sides of the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, Nos. 11-393, 11-398 & 11-400 (June 28, 2012) has a decidedly non-Realist flavor. *E.g.*, Akhil Reed Amar, Op-ed., *Constitutional Showdown*, L.A. TIMES, Feb. 6, 2011, http://articles.latimes.com/2011/feb/06/opinion/la-oe-amar-health-care-legal-20110206 (arguing that the judge erred by failing to adhere to prior precedent); Brian Leiter, *Why the Affordable Health Care Act Was Clearly Constitutional Under Existing Precedents*, LEITER REP.: A PHIL. BLOG (July 9, 2012, 9:18 AM), http://leiterreports.typepad.com/blog/2012/07/why-the-affordable-health-care-act-was-clearly-constitutional-under-existing-precedents.html; Randy Barnett, *The Unprecedented Uniqueness of Chief Justice Roberts'*

Once we recognize the persistence of the belief that seemingly unregulated cases have legally right answers, the identification of which is the normal diet of legal reasoning, we can appreciate the challenge of even Tamed Realism. When François Gény celebrated the judge as a creative lawmaker in cases where the civil code did not indicate an outcome,[50] he departed from his civilian predecessors who believed that substantially constrained logical or linguistic operations enabled interpreters of the code to identify uniquely correct results even when the code did not explicitly cover a particular situation.[51] Similarly, the *Freirechtsschule* (Free Law School) of Hermann Kantorowicz, Eugen Ehrlich, and their allies[52] argued not that the law was anything that judges wanted it to be, but that decision making within legal gaps was "free" of law, thereby allowing judges to exercise discretion and create law on the basis of nonlegal factors.[53] We think of Gény and the *Freirechtsschule* as precursors to American Realism precisely because their claims about gaps, discretion, and judicial lawmaking within the gaps seemed heretical when made, however much such claims seem mild and conventional today. And so too with the most prominent of Realism's forerunners, Oliver Wendell Holmes, whose assertion that "the life of the law has not been logic; it has been experience"[54] is best interpreted as insisting that the common law necessarily draws on nonlegal empirical factors when preexisting law is silent.

The Realists and their precursors thus believed that legal gaps were to be filled by judges acting as lawmakers. That this view is now held by critics of Realism as well as Realists may make it seem trivially true, but the appearance is deceiving. Recognizing judicial discretion exercised on substantially nonlegal grounds within law's gaps may seem tame today, but it

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Opinion, VOLOKH CONSPIRACY (July 5, 2012, 5:14 PM), www.volokh.com/2012/07/05/the-unprecedented-uniqueness-of-chief-justice-roberts-opinion/.

50. FRANÇOIS GÉNY, METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW (Jaro Mayda trans., 2d ed. 1963) (1919); François Gény, *Judicial Freedom of Decision, Its Necessity and Method*, *in* SCIENCE OF LEGAL METHOD (Ernest Bruncken & Layton B. Register trans., 1917); *see* JARO MAYDA, FRANÇOIS GÉNY AND MODERN JURISPRUDENCE 6 (1978) (noting that, for Gény, when statutes and formal doctrine fail to provide an answer, "the judge must *freely search for a rule* on which to base his decision").

51. *See* Marie-Claire Belleau, *The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth-Century France*, 1997 UTAH L. REV. 379, 393–94 (distinguishing Gény as critical of traditionalists who elevated legal constructs to the level of objective reality).

52. *See* Eugen Ehrlich, *Judicial Freedom of Decision: Its Principles and Objects*, *in* SCIENCE OF LEGAL METHOD, *supra* note 50, at 47, 71 (arguing that judges who make decisions without reference to statute are by no means arbitrary, and are instead acting out of the "juridical tradition"); Gnavius Flavius, *The Battle for Legal Science*, 12 GERMAN L.J. 2005 (2011) (translating a 1906 pseudonymous article by Hermann Kantorowicz). On the *Freirechtsschule* and its influence on Realism generally, see James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399 (1987).

53. *See* Herget & Wallace, *supra* note 52, at 413–17 (describing the free law movement's belief that judicial recognition was the source of law).

54. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Mark D. Howe ed., Harv. Univ. Press 1963) (1st ed. 1881).

was a substantial challenge previously, and remains far from universal even now.

IV. Realism Untamed

At the heart of Tamed Realism lie two related premises. One is that there are easy cases. The other is that easy cases are easy by virtue of the facts straightforwardly falling under the plain (whether ordinary or technical)[55] meaning of the language of a legal rule. Thus, Andrei Marmor sees easy cases as those in which the "concept-words" of a legal rule fit some set of facts in an "obvious" and "unproblematic" way,[56] and Brian Leiter understands them as ones in which the "plain meaning of the words" of a legal rule produces an outcome.[57] Others have made similar claims.[58] And Hart, when first offering his "No Vehicles in the Park" example,[59] took the conventional meaning of "vehicle" and "park" as the starting point for determining which events clearly fell under the rule.

Tamed Realism is premised on the assumption that such straightforward applications of legal rules are rarely contested in court, leaving a vast number of often invisible but easy and routine applications of law existing alongside the more visible hard and litigated cases in which nonlegal factors play a

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55. This is not the occasion for extended analysis of legal technical meaning, but it is worth emphasizing that plain meaning is not necessarily ordinary meaning. There can be technical meanings widely understood in a specialized domain by members of a linguistic (sub)community. In that case the meanings would be plain, albeit technical. "Meson" has a plain meaning for physicists, and "gesso" for painters, although such terms do not appear in ordinary language. And the same holds true for law, where the plain meanings of "habeas corpus," "quantum meruit," "tying arrangement," "curtesy," and "interrogatory" are no part of ordinary language. On the relationship between ordinary and technical language in general, see Charles E. Caton, *Introduction*, *in* PHILOSOPHY AND ORDINARY LANGUAGE v, vii–xi (Charles E. Caton ed., 1963). On technical legal language and its relation to ordinary language, see Mary Jane Morrison, *Excursions into the Nature of Legal Language*, 37 CLEV. ST. L. REV. 271 (1989).

56. MARMOR, *supra* note 37, at 126.

57. Leiter, *Legal Indeterminacy*, *supra* note 37, at 485.

58. *E.g.*, PUD No. 1 of Jefferson Cnty. v. Wash. Dep't. of Ecology, 511 U.S. 700, 723 (1994) (Stevens, J., concurring) (asserting that the plain meaning of a statute makes the case easy); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1233 (1992) (same); James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV. 901, 906–07 (2011) (same); Lauren C. Hennessey, *No Exception for "No": Rejection of the Exculpatory No Doctrine*, 89 J. CRIM. L. & CRIMINOLOGY 905, 937 (1999) ((clear language produces an easy case); Steven J. Johansen, *What Does Ambiguous Mean? Making Sense of Statutory Analysis in Oregon*, 34 WILLAMETTE L. REV. 219, 228–29 (1998) (same); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 708–09 (2011) (concluding that many constitutional provisions are understood to mean what they say); Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 717 (1992) (noting that plain meaning often dictates straightforward outcomes).

59. Hart, *Positivism*, *supra* note 32, at 607. Hart subsequently acknowledged that the core of a legal rule might, contingently, be based, in part, on a rule's purpose as well as its literal meaning. H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 1, 7–8 (1983). At the same time, however, he reemphasized that the core of a legal rule could, again contingently, be entirely a function of the "settled conventions of language." *Id.* Hart's example is analyzed at length in Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109 (2008).

major role. Thus in constitutional law,[60] a domain in which the nonlegal dimensions of contested cases are especially apparent,[61] numerous constitutionally determined outcomes remain unlitigated precisely because the words of a constitutional provision are so clear as to make litigation futile. The plain language of the Twenty-Second Amendment,[62] for example, prohibits a President from serving a third term, and the precise words of Article I bar twenty-eight-year-olds from serving in the Senate.[63] That litigation under such provisions would be pointless, however, does not render them irrelevant. Without them, well-qualified (or at least as qualified as anyone else) twenty-eight-year-olds might well be elected to and serve in the Senate, and popular Presidents could, as with Franklin Roosevelt prior to the adoption of the Twenty-Second Amendment, serve third (and fourth) terms. Law in its determinate and unlitigated application might thus be efficacious[64] in producing outcomes different from those that would have existed without the rule, or with a different rule.

Undergirding this picture of law in its nonlitigated everyday application is the premise that the easiness of easy cases—or, more accurately, the easy application of the law—is typically determined by the meaning of the language of the pertinent legal rule, and that the indications of the meaning are ordinarily followed by judges. The consequence is the hypothesis that most disputes or events clearly falling under a rule's language are ones in

60. Schauer, *Easy Cases*, *supra* note 1, at 404.

61. That nonlegal factors (see *supra* note 38, however, for important clarification) play the predominant role in Supreme Court constitutional litigation is the chief contribution of the so-called attitudinal perspective on Supreme Court decision making. *See, e.g.*, SAUL BRENNER & HAROLD SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE U.S. SUPREME COURT, 1946–1992 (1995) (finding precedent less important than ideological attitudes in explaining Justices' votes); *see also* Lee Epstein & William M. Landes, *Was There Ever Such a Thing as Judicial Self-Restraint?*, 100 CALIF. L. REV. 557, 559 (2012) (concluding that "Justices appointed since the 1960s were and remain ideological in their approach to the constitutionality of federal laws"). *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) (analyzing the role of nonlegal attitudes in Supreme Court decision making); William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169 (1996) (same); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 561 (1989) (same).

62. "No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once." U.S. CONST. amend. XXII, § 1.

63. "No person shall be a Senator who shall not have attained to the Age of thirty Years, . . ." *Id.* art. I, § 3, cl. 3.

64. That is, the law would exclude otherwise societally eligible outcomes and mandate ineligible ones. On whether law would be efficacious in doing so, compare Frederick Schauer, *Easy Cases*, *supra* note 1 (stating that the Constitution's precise language in some matters will forestall "litigation with respect even to matters of great moment"), with Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 687–89 (1985) (noting the dependence of seemingly plain meaning on contingent social agreement); Tushnet, *Following the Rules Laid Down*, *supra* note 2, at 822–24 (same).

which one party, with little hope of prevailing, would rarely pursue litigation. The selection effect[65] is thus parasitic on the existence of easy cases.[66] Tamed Realism's relegation of legal indeterminacy to the litigated fringe of law presupposes a core of easy cases whose easiness is determined by the straightforward interpretation of conventional legal materials by the equally straightforward application of standard methods of legal reasoning.

But now consider Llewellyn's distinction between paper rules and real rules, a distinction first offered in 1930,[67] and subsequently elaborated several years later.[68] In drawing the distinction, Llewellyn distanced himself from the particularism of Jerome Frank,[69] Joseph Hutcheson,[70] and other Realists,[71] making clear he believed there to be legal rules.[72] Moreover, such rules were not simply *ex post* descriptions of categories of legal outcomes. Llewellyn fully recognized the distinction between descriptive and prescriptive rules,[73] and understood the idea of internalized prescriptive and guiding rules,[74] exactly the idea that Hart mistakenly accused him and other Realists of failing to comprehend.[75] What Llewellyn and others[76] denied, however, was the identity between the real rules, the prescriptive rules actually internalized by judges and used in making decisions, and the paper rules, the rules in "propositional form,"[77] which happened to be written down in law books.[78]

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65. *See supra* note 25 and accompanying text.

66. Leiter, *Legal Indeterminacy*, *supra* note 37, at 488.

67. Llewellyn, *A Realistic Jurisprudence*, *supra* note 5, at 444–57.

68. LLEWELLYN, THE THEORY OF RULES, *supra* note 5, at 63–76. The exact period when Llewellyn produced the manuscript is uncertain.

69. FRANK, *supra* note 20, *passim*. *See generally* Charles L. Barzun, *Jerome Frank and the Modern Mind*, 58 BUFF. L. REV. 1127, 1129 (2010) (offering an interpretation of Frank's version of Legal Realism that focuses on "particular human characteristics" of judges as the basis for analysis of legal progress).

70. Hutcheson, *supra* note 22, at 276–77.

71. *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 80–81 (1977) (describing the particularism of Wesley Sturges); *see also* Herman Oliphant, *Mutuality of Obligation in Bilateral Contracts at Law*, 28 COLUM. L. REV. 997, 999–1000 (1928) (complaining about the excess breadth of most statements of law).

72. LLEWELLYN, THE THEORY OF RULES, *supra* note 5, at 51–52.

73. On the distinction, see FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991).

74. LLEWELLYN, THE THEORY OF RULES, *supra* note 5, at 51–62. The title of the chapter, "Rules of Law: Command and Prediction," leaves little doubt about Llewellyn's understanding of prescriptive rules.

75. HART, *supra* note 7, at 137–47.

76. *See supra* note 7. Later in his life, Frank too subscribed to the distinction between paper and real rules. Jerome Frank, *Civil Law Influences on the Common Law—Some Reflections on "Comparative" and "Contrastive" Law*, 104 U. PA. L. REV. 887, 904 (1956). In fact, he had noted the distinction long earlier. FRANK, *supra* note 20, at vii. And on the idea of a working rule, see also JOHN R. COMMONS, THE ECONOMICS OF COLLECTIVE ACTION 125–26 (1970).

77. LLEWELLYN, THE THEORY OF RULES, *supra* note 5, at 63.

78. On the distinction, see also Stephenson, *supra* note 27, at 198–99.

Before turning to judicial examples, consider, as an aid to grasping the basic idea, the typical interstate highway speed limit. The official limit is often 65 miles per hour, which is what is posted on signs, located in codified highway rules and regulations, and sometimes even set forth in a statute. Sixty-five miles per hour is the relevant paper rule. Yet although 65 is the paper rule, it is common knowledge that the real rule is often 74.[79] Police rarely ticket drivers unless they are exceeding 74,[80] and judges, in the unlikely event a driver summoned to court for driving at greater than 65 but less than 75, might, although more debatably, find a way to acquit or dismiss.[81] Insofar as both police officers and judges actually so behave, the real rule is a speed limit of 74 and not 65. And this divergence between the paper rule of 65 and the real rule of 74 is exactly what the Realists were at pains to stress.

Note that 74 miles per hour in the example is a genuine prescriptive and guiding rule, providing a reason, albeit not necessarily a conclusive one, for decision pursuant to it. Some police officers and some judges could believe that sound public policy permitted driving up to but not above 74, believing that the posted limits are too low, that speed is not a major contributor to highway accidents, that losses in safety from faster driving are not worth losses in efficiency from slower driving, or that it is useful to enforce a limit containing a substantial margin of error. But whatever the reason, they might well internalize, exactly in Hart's sense, the "speed limit 74" rule, albeit with

79. Kansas even makes it quasi-official. KAN. STAT. ANN. § 8-1560d (2010). On the divergence between posted and real speed limits as exemplifying the gap between law on the books and law in action, see Albert W. Alschuler, *The Descending Trail: Holmes'* Path of the Law *One Hundred Years Later*, 49 FLA. L. REV. 353, 367–68 (1997) (noting a five-mile-per-hour divergence); Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 718 (1998) (same).

80. A useful portal into state practices is *State Traffic and Speed Laws*, MIT, http://www.mit.edu/~jfc/laws.html (last modified June 27, 2012). Various (alleged) police officers describe their practices, rather more complex and nuanced than indicated in the text, at *Tolerance for Above Speed Limit*, OFFICER.COM (Oct. 20, 2012, 2:55 PM), http://forums.officer.com/t80902/. On speed limit enforcement generally, with special attention to Montana's experiment in eliminating numerical limits, see Robert E. King & Cass R. Sunstein, *Doing Without Speed Limits*, 79 B.U. L. REV. 155 (1999).

81. Of course some judges might enforce 65 even if police officers routinely applied 74. Police officers might not ordinarily ticket anyone driving under 75, but if they happened to do so, judges might still convict anyone proved to be driving over 65. On the other hand, judges, aware of the 74-miles-per-hour real rule (note that Schiltz, *supra* note 79, is a judge), might instead find a way to acquit drivers proved to be driving at greater than 65 but less than 75. More broadly, therefore, the real rule for a police officer might well not be the real rule for a judge. Or the real rule for a judge might be closer to the paper rule than it is for a police officer. It is thus a mistake to assume that the distinction between paper and real rules operates in the same way for all officials, but, as the Realists stressed, it is also a mistake to assume, without empirical investigation, that the real rules that even judges used could be identified simply by identifying the formal legal doctrine or the "announced" rules. *See* Llewellyn, *A Realistic Jurisprudence*, *supra* note 5, at 444 (describing the difference between accepted rules and the practice of decision in judges' actual behavior).

opinions couched in different terms and relying, often disingenuously, on different reasons.[82]

The important feature of the internalization and application of a real rule at variance with the paper one is that there are still easy cases. If the real rule internalized and applied by judges is as described, then a driver driving at 67 presents an easy case because 67 is plainly less than 74. And because 67 is plainly less than 74, then the "speed limit 74" rule straightforwardly prescribes and predicts the outcome whenever a police officer or judge uses that and not the paper rule. But "speed limit 74" is nowhere to be found in the official law, which is exactly what Llewellyn and others sought to highlight.[83]

When "speed limit 74" is the real rule, however, and when "speed limit 74" generates easy cases, the selection effect still obtains. Drivers will drive at 67 with impunity, and police officers will not stop them for doing so, even though the written law has been broken. Drivers will know that the real "speed limit 74" rule gives them chances the paper rule does not. And police officers will systematically refrain from ticketing drivers even when enforcement actions would be sound based on the paper rule because they know their chances of succeeding before a judge in a contested case would be small. The cases winding up in court will then still disproportionately be the hard cases, whether because they are on the edges of the rule, as with someone driving 73.9 or 74.1, or because other factors (erratic driving, say, or a child in the car) are present, or because someone caught exceeding the real speed limit had a good and possibly legally cognizable reason for doing so.

The lesson of this example is that even when real rules diverge from paper rules, there will still be easy cases, and the selection effect will still exclude them from litigation. But the easiness of the easy cases will no longer be determined by the conventional legal meaning of published legal rules, as tamed Realism maintains, but instead by the plain understanding of a rule not located in standard legal sources. Untamed Realism, by stressing the distinction between paper and real rules, accepts that easy cases differ from hard ones, and that mostly hard cases wind up in court, but challenges the traditional understanding of what makes an easy case easy and consequently unlitigated.

As transformed, the Realist challenge is no longer limited to the class of cases in which the language of the law or the traditional devices of legal analysis—the standard implements in the lawyer's toolkit—do not

82. That the reasons supplied by judges in justifying their decisions are typically not the reasons that produced those decisions is a central Realist tenet. *See supra* Part I.

83. *See, e.g.*, Llewellyn, *A Realistic Jurisprudence*, *supra* note 5, at 448 ("'Paper rules' are what have been treated, traditionally, as rules of law: the accepted *doctrine* of the time and place—what the books there say 'the law' is. The 'real rules' and rights—'what the courts will do in a given case, and nothing more pretentious'—are then predictions.").

straightforwardly indicate an outcome. Rather, it is a claim about the impotence of paper rules (and traditional techniques of legal reasoning) in generating legal outcomes. Insofar as the claim is empirically sound, it is thus about all of law, and not just the law to be applied when paper rules are indeterminate. The challenge is now to the very idea of positive or formal law as the source of legal determinacy, and is thus Realism in its far less interstitial and thus far less tamed dimension. Untamed Realism does not claim that there is no legal determinacy, but instead that legal determinacy is often a product of something other than the conventional legal meaning of official rules.[84] Or, to put it differently, the Realist claim about the gap between paper and real rules is not about indeterminacy, but about what we might call *dislocated determinacy*.

The speed limit example presents dislocated determinacy crisply, but Realism was focused on judges. So consider the rules of evidence. Although many formal evidentiary rules govern trials in American courts, American evidence law cannot accurately be described without recognizing that judges, when acting as fact finders without a jury, routinely discard many of the official rules of evidence.[85] The judges make rule-guided decisions, but they are guided by rules at odds with the formal paper rules. In acting in this way, the judges are applying a genuinely internalized rule. Not only do they believe that proceeding largely without the formal rules of evidence is what they ought to do, but a judge who rigidly enforced the rules in a bench trial might also be subject to criticism for failing to apply the widely accepted but unwritten real rule mandating the nonuse of the paper rules of evidence.

Dislocated determinacy appears even more sharply when a *single* real rule of decision diverges from the paper rule. Consider the research by Bernard Wolfman and his collaborators on the votes of Justice William O. Douglas (himself a pioneer Realist) in federal income tax cases.[86] Whatever the actual indications of the Internal Revenue Code or its associated rulings and interpretations, Wolfman argued, Douglas actually applied a "taxpayer wins" rule, and thus, for him, "taxpayer wins" was the real rule actually applied (and, arguably, genuinely internalized) in making decisions.

As in the speed limit example, instances of paper rule–real rule divergence multiply when we examine enforcement practices as well as

84. On the point that Realism is best seen as a matter of degree, see Stephenson, *supra* note 27, at 197–98.

85. *See* JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 4d.1, at 213–14 (Peter Tillers rev. ed., 1983) ("[M]any of the exclusionary rules [of evidence] are not vigorously enforced in bench trials."); Richard A. Posner, *Comment on Lempert on Posner*, 87 VA. L. REV. 1713, 1714 n.8 (2001) ("Most lawyers and judges have quite a relaxed sense of the rules of evidence, often ignoring them by tacit agreement and not only in bench trials."); Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 165–66 (2006) (collecting references).

86. BERNARD WOLFMAN ET AL., DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES (1975).

judicial decisions. According to the Securities Act of 1933, for example,[87] issuers of securities must file a registration statement with the Securities and Exchange Commission prior to selling securities to the public.[88] The registration then becomes effective—the securities can be sold—twenty days after the Commission has found the representations in the registration statement sufficient to provide adequate information to prospective investors.[89] Because of continuous price fluctuations in the financial markets, however, offerings are highly time- and price-sensitive. In practice, therefore, securities must be offered very shortly after a price-dependent underwriting agreement, an agreement that is itself part of the required registration materials, is finalized. And because a registrant forced to wait twenty days after Commission approval is consequently doomed to an unsuccessful offering, the discretionary power of the Commission to "accelerate" the twenty-day waiting period[90] is in practice crucial. Knowing the importance of acceleration, the Commission has long used its discretionary acceleration power to impose requirements nowhere to be found in the statute—a commitment to nonindemnification of directors for wrongdoing, for example.[91] And thus there is now substantial divergence between the paper rule as embodied in the statute and the requirements imposed by the relevant enforcement authority.

Somewhat similar is the fact that the promise of *New York Times Co. v. Sullivan*[92] in freeing the press from much of the risk of libel litigation is undercut by the way in which libel insurers tend to impose upon their insured publications requirements that would seem unnecessary under *Sullivan* alone.[93] Here the real rule is imposed by private insurer behavior and not by official administration and enforcement, but the gap and its effect on primary behavior still exists.

Libel practice and SEC acceleration practice are examples of paper and real rules diverging by virtue of the real enforcement of what on paper is not a rule at all. More commonly, however, the divergence between paper and real rules comes from the nonenforcement of a paper rule. Examples

87. 15 U.S.C. §§ 77a–i (2010).

88. *Id.* § 77e.

89. *Id.* § 77h(a).

90. *See* 17 C.F.R. § 230.461 (2012) (allowing for acceleration of the effective date of registration by written request).

91. *See* Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 711 n.94 (describing non-acceleration where indemnification is guaranteed); *see also* Mark Anthony Jefferis, *Regulation A: Direct Public Offerings and the Internet*, 79 DENV. U. L. REV. 229, 238 n.63 (2001) (noting the Commission-imposed requirement of adequate distribution).

92. 354 U.S. 467 (1964).

93. Note, for example, the fact that libel insurers often ask applicants about the extent of pre-publication legal review. For an example, see NEW ENGLAND NEWSPAPER & PRESS ASS'N, NEWSPAPER PUBLISHER LIABILITY INSURANCE APPLICATION FOR COVERAGE 2 (2008), *available at* http://issisvs.com/nenpa/nenpa_inter_app.pdf at 2.

abound, as with speed limits, and often with taxation. In *Dickman v. Commissioner of Internal Revenue*,[94] for example, the Supreme Court noted the prior de facto exemption of an intra-family interest-free loan from being treated as a taxable gift,[95] the exemption operating to eliminate the paper rule and substitute a real rule of nontaxability. Even more pervasively, the widespread nonenforcement of state sales and use taxes on most interstate consumer transactions has much the same effect.[96]

As with real speed limits, all of these real rules generate easy cases. A lawyer in a nonjury trial will often not make a technically valid objection, knowing that if she did so the objection would not only be overruled, but also that she would likely be scolded by the judge for being so silly as to make what, on the basis of the paper rules, was a legitimate objection. A lawyer who, not knowing the rules about SEC acceleration, neglected to comply with the unwritten rules imposed by the Commission as a condition for acceleration could well be found to have committed malpractice. And most people treat their technical obligations to pay sales and use taxes on routine Internet consumer transactions as easy cases of legal permissibility, although the formal law is to the contrary.

These examples suggest the conclusion that the gap between paper and real rules is potentially a pervasive phenomenon throughout the law,[97] influencing which cases are hard and which easy. Insofar as the gap exists,

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94. 465 U.S. 330 (1984).

95. *Id.* at 342–43.

96. *See* Christopher Banthin, *Cheap Smokes: State and Federal Responses to Tobacco Tax Evasion over the Internet*, 14 HEALTH MATRIX 325, 335 (2004) (arguing that practical and legal obstacles to enforcement inhibit collection of use taxes on out-of-state purchases); Brian Masterson, Note, *Collecting Sales and Use Tax on Electronic Commerce: E-confusion or E-collection*, 79 N.C. L. REV. 203, 205 & n.11 (2000) ("In the overwhelming majority of instances in which the remote seller does not collect the use tax, the state does not have an enforcement mechanism to recover the use tax from the consumer."); Sam Zaprzalka, Note, *New York's Amazon Tax Not out of the Forest Yet: The Battle over Affiliate Nexus*, 33 SEATTLE U. L. REV. 527, 531–32 (2010) (observing that lack of consumer awareness of use tax obligations, ineffective state enforcement, and disobedience "result in almost universal noncompliance" with use tax laws).

97. And elsewhere. Those fond of legal examples from sports and games may recognize the exact phenomenon under discussion in the so-called phantom tag in baseball, where umpires genuinely internalize and apply a rule about tagging a runner that differs from the rule on the books. So too with the former distinction between American and National League strike zones, a distinction nowhere to be found in the official rules of baseball. *See* David W. Rainey & Janet D. Larsen, *Balls, Strikes, and Norms: Rule Violations and Normative Rules Among Baseball Umpires*, 10 J. SPORT & EXERCISE PSYCH. 75, 77, 79 (1988) (stating that umpires routinely called the strike zone more than two inches lower than the definition in the official rules in spite of the fact that 94% of those surveyed knew the official definition); David W. Rainey et al., *Normative Rules Among Umpires: The "Phantom Tag" at Second Base*, 16 J. SPORT BEHAVIOR 147, 152–53 (1993) (describing that, in spite of the official rules, more than half of umpires in the study allowed the phantom tag, whereby a runner is called out at second even when the fielder does not have a foot on base so long as the ball beats the runner to the base); Peter Gammons, *What Ever Happened to the Strike Zone?*, SPORTS ILLUSTRATED, Apr. 6, 1987, at 40–45, *available at* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1065780/1/index.htm (explaining that differences in chest protector equipment for umpires led to the National League being a "low ball" league as compared to the American League).

and especially insofar, as with the evidence example, as the gap exists for judges, it undercuts not the idea that there are easy cases, but the belief that the rules found in lawbooks are the determinants of easiness. Were it known, for example, that a majority of the judges of some court routinely decided for the taxpayer in tax cases even when the code and regulations pointed in favor of the government,[98] then a lawyer with a taxpayer client might advise a formal challenge to a tax ruling even against the indications of the paper rules. There would still be easy cases under the "taxpayer wins" rule as opposed to the rules contained in the Internal Revenue Code, but some of the cases that would have been easy according to the paper rule would now be at least debatable, the paper rule notwithstanding. As in the previous examples, the distribution between easy and hard cases would come not from the official sources, but from the "taxpayer wins" rule.

In the above examples, the paper rule was understood in terms of the plain (even if technical) meaning of the language of the rule as published in formal legal sources. Yet although many Realists understood the matter in this way, the distinction between paper and real rules need not be so limited. More plausible, especially now and in the United States,[99] is understanding the idea of a paper rule to encompass the entire array of accepted conventional methods of legal reasoning. This expanded notion of a paper rule could include, for example, references to a rule's purpose[100] or legislative history,[101] application of accepted canons of statutory interpretation,[102] and conventional techniques for identifying the holdings in previously decided cases.[103] Yet even when the idea of a paper rule is

98. In other words, that there was a court a majority of whose judges behaved as Justice Douglas. WOLFMAN ET AL., *supra* note 86.

99. At least on the assumption that the United States is an especially nonformal legal environment. *See* P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW (1987) (maintaining that the American legal system is more substantive than formal).

100. *See* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 88 (Sari Bashi trans., 2005) (defining purposive interpretation and arguing for its pervasive use); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 116 (2011) (defining "new purposivism" and relating it to textual analysis).

101. *See* James J. Brudney, *Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court*, 85 WASH. U. L. REV. 1 *passim* (2007) (contrasting American and British uses of legislative proceedings in statutory interpretation); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1654–55 (2010) (offering empirical analysis of the likelihood of use of legislative history).

102. *See* CALEB NELSON, STATUTORY INTERPRETATION 108–226 (2011) (surveying and explaining traditional canons of statutory interpretation); 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 45:13 (7th ed. 2007) (providing an introduction to canons and aids of statutory construction).

103. *See* RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW (4th ed. 1991) (analyzing the doctrine of precedent in England); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 568–69 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (explaining and justifying use of and reliance on prior cases).

broadened to include the panoply of respectable methods of legal reasoning, the basic point still holds. If the paper rule is the rule as understood in light of its purpose, say, the paper rule so understood may still diverge from the actual rule as enforced and applied administratively and judicially. Justice Douglas's "taxpayer wins" rule,[104] for example, still differs from the rule that competent tax practitioners would extract from the available traditional sources of tax law. The example thus does not turn on the non-Realist reading of the tax law being limited to literal reading of the code and regulations. If there were five Justices with views like Douglas's on the Supreme Court, then there would be many cases the Internal Revenue Service would deem not worth litigating even though the law as best but conventionally understood was on its side, and many cases that taxpayers would litigate even against overwhelming conventional legal odds. Similarly, the disregard of many rules of evidence in bench trials is inconsistent with the purposes and intent behind those rules, but the paper rules are disregarded nonetheless. And as long as such disregard exists, it will play a crucial role in determining which objections at trial are worth making, and which, formal law as best and purposively understood notwithstanding, are treated as futile.

The gap between paper rule and real rule is accordingly not confined to understanding the idea of a paper rule in literal terms. As long as even an expansive understanding of "the law" varies from the rules actually applied, the difference between paper and real rules will determine which cases are easy and which hard, and will thus, by operation of the selection effect, determine which events are disputed, litigated, and appealed, and which are treated as routine and uncontroversial. To the extent that this gap exists in some or many areas of law, therefore, it will play a major role in constituting the fields of litigation and nonlitigation. Insofar as the Realist claim about the insufficiency of the paper rules to determine outcomes is correct, therefore, the Realist challenge ceases to be interstitial or marginal, but applies throughout the operation of law. The challenge as recast is still about the indeterminacy of the set of cases worth litigating, but by being constitutive of that set of cases in the first instance, it questions all and not just the edges of the traditional understanding of law.

V. An Empirical Claim

Because Untamed Realism goes to the core and not merely the penumbra of legal rules, it goes to the core of how we understand law itself. But characterizing the Realist challenge in this way does not address whether the challenge actually succeeds. As the Realists themselves acknowledged—indeed, insisted—their contentions, including those about the gap between

104. WOLFMAN ET AL., *supra* note 86, at 9, 63.

paper and real rules, were principally empirical.[105] Legal judgments might follow the paper rules, the Realists admitted, but whether and when and how often they did so was to be resolved by empirical inquiry rather than bald assertion or quasi-religious faith in the power of the law. The question then remains about the extent to which the array of cases worth litigating is determined by the plain meaning, when there is one, of the words of legal rules, as the most tamed version of Realism predicts, or by the full array of traditional legal interpretive techniques, as a more expansive version would suppose, or by a much wider set of nonlegal as well as legal considerations, as Untamed Realism posits. However we understand the notion of a paper rule, the extent of the divergence between paper and real rule is an unavoidably empirical question. Untamed Realism hypothesizes that this divergence is frequently substantial, but whether that hypothesis is borne out by the facts remains to be investigated.

Obviously Untamed Realism's hypothesized gap between paper and real rules is a matter of degree not susceptible to a yes or no answer. And of course the answer will vary across time, place, judge, court, legal system, area of substantive law, and much else. Nevertheless, some preliminary generalizations might usefully inform the more systematic empirical analysis that the spirit of Realism urges us to pursue.

Initially, it is important to recognize that departures from paper rules, even when based on nonlegal reasons, still require the law-like public justifications that the Realists tended to call "rationalizations."[106] Perhaps the

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105. *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 93–97 (1995) (summarizing realism in the social sciences and its influence on Legal Realism); KALMAN, *supra* note 2, at 3–44 (discussing the role of empirical research in Legal Realism); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995) (arguing that empirical research was an essential component of Legal Realism); Herbert M. Kritzer, *Empirical Legal Studies Before 1940: A Bibliographic Essay*, 6 J. EMPIRICAL LEGAL STUD. 925 (2009) (collecting references to empirical legal studies conducted by early twentieth-century Realists).

106. *See* FELIX S. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 237 (1933) (observing that "principles enunciated by courts as grounds of decision often represent nothing more objective than a resolution to use sanctified words wherever specified results are dictated by undisclosed determinants"); FRANK, COURTS ON TRIAL, *supra* note 20, at 29–30, 100–04 (describing as "rationalization" the process by which judges begin "with the results they desire[] to accomplish" and then seek support for these conclusions); RUMBLE, *supra* note 18, at 30, 79–83 (discussing Llewellyn's "opinion-skepticism"); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809–12 (1935) (arguing that "the traditional language of argument and opinion neither explains nor justifies court decisions"); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 910–11 (1933) (urging law students to observe what actually goes on in law offices and courtrooms instead of studying judicial opinions); Hutcheson, *supra* note 22, at 285 (asserting that "the judge really feels or thinks that a certain result seems desirable, and he then tries to make this decision accomplish that result"); Llewellyn, *Some Realism About Realism*, *supra* note 5, at 1238–39 (describing rationalization as "trained lawyers' arguments . . . intended to make the decision seem plausible, legally decent, legally right, to make it seem, indeed, legally inevitable"); George Wilfred Stumberg, Book Review, 17 TEXAS L. REV. 531, 532 (1939) (reviewing KENNETH C. SEARS & HENRY WEIHOFEN, MAY'S LAW OF CRIMES (4th ed. 2938)) ("[L]egal abstractions are of little use in describing what the courts have done because

police need not provide a formal justification for why the real speed limit is 74 and not 65, but more commonly, especially when a judge departs from a paper rule, there must be a law-sounding justification on which the divergence between paper and real rule is based. As long as consumers of legal outcomes—lawyers, the public, the political world, the media, academic commentators, etc.—appear to demand that legal outcomes be determined by publicly available legal reasons, even a judge deciding on the basis of nonlegal reasons must offer reasons seemingly based on the law.[107] When such reasons are employed to justify a gap between paper rules and real rules, we can call them *escape routes*—the avenues by which legal decision makers explain in law-like terms the departures for nonlegal reasons from what appear to be the clear indications of a clearly written rule.

Part of Llewellyn's motivation in offering (perhaps incorrectly)[108] his menu of competing canons of statutory interpretation[109] was to demonstrate the ready availability of just such escape routes. If some principle of statutory interpretation could justify virtually any result reached for reasons other than the indications of the statute being interpreted,[110] judges inclined to depart from the paper rule for nonlegal reasons could do so without appearing to be departing from the law. For example, when the New York Court of Appeals set aside the paper rule in *Riggs v. Palmer*[111] in order to deny to Elmer Palmer the inheritance which the plain words of the Statute of Wills appeared to allow,[112] it was able to use the "no man may profit from his own wrong" principle to shroud in the language of law a justice-based and

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results have usually been first reached by judicial considerations of social consequences and then rationalized in the opinions by abstractions.").

107. On the distinction between the logic of decision and the logic of justification, see RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 26–31 (1961).

108. *See* Michael Sinclair, *"Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," One to Seven*, 50 N.Y.L. SCH. L. REV. 919 (2006) (arguing that Llewellyn's analysis of the equivalence of competing canons was largely mistaken); Michael Sinclair, *"Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," Eight to Twelve*, 51 N.Y.L. SCH. L. REV. 1002 (2007) (same); Michael Sinclair, *"Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," Pairs Thirteen to Sixteen*, 53 N.Y.L. SCH. L. REV. 953 (2009) (same).

109. Llewellyn, *Remarks on the Theory of Appellate Decision*, *supra* note 20, at 395.

110. A prominent example of Llewellyn's point is *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979), in which Justice Brennan's majority opinion relied for its conclusion that the statute allowed a voluntary affirmative action plan on the venerable principle that legislative intention could override plain meaning. *Id.* at 201. The dissenting opinions of Chief Justice Burger and Justice Rehnquist relied for their conclusion that the plan was unlawful on the equally venerable principle that plain statutory language foreclosed recourse either to legislative intent or to the spirit or purpose of a law. *Id.* at 216–17 (Burger, C.J., dissenting); *id.* at 253–54, 228 n.9, 229 (Rehnquist, J., dissenting).

111. 22 N.E. 188 (N.Y. 1889).

112. It is worth noting that both the majority and the dissent in *Riggs* agreed that the literal meaning of the words of the statute would have given Elmer his inheritance. Frederick Schauer, *Constitutional Invocations*, 65 FORDHAM L. REV. 1295, 1306 n.44 (1997) (stating that both the majority and dissenting opinions in *Riggs* were "clear in *their* understanding that the Court was taking an action *contrary* to the literal reading of the law, and not merely within the interstices of that literal reading").

fact-specific departure from the most immediately applicable rule.[113] Similarly, insofar as Lon Fuller was—implicitly—sociologically and empirically correct in predicting what an American court might do with his hypothetical cases of the military truck used as a war memorial or the businessman napping (in violation of a "no sleeping in the station" rule) while waiting for a train,[114] he relied on the legal principle of recourse to the purpose of the law as a way of legally justifying a departure from what the formal law actually said. And whenever a court relies on the principle of desuetude to nullify the force of a statute remaining officially on the books, it uses still another method to apply what looks like law to reach a result other than the one seemingly indicated by the law as it is written down.[115]

These examples suggest that departures from paper rules are common, and that American law contains ample resources permitting judges to avoid paper rules while still appearing faithfully to be applying the law. This conclusion does not address the question of just how often judges do so, or the extent to which such escape routes are routinely available, but it does suggest that judicial avoidance of the most immediately applicable paper rule is hardly unusual, that there are multiple methods of accomplishing this end, and that the existence of paper rule–real rule gaps is a significant part of the American legal environment.

But just how significant? One measure of the soundness of the claims of Untamed Realism is the frequency with which paper rules—the meaning of the language of a legal rule as set forth in a statute, regulation, or case; or the interpretation of well-understood black-letter law by the standard techniques of conventional legal reasoning—vary from the real rules as actually applied. Although the distinction between paper and real rules is conceptually important, and although there can be genuine prescriptive and internalized rules that vary from the paper rules governing the same acts, it

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113. As is well known, Ronald Dworkin uses the case to argue that the "no man may profit from his own wrong" principle was a preexisting part of the law, thus making *Riggs* a case involving neither a gap in the law nor an exercise of judicial discretion. RONALD DWORKIN, *supra* note 47, at 23–26; DWORKIN, *supra* note 46, at 15–20. In practice, however, there is little difference between Dworkin's allegedly anti-Realist position and the Realist claim that something other than the most immediately applicable legal rule is commonly available to rationalize a departure from that rule in the interest of the judge's perception of justice, policy, or the equities of the particular controversy.

114. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 662–65 (1958).

115. *See* Blanchard v. Ogima, 215 So. 2d 902, 905 (La. 1968) (applying the doctrine of desuetude to deny applicability of a vicarious liability provision in the Louisiana Civil Code); Corey R. Chivers, *Desuetude, Due Process, and the Scarlet Letter Revisited*, 1992 UTAH L. REV. 449, 451 (noting that the doctrine of desuetude voids a statute); Linda Rodgers & William Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1, 1–5 (1966) (explaining the doctrine of desuetude); *see also* CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 97 (2005) (urging use of desuetude to void outdated and rarely enforced statutes dealing with sexual behavior). Also relevant in this context is Guido Calabresi's call for judges to use common law principles to revise what they perceive to be obsolete statutes. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163–66 (1982).

could turn out that what is conceptually possible and occasionally extant is in reality rare in practice—rather like pandas or pineapple wine. There are, of course, pandas, and there really is pineapple wine,[116] but pandas no more characterize the animal kingdom than pineapple wine characterizes the universe of wine. To make too much of pandas and pineapple wine in describing the phenomenon of which they are admittedly part would be substantially misleading.

On the other hand, it may be, for some or many areas of law in some or many legal cultures, that real rules diverge from paper ones to a substantial extent and on numerous occasions. Were that so—and when and where it was so—the divergence between real and paper rules would be an essential part of characterizing and understanding the phenomenon of law, which is exactly the point the Realists pressed.

This is not the occasion to conduct that empirical inquiry. Obviously, much of Realist and post-Realist and Realist-inspired scholarship is focused on just this question,[117] and equally obviously the methods that can be used to address it encompass the full breadth of empirical approaches and methodologies. Yet it is important to note that any properly designed empirical inquiry will include within its compass not only the instances in which something other than the paper rule appeared to produce a legal result, but also the instances in which the paper rule actually influenced the outcome. For example, although the court in *Riggs v. Palmer* did depart from the applicable paper rule—the Statute of Wills—in ruling against Elmer Palmer, in fact most courts in most jurisdictions often allow unworthy beneficiaries—even ones who have contributed in some way to the death of the testator—to inherit.[118] Similarly, courts sometimes enforce the literal words of statutes even when the literal meaning plainly does not embody the legislative intent and even when the results seem silly.[119] And Supreme Court Justices have been known, because of principles of stare decisis, to follow decisions they demonstrably believe mistaken.[120] These examples

116. *See* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984) (rejecting as unconstitutionally protectionist Hawaii's understandable attempt to assist the pineapple wine industry by exempting it from otherwise applicable taxes).

117. *See supra* note 2.

118. *See* Schauer, *The Limited Domain of the Law*, *supra* note 38, at 1937–38 (juxtaposing *Riggs v. Palmer* with "[t]he full history and breadth of 'murdering heir' cases" to show that courts typically allowed killers to inherit).

119. *E.g.*, United States v. Locke, 471 U.S. 84, 96 (1985) (enforcing the exact literal meaning of a "prior to December 31" filing deadline).

120. *E.g.*, Ring v. Arizona, 536 U.S. 584, 613 (2002) (Kennedy, J., who had dissented in Apprendi v. New Jersey, 530 U.S. 466, 523 (2000), concurring); W. Lynn Creamery v. Healy, 512 U.S. 186, 209–10 (1994) (Scalia, J., who had dissented in Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 254 (1987), concurring); Edwards v. Arizona, 451 U.S. 477, 478 (1981) (White, J., who had dissented in Miranda v. Arizona, 384 U.S. 436, 504 (1966), for the Court); Roe v. Wade, 410 U.S. 113, 167–68 (1973) (Stewart, J., who had dissented in Griswold v. Connecticut, 381 U.S. 479, 530 (1965), concurring).

may be unrepresentative, but they suggest that paper rules at least sometimes have at least presumptive effect in some jurisdictions on some topics at some times and for certain courts (or judges) and other legal decision makers.[121] When the effect of paper rules might be considerable, therefore, and the gap between paper and real rules minimal or infrequent, the force of the Realist challenge would be diminished.

Not only might paper rules sometimes be outcome determinative, but even in cases of divergence paper rules might influence the content of real rules. Consider again the speed limit. A common real speed limit is 74 when the posted paper speed limit is 65, but a common real speed limit is 69 when the posted limit is 60 and 64 when the posted limit is 55, suggesting that often the real speed limit is the paper limit plus nine. The divergence between paper and real rules, even when considerable, may thus be a function not only of administrative discretion and other nonrule factors, but also of the paper rule itself.

To repeat, the extent to which paper rules are followed or influential is an empirical question not answerable by a selected anecdote or an unrepresentative example. That the law consists of paper rules, the understanding of which produces a mastery of the law, is what the Realists attempted to challenge. But that paper rules have little to do with the law in action is no less an empirical claim, the critical testing of which is fully consistent with the broadest understanding of the Realist program.

VI. Conclusion

As Llewellyn noted more than eighty years ago,[122] law is far more than the decision of appellate cases. Appellate cases are important, and so is litigation, but the effect of law is felt most clearly in the law-influenced events that never see a court at all. Yet to accept that law is most important in its unlitigated effect is to invite the question about what causes the unusual

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121. Duncan Kennedy argues that the possibility of an outcome in contravention of the paper rule in any case destroys the formality of the entire system. Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 351–54 (1973). The reality of contravention in one case puts its possibility on the agenda in every case, he argues, thus undercutting the goal of formality of producing results simply and mechanically. Kennedy's insight is important, but the extent of its value is an empirical and not logical matter. The strength of a presumption in favor of the paper rule will determine the reality of the plausibility of arguing against it, and thus the stronger the presumption the less an outcome against the presumption will undermine the system's decision-constraining goals. The same argument applies to Ronald Dworkin's speed limit example. DWORKIN, *supra* note 46, at 266. Dworkin's conclusion that what looks like a straightforward application of the paper rule is in fact the product of a decision maker's capacious consideration of a larger array of rules and principles again ignores the possibility that presumptions may eliminate such consideration in most instances. And when Melvin Eisenberg contends that easy cases are only those in which a doctrinal proposition is found to be compatible with what he calls a "social proposition," MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 3 (1988), he may similarly be slighting the weight given to doctrinal propositions themselves.

122. *See supra* note 26. The claim is repeated in LLEWELLYN, THE COMMON LAW TRADITION, *supra* note 21, at 6, 64–68.

cases to be unusual, and, conversely, what makes the usual and thus unlitigated instances of law application usual in the first place. Holmes famously emphasized that lawyers and clients often seek to predict what courts will do,[123] and accordingly often behave in ways that reflect these predictions. And in emphasizing prediction, Holmes initiated a concern with courts based not only on the cases courts decide, but also on the fact that what courts decide influences primary behavior that never sees the inside of a courtroom. Holmes was less a Realist than a precursor of Realism because he believed that legal categories and legal doctrine were the best sources of prediction of judicial behavior, a view premised on the assumption that courts would typically make decisions in accordance with all of the traditional features of formal law.[124] The real Realists would take their leave of Holmes at this juncture, believing that the paper rules were less explanatory of judicial outcomes than even Holmes supposed. But even if the Realists were right and Holmes wrong, the Holmesian focus on prediction survives, alerting us to the way in which routine behavior exists in the shadow of potential judicial or other official action.[125] If that action departs from the formal law, however, then the shadow in which unlitigated behavior exists will not be the shadow of the paper rules, but the shadow of the real rules the courts and other officials actually enforce.

The tamest versions of Realism follow the Holmesian path in assuming that when the formal written law and the paper rules are clear, judges will follow the law, and lawyers and their clients will plan their actions accordingly. If this is so, then recognizing the indeterminacy of decision when the rules are unclear is important, but not much of a challenge either to a traditional picture of how law operates, or to the conventional understanding of the role of rules in that operation. And this is precisely why it has been so easy for so many years for so many commentators to marginalize the Realist understanding of law and the Realists' objections to the traditional picture. Under this view, Legal Realism is about gaps in the law.

But Legal Realism may not be limited to questions about legal gaps. If judges sometimes or often depart from paper rules even when they are clear, then predicting judicial outcomes can no longer be based on paper rules alone. Sound predictions will then be based on the real rules, and these

123. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (stressing the importance of "[t]he prophecies of what the courts will do in fact").

124. Thus we assume that Leon Green, see *supra* note 22, would have taken much issue with Holmes's conclusion that thinking that "churn" could be a relevant legal category was preposterous, and with Holmes's lesson from his churn story that it is a mistake to assume that categories such as railroads, telegraphs, or shipping could provide the "true basis for prophecy." Holmes, *supra* note 123, at 474–75.

125. *Cf.* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (discussing the effects of divorce law on formal and informal bargaining between the parties occurring outside of the courtroom).

predictions will influence the behavior of clients and lawyers. Most importantly, predictions based on real and not paper rules will determine the array of cases that are deemed worth litigating, and the array that never gets to court. The gap between paper and real rules will thus determine the entire landscape of the law. When clear paper rules or applications of standard techniques of legal reasoning are not outcome determinative, the effect will be felt far outside the domain of litigated cases.

If the Realist contention about the relative importance of real rules and the relative unimportance of paper ones is sound, therefore, and when and where it is sound, that contention will have effects on our understanding of law that are by no means limited to the domain of cases worth fighting over. This, in a nutshell, is the untamed version of Legal Realism. Determining whether and when this genuinely nontraditional and destabilizing version of law's operation is true is an empirical question, the pursuit of which is an important part of future research in the Realist spirit.

Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause

Robert J. Delahunty* & John C. Yoo**

I. Introduction

As a candidate in the 2008 presidential election race, Barack Obama vigorously denounced the Bush Administration for what he argued were extreme and indefensible assertions of executive power.[1] As President, however, he has frequently taken action by claiming broad executive power.[2]

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1. *See* Ross Douthat, *All the President's Privileges*, N.Y. TIMES, June 23, 2012, http://www.nytimes.com/2012/06/24/opinion/sunday/douthat-all-the-presidents-privileges.html?_r=3&.& ("Obama campaigned as a consistent critic of the Bush administration's understanding of executive power . . . ."); Charlie Savage, *Barack Obama's Q&A*, BOS. GLOBE, Dec. 20, 2007, http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/ (criticizing the Bush Administration's claim of plenary authority for the President).

2. *See* Melanie M. Marlowe, *President Obama and Executive Independence*, *in* THE OBAMA PRESIDENCY IN THE CONSTITUTIONAL ORDER 47, 48 (Carol McNamara & Melanie M. Marlowe

In the area of national security, foreign policy, and military affairs (where the Executive has long held sway),[3] the Administration has conducted an undeclared cyber-war against Iran, used military force to bring about regime change in Libya, pursued a proxy war in Somalia, and prepared for more extensive shadow warfare in Africa.[4]

The Obama Administration has been equally assertive in domestic matters. Especially since the Republican congressional victories in the 2010 midterm elections, the Obama Administration has taken measures based on claims of sole executive authority, even after Congress has considered but rejected such proposals.[5] To be sure, earlier Administrations also deployed executive powers before a hostile Congress. In early January 2007, not long after his party had been defeated in the 2006 congressional elections, President George W. Bush announced plans for a "surge" of U.S. military

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eds., 2011) (asserting that President Obama has been a "champion of the unitary executive" in areas such as "access to information, signing statements, control of administration, and national security"); David K. Nichols, *Professor Obama and the Constitution*, *in* THE OBAMA PRESIDENCY IN THE CONSTITUTIONAL ORDER, *supra*, at 25, 34–39 (surveying Obama's actions in a number of areas of national security and domestic policy and finding them to demonstrate a retrenchment from his campaign criticisms of the scope of executive power under President Bush); Laura Meckler, *Obama Shifts View of Executive Power*, WALL ST. J., Mar. 30, 2012, http://online.wsj.com/article/SB10001424052702303812904577292273665694712.html (focusing on Obama's use of executive power to "press his domestic agenda"); James Oliphant, *The Presidency Will Only Grow More Powerful (No Matter Who Wins)*, NAT'L J., Oct. 11, 2012, http://www.nationaljournal.com/issues/the-presidency-will-only-grow-more-powerful-no-matter-who-wins--20121011 (surveying President Obama's most aggressive executive actions).

3. For a study of the President's constitutional powers in those areas, see generally JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005). *But see* PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 54 (2009) (arguing that the "presidentialist case for a near-monarchical President in foreign and military affairs fails" and is not "based on a sound reading of constitutional text or history").

4. *See* Robert J. Delahunty, *War Powers Irresolution: The Obama Administration and the Libyan Intervention*, ENGAGE, Sept. 2011, at 122, 123, http://www.fed-soc.org/publications/detail/engage-volume-12-issue-2-september-2011 ("As President Obama and other NATO leaders have repeatedly insisted, the Allies' overriding war aim is regime change . . . ."); Siobhan Gorman & Julian E. Barnes, *Cyber Combat: Act of War*, WALL ST. J., May 30, 2011, http://online.wsj.com/article/SB10001424052702304563104576355623135782718.html (explaining that the "sabotaging of Iran's nuclear program via the Stuxnet computer worm" was an important aspect of the larger global shift toward cyber warfare); Nick Turse, *Washington Puts Its Money on Proxy War: The Election Year Outsourcing that No One's Talking About*, LE MONDE DIPLOMATIQUE, Aug. 10, 2012, http://mondediplo.com/openpage/washington-puts-its-money-on-proxy-war ("Washington is currently pursuing plans for proxy warfare across the globe, perhaps nowhere more aggressively than in Africa."); Craig Whitlock, *At Pentagon, 'Pivot to Asia' Becomes 'Shift to Africa,'* WASH. POST, Feb. 14, 2013, http://www.washingtonpost.com/world/national-security/at-pentagon-pivot-to-asia-becomes-shift-to-africa/2013/02/14/649988e0-76d4-11e2-9357-7a107e548ef5_story.html (noting that over past two years, the Pentagon has become embroiled in conflicts in Libya, Somalia, Mali, and elsewhere in Africa).

5. *See* Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES, Apr. 22, 2012, http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html?pagewanted=all&_r=0 (noting that "[t]he Obama administration started down [the] path" of unilateral executive action "soon after Republicans took over the House of Representatives").

forces in Iraq.[6] President Ronald Reagan, in a similar situation after the congressional elections of 1986, began to issue Executive Orders far more frequently.[7]

The Obama Administration's preferred tool for domestic policy, however, is new: using "prosecutorial discretion" *not* to enforce statutes with which the President disagrees.[8] In 2009, the Department of Justice stopped enforcing federal drug laws against individuals whose actions comply with "existing state laws providing for the medical use of marijuana."[9] In 2011, the Department of Justice decided that it would not defend a provision of the Defense of Marriage Act in the federal courts.[10] The Administration has also relied on "prosecutorial discretion" to shield Attorney General Eric Holder from prosecution for contempt of Congress.[11]

The Obama Administration has claimed "prosecutorial discretion" most aggressively in the area of immigration. The most notable example of this trend was its June 15, 2012 decision not to enforce the removal provisions of the Immigration and Nationality Act (INA) against an estimated population of 800,000 to 1.76 million individuals illegally present in the United States.[12]

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6. *See generally* THOMAS E. RICKS, THE GAMBLE: GENERAL DAVID PETRAEUS AND THE AMERICAN MILITARY ADVENTURE IN IRAQ, 2006–2008 (2009).

7. *See* JOHN YOO, CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH 391–93 (2009) (explaining that because the Reagan Administration entered office with a Democrat-controlled House and was faced with a Democrat-controlled Senate after the 1986 election, it had an easier time changing policy "through a combination of executive orders, rule-making, and judicial appointments rather than new legislation").

8. The Administration has also made broad use of its discretionary powers under (its interpretations of) statutory laws. For example, it has "exempted over 190 million health plan participants and beneficiaries from the preventive care coverage mandate" of the Affordable Care Act. Newland v. Sebelius, No. 1:12-cv-01123-JLK, slip op. at 14–15 (D. Colo. July 27, 2012).

9. Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Selected U.S. Att'ys (Oct. 19, 2009), *available at* http://blogs.justice.gov/main/archives/192.

10. Letter from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. For a recent defense of the Obama Administration's decision, see generally Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507 (2012). A decision not to defend the constitutionality of an act of Congress is cognate in some respects to a decision not to enforce it. *See* Michael T. Brady, Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 977 n.27 (1983) (arguing the criticism of executive discretion not to defend federal statutes is often combined with the problem of executive discretion to enforce statutes).

11. Letter from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (June 28, 2012), *available at* http://abcnews.go.com/images/Politics/062812%20letter.pdf. The Department's decision seems likely to have been based on a 1984 memorandum of law to the Attorney General from the Justice Department's Office of Legal Counsel. Prosecution for Contempt of Congress of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 102 (1984).

12. Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2006). The Pew Hispanic Center reported that as many as 1.4 million persons would be covered. Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 15, 2012, http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html?

By taking this step, the Obama Administration effectively wrote into law "the DREAM Act,"[13] whose passage had failed numerous times.[14]

The President's claim of prosecutorial discretion in immigration matters threatens to vest the Executive Branch with broad domestic policy authority that the Constitution does not grant it. For if a President can refuse to enforce a federal law against a class of 800,000 to 1.76 million individuals, what discernible limits are there to prosecutorial discretion? Can a President decline to enforce federal laws barring that class from voting in federal elections? Can a President decline to enforce the deportation statute against *all* illegal immigrants because of a belief in an "open borders" policy? Can a President who wants tax cuts that a recalcitrant Congress will not enact decline to enforce the income tax laws? Can a President effectively repeal the environmental laws by refusing to sue polluters, or workplace and labor laws by refusing to fine violators?

In this Article, we use the Administration's June 15 nonenforcement decision as a lens through which to examine the Executive's law enforcement powers and responsibilities. We do not address the merits as a matter of immigration policy, although both of us favor a speedier path to citizenship for illegal aliens who were brought here as children and are enrolled in school or serve in the United States Armed Forces. We argue that the Constitution's Take Care Clause imposes on the President a duty to enforce *all* constitutionally valid acts of Congress in *all* situations and cases. In other words, we shall argue that there is simply no general presidential nonenforcement power. It is true that enforcement cannot occur in all circumstances. The ordinary, efficient administration of the law requires discretionary decision making on the part of enforcers. But that does not mean that all breaches of the duty are tolerable. On the contrary, the

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pagewanted=all. The Migration Policy Institute currently estimates as many as 1.76 million. JEANNE BATALOVA & MICHELLE MITTELSTADT, MIGRATION POLICY INST., RELIEF FROM DEPORTATION: DEMOGRAPHIC PROFILE OF THE DREAMERS POTENTIALLY ELIGIBLE UNDER THE DEFERRED ACTION POLICY 1 (2012), *available at* http://www.migrationpolicy.org/pubs/FS24_deferredaction.pdf.

13. The name comes from a bill originally introduced into Congress in 2001, entitled the Development, Relief, and Education for Alien Minors Act, or the "DREAM Act," S. 1291, 107th Cong. (2001). The most recent form of the DREAM Act was S. 952, 112th Cong. (2011).

14. Even the President had previously gone on record to say that such action would be outside his constitutional powers. In a March 2011 Univision Town Hall in Washington, D.C., the President responded to a question whether he would grant "temporary protected status" to undocumented students. President Barack Obama, Remarks by the President at Univision Town Hall (Mar. 28, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall. He said that he could not "waive away the laws that Congress put in place" and that "the president doesn't have the authority to simply ignore Congress and say, 'We're not going to enforce the laws that you've passed.'" Lamar Smith, *Obama's Amnesty for Illegal Immigrants Is Against the Law*, CHRISTIAN SCI. MONITOR, June 15, 2012, http://www.csmonitor.com/Commentary/Opinion/2012/0615/Lamar-Smith-Obama-s-amnesty-for-illegal-immigrants-is-against-the-law.

deliberate decision to leave a substantial area of statutory law unenforced or underenforced is a serious breach of presidential duty.

The Take Care Clause sets the baseline; any deliberate deviation from it is presumptively forbidden. But as with legal duties generally, the duty is "defeasible," and its nonperformance can be excused or justified in appropriate circumstances.[15] In the immigration area, nonenforcement of the INA's removal provisions, even in a very large and important class of cases, might arguably be excused or justified if the execution of the law in those cases would undercut the President's constitutional powers and responsibilities. The immigration laws, for example, might be read to require the President to treat enemy combatants captured in wartime as illegal aliens, who would be due deportation, rather than detention and trial by military authorities. In such cases, we believe, the President could refuse to enforce the immigration laws because they conflict with his authority under the higher law of the Constitution to manage the conduct of war.

We argue, however, that the Obama Administration has provided no adequate excuse or justification for its nonenforcement decision. Rather, it has laid claim to a power to make significant domestic policy on its own, even when that policy effectively amends existing acts of Congress.[16] In the terms of an earlier period of Anglo-American constitutional history, the Obama Administration seeks a "dispensing" power to waive the law. Congress, however, must shoulder some of the blame for enacting stringent immigration rules and then chronically underfunding their administration, which delegates to the President a sweeping de facto discretion over enforcement.

We introduce our discussion in Part II by describing the circumstances of the Administration's June 15 nonenforcement decision and by identifying the central legal issues. In Part III, we examine the meaning and scope of the President's duty to "take care" that the laws be faithfully executed. We explore the original understanding of the Take Care Clause by examining the constitutional text, the seventeenth- and eighteenth-century English constitutional background, political theory of the day, and American colonial and early national understandings of the executive power. We devote significant attention to the differences between Thomas Jefferson and

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15. For analysis of the meaning of "defeasibility," the place of the concept in legal reasoning, and the tension between it and the rule of law, see generally Frederick Schauer, Is Defeasibility an Essential Property of Law? (Oct. 12, 2008) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1403284.

16. The "amendment" was of course functional, not formal. *Compare* Clinton v. City of New York, 524 U.S. 417, 448–49 (1998) (striking down the Line Item Veto Act as an impermissible violation of the Presentment Clause), *with* INS v. Chadha, 462 U.S. 919, 954–55 (1983) (rejecting the single congressional house veto of presidential action as an infringement of the Presentment Clause). In this case, the President's displeasure with a "restriction on benefits imposed by Congress" led to executive action that had "the practical force of law, in violation of the Constitution." OPM v. Richmond, 496 U.S. 414, 428 (1990).

Abraham Lincoln over whether the President retains a "prerogative" power enabling the suspension of the law for the common good. In Part IV, we catalogue and review the most commonly offered and generally accepted excuses or justifications for the breach of the duty to execute the laws, such as unconstitutionality of the law, equity in individual cases, and resource limitations. We find that the June 15 decision does not fall within any of them.

There is no obvious "remedy," either judicial or political, for this constitutional wrong. It is doubtful whether any individual litigant could show the particularized harm necessary for Article III standing,[17] and after *Raines v. Byrd*,[18] it is unlikely that the Senate, the House of Representatives, or individual members of Congress would have standing either.[19] Moreover, even if a plaintiff with standing could be found, the prevailing standard of review for challenges to executive nonenforcement decisions is extraordinarily lenient.[20] Political "remedies" *do* seem possible (assuming Congress decides again not to pass the DREAM Act). These could include legislation to defund the implementation of the program to provide immigration-related benefits to the DREAMers, or Senate rejection of the Obama Administration's nominees for ranking positions in the immigration area. More ambitiously, Congress could enact legislation (or the President could issue an Executive Order) requiring a detailed justification for any major Executive Branch decision not to enforce federal statutory law.[21] We shall not, however, explore such remedies here.

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17. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974) (holding that the interest in Executive Branch conformity to the requirements of the Incompatibility Clause creates speculative harm shared by all citizens, making it not justiciable).

18. 521 U.S. 811 (1997).

19. We note that the Supreme Court seemingly intends to consider further aspects of "congressional standing" next Term. *See* United States v. Windsor, 133 S. Ct. 787 (2012) (mem.) (granting certiorari on *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) and ordering briefing on the question of whether the Bipartisan Legal Advisory Group of the U.S. House of Representatives has Article III standing).

20. *See infra* notes 70–71.

21. In particular, a new federal statute or Executive Order might provide that if a major nonenforcement decision is allegedly based in whole or in part on inadequate congressional funding—*see infra* subpart IV(C)—then the Executive must provide and publish a detailed account of how great the budgetary shortfall is, what cost savings it expects to achieve from the nonenforcement measure at issue, what additional costs its alternative policy may incur, what alternative forms of nonenforcement it has considered, and why it concluded that the particular option it chose created greater net efficiencies than any of the alternatives. In other words, Congress or the Executive itself could require that the Executive bear and discharge a burden of persuasion on major nonenforcement decisions. Congress might also make at least some major nonenforcement decisions judicially reviewable. *See* Fed. Election Comm'n v. Akins, 524 U.S. 11, 19–25 (1998) (explaining that Congress may create standing to receive information even when the grievance is a general one).

In order to keep a steady focus throughout this Article, we limit our inquiry in two important ways. First, we give no specific consideration to executive nonenforcement decisions in the criminal area ("prosecutorial discretion" in the strict sense), since immigration laws are primarily enforced civilly. Second, "prosecutorial discretion" in immigration law cuts a very broad swath. It "extends to decisions about which offenses or populations to target; whom to stop, interrogate, and arrest; whether to detain or to release a noncitizen; whether to initiate removal proceedings; whether to execute a removal order; and various other decisions."[22] In this Article, we shall concentrate on decisions, based on broad-gauged policies or resource constraints, to decline (or to suspend) charging members of a large class of persons subject to removal proceedings or orders. We also dispense with phrases like "amnesty" or "illegals," which are not only inaccurate, but tend to obscure with rhetorical invective the important constitutional substance at issue.

II. The Administration's Nonenforcement of the Immigration Laws

A. Enacting the DREAM Act Through Deferred Action

The Government has estimated that as of January 2011, there were about 11.5 million illegal immigrants inside the United States.[23] Illegal immigrants comprise about 30% of the country's estimated population of 40 million immigrants.[24] Illegal immigrants present in the United States are, broadly, of two kinds: those who have entered the country illegally; and those who, having entered legally (such as with a tourist or student visa), are nonetheless now present illegally (visa "overstayers").[25] The Immigration and Nationality Act (INA) provides for the removal (in older language,

22. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010); *see also* Arizona v. United States, 132 S. Ct. 2492, 2499, 2505–06, 2527 (2012) (discussing the U.S. Immigration and Customs Enforcement's prosecutorial discretion). *See generally* Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611 (2006) (reviewing the discretionary nature of deportation and its interaction with the plenary power doctrine).

23. MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRATION POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 4 (2012), *available at* http://www.dhs.gov/estimates-unauthorized-immigrant-population-residing-united-states-january-2011. An "illegal immigrant" (or "unauthorized resident") is defined as a foreign-born noncitizen who is not a legal resident. *Id.* at 2. A legal resident immigrant is defined to include "all persons who were granted lawful permanent residence; granted asylum; admitted as refugees; or admitted as nonimmigrants for a temporary stay in the United States and not required to leave by January 1, 2011." *Id.*

24. *See id.* at 4 (deducing that there are approximately 33.6 million foreign-born individuals in the United States); MICHAEL JONES-CORREA, MIGRATION POLICY INST., CONTESTED GROUND: IMMIGRATION IN THE UNITED STATES 13 (2012), *available at* http://www.migrationpolicy.org/pubs/TCM-UScasestudy.pdf (noting that there are approximately 11.5 million illegal immigrants and slightly under 40 million total immigrants).

25. HOEFER ET AL., *supra* note 23, at 2.

deportation) of aliens not lawfully present in the United States.[26] Aliens may be removed if they were "inadmissible" at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law.[27]

Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security (DHS), has the responsibility of removing illegal immigrants within the United States.[28] ICE is one of the successor agencies to the Immigration and Naturalization Service (INS).[29] Realistically, ICE cannot remove much of the illegal immigrant population unless Congress increased funds more than twentyfold.[30] Removals of illegal immigrants run at just under 400,000 per year, only about 3%–4% of the nation's current illegal population.[31] Chiefly because of its massive caseload and chronic underfunding, ICE must develop enforcement priorities. These may vary from one administration to the next. DHS Secretary Janet Napolitano explained in an August 2011 letter to the Senate that ICE's priorities focus on "identifying and removing criminal aliens, those who pose a threat to public safety and national security, repeat immigration law violators and other individuals prioritized for removal."[32]

As a direct consequence of structuring its enforcement priorities, ICE must regard some categories of cases as low priority. One category now includes the 800,000 to 1.76 million who would have benefited from the passage of the DREAM Act and who were also covered by the June 15 nonenforcement decision.[33] In the words of several of its leading supporters in the Senate, the DREAM Act:

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26. 8 U.S.C. § 1227 (2006).

27. *Id.*

28. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, A DAY IN THE LIFE OF ICE ENFORCEMENT AND REMOVAL OPERATIONS, *available at* http://www.ice.gov/about/offices/enforcement-removal-operations/.

29. *Overview*, ICE, http://www.ice.gov/about/overview/.

30. Apprehending, detaining, and removing all illegal aliens in the nation would require an ICE budget of $135 billion. Letter from Nelson Peacock, Assistant Sec'y for Legislative Affairs, U.S. Dep't of Homeland Sec., to Senator John Cornyn (Dec. 3, 2010). In 2012, ICE's appropriations ran under $6 billion. WILLIAM L. PAINTER, CONG. RESEARCH SERV., R42557, DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS: A SUMMARY OF THE HOUSE-PASSED AND SENATE-REPORTED BILLS FOR FY2013, at 6 (2012).

31. *See* JONES-CORREA, *supra* note 24, at 10 (illustrating that 387,000 noncitizens out of the total population of 11.5 million noncitizens were removed in 2010).

32. Letter from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to Senator Dick Durbin (Aug. 18, 2011), *available at* http://durbin.senate.gov/public/index.cfm/files/serve?File_id=1180a746-c6d4-4fe9-b11f-cf9be50b6226.

33. *See* Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs. & John Morton, Dir., U.S. Immigration & Customs Enforcement (June 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf (setting forth guidelines for exercising prosecutorial discretion and stating that "young people who were brought to this country as children and know only this country as home" are a low enforcement priority); *see also* Guillermo I. Martínez, *1.76 Million Dreamers Could Emerge from the Shadows*, SUNSENTINEL, Aug. 8, 2012, http://articles.sun-sentinel.com/2012-08-09/news/sfl-gmcol-dreamers-8912_1_dreamers-shadows-

> would give a select group of students the chance to earn legal status if they arrived in the United States when they were 15 or younger, have lived in this country for at least five years, have good moral character, are not inadmissible or removable under a number of specified grounds, have graduated from high school or obtained a GED, and attend college or serve in the military for two years.[34]

The DREAM Act, in one form or other, has been before Congress since 2001.[35] The Act has commanded widespread bipartisan support and has received the Obama Administration's blessing; indeed, the President called for its enactment in his 2011 State of the Union Address.[36] Nonetheless, the DREAM Act has repeatedly failed to receive Congress's approval. Congress took up the proposal in 2006, 2007, 2009, 2010, and 2011, but never passed it. Congress rejected the legislation in a recorded vote most recently in December 2010, when forty-one Senators (including six members of the President's party) voted against cloture in the debate over the bill.[37]

The Senate's rejection of the DREAM Act in December 2010, followed by the seating of a Republican-controlled House in January 2011,[38] led the Administration to pursue major immigration goals by administrative means alone. An internal DHS policy document entitled *Administrative Alternatives to Comprehensive Immigration Reform*, prepared for the Director of U.S. Citizenship and Immigration Services (USCIS), a component of DHS, reveals this new strategic thinking.[39] The memorandum

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application (reporting that while the government originally estimated that 800,000 DREAMers would be entitled to Deferred Action for Childhood Arrivals, the Migration Policy Institute estimates that there are as many as 1.76 million DREAMers).

34. Letter from Senator Harry Reid et al., to President Barack Obama (Apr. 13, 2011), *available at* http://tucsoncitizen.com/arizona-hispanic-republicans/files/2011/04/ReidDreamLetter.pdf. The Senators wrote to the President to urge him to exercise "prosecutorial discretion" on behalf of the DREAMers by granting "deferred action" to them, arguing that they "are not an enforcement priority for DHS" and that such action would "conserve limited enforcement resources." *Id.* Rather perfunctorily, the Senators acknowledged to the President that as "the nation's chief law enforcement officer [you] are, of course, obligated to enforce the law." *Id.*

35. Heidi Timmerman, *Dare to DREAM: Generation 1.5 Access to Affordable Postsecondary Education*, 39 W. ST. U. L. REV. 67, 76 (2011).

36. *See* President Barack Obama, The State of the Union (Jan. 25, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address (proclaiming the need to stop deporting talented young people that have been educated in the United States).

37. *See* Elisha Barron, Recent Development, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 632–37 (2011) (summarizing the failed attempts to enact various versions of the DREAM Act from 2001 to 2011); Alexander Bolton, *Senate Rejects DREAM Act, Closing Door to Immigration Reform*, HILL, Dec. 18, 2010, http://thehill.com/homenews/senate/134351-dream-act-defeated-in-senate (describing how the DREAM Act failed to overcome a GOP-led filibuster with a vote of 55 to 41).

38. Carl Hulse, *Taking Control, G.O.P Overhauls Rules in House*, N.Y. TIMES, Jan. 5, 2011, http://www.nytimes.com/2011/01/06/us/politics/06cong.html?pagewanted=all&_r=0.

39. *See* Memorandum from Denise A. Vanison, Policy & Strategy, U.S. Citizenship & Immigration Servs. et al., to Alejandro N. Mayorkas, Dir., U.S. Citizenship & Immigration Servs., *available at* http://abcnews.go.com/images/Politics/memo-on-alternatives-to-comprehensive-

advised that "[i]n the absence of Comprehensive Immigration Reform, USCIS can extend benefits and/or protections to many individuals and groups by . . . exercising discretion with regard to . . . deferred action."[40] The memorandum defined "deferred action" as "an exercise of prosecutorial discretion not to pursue removal from the U.S. of a particular individual for a specific period of time."[41] It offered the thought that "[r]ather than making deferred action widely available to hundreds of thousands and as a non-legislative version of 'amnesty,' USCIS could tailor the use of this discretionary option for particular groups such as individuals who would be eligible for relief under the DREAM Act (an estimated 50,000)."[42] It also noted that "[w]hile it is theoretically possible to grant deferred action to an unrestricted number of unlawfully present individuals, doing so would likely be controversial, *not to mention expensive*."[43]

Other components of DHS began taking administrative steps in 2011 towards the DREAM Act's goals. On June 17, 2011, ICE Director John Morton issued a memorandum instructing subordinates on the exercise of "prosecutorial discretion." Morton's memorandum characterized "prosecutorial discretion" as "the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual."[44] Morton detailed an extensive list of factors to be considered in evaluating whether an exercise of prosecutorial discretion on

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immigration-reform.pdf (outlining administrative relief options designed to "promote family unity, foster economic growth, achieve significant process improvements and reduce the threat of removal for certain individuals present in the United States without authorization"). The Memo is marked "DRAFT" and is undated, but from internal evidence was provided in 2011.

40. *Id.* at 1.

41. *Id.* at 10. This definition was first published in the USCIS Adjudicator's Field Manual. U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL § 40.9.2(b)(3)(J).

42. *Id.* at 11.

43. *Id.* at 10 (emphasis added).

44. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge & All Chief Counsel 2 (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf. We note that ICE has defended its exercise of "prosecutorial discretion" in both the Obama and Bush Administrations. *See* Memorandum from William J. Howard, Principal Legal Adviser, U.S. Immigration & Customs Enforcement, to All OPLA Chief Counsel (Oct. 24, 2005), *available at* http://shusterman.com/pdf/prosecutorialdiscretionimmigration2005.pdf (outlining ICE's use of prosecutorial discretion in removal cases). In the latter memorandum, however, the argument rested wholly on the agency's stretched resources, not on a claim to positive authority. *See id.* at 1–3 (highlighting ICE's limited resources and overwhelming caseload as a justification for the use of prosecutorial discretion). In a still earlier INS memorandum from the Clinton Administration, prosecutorial discretion is characterized as a positive "authority." *See* Memorandum from Doris Meissner, Comm'r, Immigration & Naturalization Servs., to Regional Dirs., District Dirs., Chief Patrol Agents & Regional & District Counsel 2 (Nov. 17, 2000), *available at* http://www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00 ("'Prosecutorial discretion' is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone. The INS, like other law enforcement agencies, has prosecutorial discretion and exercises it every day.").

behalf of an individual alien was warranted.[45] He then specifically identified "positive factors" that "should prompt particular care and consideration," among them being "present in the United States since childhood."[46]

On June 15, 2012, Secretary Napolitano instructed officials in ICE and two other agencies to "defer action" against "certain young people who were brought to this country as children and know only this country as home."[47] The criteria for inclusion in this class mapped closely onto those specified in the DREAM Act: aliens who came to the United States under the age of sixteen; have continuously resided here for at least five years and are currently present; are a student, high school graduate, GED certificate holder, or veteran; have not had a significant criminal record or otherwise pose a threat to national security or public safety; and are thirty years old or younger.[48] Among the beneficiaries of Secretary Napolitano's order were aliens "already in removal proceedings or subject to a final order of removal."[49] Individuals receiving benefits under the order were first to undergo "a background check."[50] Napolitano characterized and justified her action as an "exercise of prosecutorial discretion."[51] Not mentioned in Secretary Napolitano's memorandum, but included in a list of "Frequently Asked Questions" published by DHS, is that individuals who have been granted "deferred action" status are eligible to receive employment authorization for the period they remain in that status.[52] It should be observed that this use of prosecutorial discretion cannot convey a work permit, and the Administration has not identified any source of legal authority for this aspect of its policy. Deferred action status is to be granted for a period of two years, subject to repeated renewal in two-year increments.[53]

The President personally wrote an op-ed defending the legality of the decision based largely on the grounds that ICE's enforcement resources were

45. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, *supra* note 44, at 4.

46. *Id.* at 5.

47. Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., *supra* note 33, at 1.

48. *Compare id.* at 1, *with* DREAM Act of 2011, S. 952, 112th Cong. § 3(b) (2011) (listing the requirements for obtaining permanent residency under the DREAM Act).

49. Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., *supra* note 33, at 2.

50. *Id.*

51. *Id.* at 1.

52. *Deferred Action for Childhood Arrivals*, ICE, http://www.ice.gov/about/offices/enforcement-removal-operations/publicadvocate/deferred-action-process.htm.

53. Press Release, U.S. Dep't of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), *available at* http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low.

limited.[54] Otherwise, the Administration did little to defend its legal view publicly. It may, however, have relied on a letter that some 100 law professors had sent to the President on May 28, 2012.[55] The law professors argued that the President had the legal authority to grant "deferred action" in his discretion:

> Though no statutes or regulations delineate deferred action in specific terms, the U.S. Supreme Court has made clear that decisions to initiate or terminate enforcement proceedings fall squarely within the authority of the Executive. In the immigration context, the Executive Branch has exercised its general enforcement authority to grant deferred action since at least 1971.[56]

B. *The Tension Between Prosecutorial Discretion and the Presumption that Laws Will Be Enforced*

For students of executive power, the Obama Administration's June 15 nonenforcement decision creates what might seem to be an acute, indeed insoluble, dilemma. On the one hand, the President seems undeniably to have the power to decide on the proper allocation of the limited personnel and resources available to him for enforcing the laws and to establish enforcement priorities for the agencies under him. Indeed, one can argue that the President's ability to moderate legislative purposes through enforcement is a necessary and desirable consequence of a constitutional system that seeks to protect individual liberties by separating the power to legislate from the power to enforce.[57] Separating the power to execute the law from the power to enact it creates a space in which liberty can be protected by discretionary executive decisions not to implement laws that are vicious, oppressive, or disproportionately harsh.[58] In our constitutional scheme, the "class of

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54. *See* Barack Obama, *A Nation of Laws and a Nation of Immigrants*, TIME, June 17, 2012, http://ideas.time.com/2012/06/17/A-NATION-OF-LAWS-AND-A-NATION-OF-IMMIGRANTS/ ("We prioritized our resources and used discretion about whom to prosecute, focusing on criminals who endanger our communities rather than students who are earning their education.").

55. Letter from Professor Hiroshi Motomura et al., to President Barack Obama (May 28, 2012), *available at* www.nilc.org/document.html?id=754.

56. *Id.* at 2 (footnote omitted).

57. Moreover, it can be argued that Congress implicitly encourages, and perhaps desires, broad enforcement discretionary authority as an antidote to its own overregulation or overcriminalization. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 514, 546–47 (2001) (noting the proliferation of state and federal criminal statutes and explaining that enforcement discretion substantially alters the trade-offs that legislatures confront when defining crimes). We shall consider the application of Stuntz's insight by Adam B. Cox & Cristina M. Rodríguez to the immigration area in subpart IV(D).

58. Indeed, a constitutional system that separates lawmaking from law interpretation and law enforcement seems to argue against clear *ex ante* rules of any kind, and thus to promote some degree of discretionary decision making. *See* Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 1004 (1995) (discussing how the separation of legislative and executive power produces some pressures militating against *ex ante* rules, which may result in executive discretion).

legitimate official revisions" of statutory law by executive officials "is large."[59]

This seems particularly obvious in the area of criminal law enforcement. Even if sufficient resources are available to enforce valid, unrepealed but obsolete laws against, say, the sale of contraceptives, many would argue that the Executive had not failed in its constitutional duties if it left those laws unenforced.[60] Likewise, the Executive can arguably take account of changing social attitudes regarding illegal drugs by choosing not to prosecute dying cancer patients who purchase marijuana as a painkiller. Or to take another case: the Executive might be considered to be acting properly if it declined to exact lawful but grossly exorbitant fines for failing to report the transport of money outside the country.[61] And given that no federal prosecution has been brought under the Logan Act in the more than 200 years of its existence, are United States Attorneys at fault if they decline to bring cases under it—even though Congress has resisted efforts to repeal it?[62]

Even in the area of civil enforcement, the need for substantial enforcement discretion seems apparent. The many-sided responsibilities of the modern administrative state appear to dictate nothing less.[63] The courts seem implicitly to have acknowledged this: judicial review of executive nonenforcement decisions in the civil context is, for most practical purposes, nonexistent. In *Lincoln v. Vigil*,[64] the Supreme Court reviewed its precedents and affirmed that judicial review of agency nonenforcement decisions under

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59. *Id.* at 1008. Sunstein argues that:

> [T]here will often be a gap between law on the books and law in the world, and for good democratic reasons. We might conclude that officials in certain social roles—jurors, prosecutors, police—should believe that rules are generally binding, but that they have authority to depart from the rules in compelling circumstances. This authority has democratic foundations; it might promote liberty as well.

Id. at 1009.

60. *Cf.* Poe v. Ullman, 367 U.S. 497, 498, 507–08 (1961) (holding that, without a showing of a real enforcement threat, there is insufficient grounds to adjudicate the constitutionality of a uniformly unenforced statute that prohibited the use of contraceptive devices).

61. *See* United States v. Bajakajian, 524 U.S. 321, 324 (1998) (holding that it violates the Excessive Fines Clause of the Eighth Amendment to fine the respondent for the entire amount of money that he failed to declare upon leaving the country).

62. 18 U.S.C. § 953 (2006) (subjecting to fine or imprisonment any U.S. citizen who "without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government . . . or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States"); *see generally* MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RL33265, CONDUCTING FOREIGN RELATIONS WITHOUT AUTHORITY: THE LOGAN ACT (2006) (exploring the history of the Logan Act).

63. For that very reason, critics of the modern administrative state consider it to be inherently lawless. *See* Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 N.Y.U. J.L. & LIBERTY 491, 495 (2008) ("[T]he administrative state gives rise to a peculiar blend of bureaucratic rule and discretion that does not comport with the historical conception of a rule of law, and its central concern with the control of arbitrary power."); *see also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233, 1248–49 (1994) (arguing that the administrative state violates separation of powers principles).

64. 508 U.S. 182 (1993).

the Administrative Procedure Act was generally unobtainable.[65] More recently, the Court reaffirmed the same position in a 2007 case, *Massachusetts v. EPA*.[66] Only this Term, in *Arizona v. United States*,[67] the Court stated that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all."[68]

On the other hand, the Constitution seems to presuppose that the laws will be enforced in a nonarbitrary manner. It imposes on the President a duty to enforce existing statutes,[69] regardless of any policy differences with the Congresses that enacted them or the presidents who signed them. As President George Washington said, "[I]t is the particular duty of the Executive 'to take care that the laws be faithfully executed.'"[70] Our constitutional scheme of separated powers was consciously designed to prevent "governmental tyranny which . . . is closely related to [the] arbitrary and capricious government."[71] Unlimited discretion in enforcement policy can become a greater threat to personal liberty and security than the mechanical enforcement of the law. Thus, even while marginalizing the role of the judiciary in monitoring the Executive's nonenforcement decisions, the Supreme Court warned that judicial review might indeed be available in "a situation where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."[72]

Several reasons support a robust conception of the Executive's enforcement duty. The passage of legislation is an arduous and slow-moving process, requiring proponents of a new law to assemble majorities on repeated occasions to overcome Congress's built-in tendency towards inertia. The Framers created multiple veto points such as bicameralism and presentment to impede the passage of all but well-considered legislation.[73]

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65. *Id.* at 191.

66. 549 U.S. 497, 527 (2007).

67. 132 S. Ct. 2492 (2012).

68. *Id.* at 2499.

69. *See* U.S. CONST. art. II, § 3, cl. 5 (stating that the president "shall take [c]are that the [l]aws be faithfully executed").

70. President George Washington, Proclamation Regarding the Cessation of Violence and Obstruction of Justice in Protest of Liquor Laws (Sept. 15, 1792), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=65427&st=st1.

71. George W. Carey, *Separation of Powers and the Madisonian Model: A Reply to the Critics*, 72 AM. POL. SCI. REV. 151, 156 (1978).

72. Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985). In raising that possibility, the *Heckler* Court referred approvingly to the D.C. Circuit's decision in *Adams v. Richardson*, 480 F.2d 1159 (1973) (en banc). *Id.* In the latter case, the plaintiff had successfully contended that the defendant agency had "consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty." *Adams*, 480 F.2d at 1162.

73. *See* Loving v. United States, 517 U.S. 748, 757–58 (1996) ("Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking."); John O. McGinnis & Michael B.

By its own internal procedural rules (including the filibuster) and complex committee structure, Congress itself has substantially added to the bias in favor of legislative inaction.[74] For legislation of any real significance to be enacted, there must first be "buy in" from many interested players representing many different perspectives, interests, and constituencies. This entire complicated process is intended to encourage legislation that reflects what Madison called "the cool and deliberate sense of the community."[75] Given the difficulty of achieving a consensus in favor of the legislation, the Constitution appears to give the President no discretion to set Congress's policies aside.[76]

Consider the ways in which "prosecutorial discretion," if carried to an extreme, can distort the lawmaking process that the Constitution established. First, it can encourage Congress to overregulate certain areas with the expectation that the Executive will counterbalance with forgiving enforcement policies. The Controlled Substances Act or the tax laws may have this feature. Second, the threat of nonenforcement gives the President improper leverage over Congress by providing a second, postenactment veto. Much as a line item veto would,[77] that second "veto" gives him a bargaining edge in negotiating with Congress for which the Constitution did not provide. Third, the possibility of class-wide nonenforcement creates an incentive for members of Congress to bypass each other in fashioning legislation and to deal directly with the Executive instead. By inviting the President to unilaterally enforce the laws along the DREAM Act's terms, some senators short-circuited the legislative process.[78] Rather than redoubling their bargaining efforts with their fellow senators, they opened bargaining with the Executive instead.

Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 488 (1995) (noting that Constitution itself imposes supermajority requirements in seven places and permits Congress to introduce additional veto points).

74. *See* McGinnis & Rappaport, *supra* note 73, at 484 (highlighting "the unbroken tradition, stretching from the early Republic to the present day, of rules, such as those sustaining the filibuster and the committee system, whose objective has been . . . to frustrate legislative majorities and promote other values"); *see also* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 184–85, 213–17 (1997) (arguing that the Senate filibuster in its present form imposes a supermajority requirement on legislation but does not promote deliberation).

75. THE FEDERALIST NO. 63, at 425 (James Madison) (Jacob E. Cooke ed., 1961).

76. On the public interest in upholding legislative compromises, see Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540–41 (1983). On the dangers that discretionary decision making poses for democratic accountability and the likelihood that it will lead to "governmental overreaching or governmental favoritism," see Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 SUP. CT. ECON. REV. 1, 12 (2003).

77. *See* Raines v. Byrd, 521 U.S. 811, 817 (1997) (explicating the argument against the Line Item Veto Act that lawmakers' decision making is adversely impacted by the President's ultimate cancellation power).

78. *See supra* note 34 (illustrating the Senators' intent that the President has unilateral enforcement power under the DREAM Act by offering guidance to him regarding how the Act should be enforced).

All of this goes to confirm Hamilton's claim in *Federalist No. 70* that "a government ill executed, whatever it may be in theory, must be in practice a bad government."[79] Our scheme of separated powers, even the very conception of "executive" power in itself, supports a stringent view of the President's duty to enforce an act of Congress.[80] The constitutional text also speaks emphatically in several places—notably, in the Take Care Clause—in favor of that view and against a more permissive understanding of "prosecutorial discretion."[81] But it is also widely accepted that the executive power includes the discretion to decline enforcement of federal laws at any time, place, or case. If the idea of executive power can seem to imply an authority, in proper cases, to deviate from the law, the idea of the liberal state arguably requires that the executive power remain subordinate to the law.

III. The Historical Background of the Executive Prerogative

The antinomy at work here has recurred over much of American constitutional history, and indeed has its roots in early modern political thought. Executive power has long presented a conundrum: how to make the Executive strong enough to promote the common good, but not so strong as to risk despotism. Identification of the tension between executive power and republican government can be credited to Machiavelli, who invented the modern idea of an arm of government to execute the laws and protect the public welfare.[82] Breaking with Aristotelian and Christian theories of political science, Harvey C. Mansfield, Jr. argues, Machiavelli "liberated" the executive from both natural law and religion.[83] Instead, the executive became the servant of necessity, bound to defend the republic in extraordinary emergencies—even if contrary to regularly constituted law.[84] Machiavelli praised executive decisiveness and secrecy: princes were "quick" to execute and acted "at a stroke," unlike fractious senates.[85] Acting "*uno solo*," the successful executive's ambition will be turned to the common good, or else he will be held accountable for his failures.[86]

The problematic nature of executive power remained vivid in the minds of the Framers.[87] During the ratification of the Constitution, Anti-Federalists

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79. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 75, at 472.

80. Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 110, 116–17 (2000).

81. *See infra* notes 104–08 and accompanying text.

82. HARVEY C. MANSFIELD, JR., TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER 121–49 (1989).

83. *Id.* at 134–35.

84. *Id.* at 135.

85. *Id.* at 142, 144.

86. *Id.* at 146.

87. For the Framers' awareness of republican political theory, see BERNARD BAILYN, INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION 31 (1967) (observing the impression made by Enlightenment rationalism on the Framers); FORREST MCDONALD, THE AMERICAN

feared that "a vigorous executive is inconsistent with the genius of republican government."[88] In *Federalist No. 70*, Alexander Hamilton responded that "[e]nergy in the executive is a leading character in the definition of good government."[89] But "energy in the executive" had somehow to be reconciled with the regularity of law: lessons of constitutional history that were well-known to the Framers had taught them to be conscious of the danger of an uncontrolled Executive that regularly "dispensed with" or "suspended" the law.[90] As both the Supreme Court and individual Justices have often observed in varied contexts,[91] the great seventeenth-century constitutional struggles in England against the Stuart dynasty that culminated in the "Glorious Revolution" of 1688 left an indelible imprint on the minds of our own Revolutionary generation.[92] By the mid-eighteenth century, Sir William

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PRESIDENCY: AN INTELLECTUAL HISTORY 4–5 (1994) (acknowledging that the Framers' understanding of political philosophy and the history of the Roman Republic and English constitutionalism molded their ideas about the Executive's power); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1789, at 10–18 (1969) (discussing the impact of Enlightenment political theory and the history of the English constitution on the Framers' ideology).

88. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 75, at 471.

89. *Id.*

90. The power to "dispense with" the laws was originally claimed on behalf of the papacy. The Pope's power to "dispense" with ordinary laws was sometimes likened to God's power to set aside the ordinary course of nature by working miracles. *See, e.g.*, Elsa Marmursztejn, *Penser la Dispense: Éclairages Théologiques sur le Pouvoir Pontifical (XIIIe-XIVe siècles)*, 78 LEGAL HIST. REV. 63, 85–86 (2010) (equating the Pope's full power with the idea of omnipotence and discussing how it allows the Pope to grant dispensation from ecclesiastical law); Francis Oakley, *Jacobean Political Theology: The Absolute and Ordinary Powers of the King*, 29 J. HIST. IDEAS 323, 332–33 (1968) (comparing the Pope's ability to act outside the laws of the Church and thus perform papal miracles to God's power to act outside of the laws of nature to perform miracles). For example, it was thought to include the power to dispense with the law so as to permit King Henry VIII of England to remarry. *Id.* at 335. An early and authoritative statement of the papal claim to the dispensing power is set forth by Pope Innocent III (1160–1216) in the decretal *Proposuit* (1198), in which the Pope laid claim to the power, *de jure*, to dispense with the canon law even when not demanded by necessity. KENNETH PENNINGTON, THE PRINCE AND THE LAW 1200–1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION 56–57 (1993). Monarchs were not slow to claim for themselves a dispensing power modeled on the Pope's.

91. *See, e.g.*, District of Columbia v. Heller, 128 S. Ct. 2783, 2797–98 (2008) (Second Amendment); Boumediene v. Bush, 128 S. Ct. 2229, 2244–46 (2008) (Suspension Clause); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 266–67 (1989) (excessive fines); *id.* at 290–91 (O'Connor, J., concurring in part and dissenting in part); Furman v. Georgia, 408 U.S. 238, 242–43 (1972) (Douglas, J., concurring) (Eighth Amendment); United States v. Brewster, 408 U.S. 501, 545–50 (1972) (Brennan, J., dissenting) (Speech and Debate Clause); Powell v. McCormack, 395 U.S. 486, 502 (1969) (Speech and Debate Clause); O'Callahan v. Parker, 395 U.S. 258, 268–70 (1969) (courts martial); *id.* at 276–77 (Harlan, J., dissenting); United States v. Johnson, 383 U.S. 169, 177–78 (1966) (Speech and Debate Clause); Am. Commc'ns Ass'n, C.I.O. v. Douds, 339 U.S. 382, 447–48 (1950) (Black, J., dissenting) (First Amendment).

92. *See, e.g.*, THE FEDERALIST NO. 26 (Alexander Hamilton), *supra* note 75, at 165–66 (describing the English Bill of Rights as arising to challenge the almost unlimited authority of the monarch to keep standing armies, and explaining that Americans derived an hereditary impression of the danger to liberty of standing armies from the experience).

Blackstone, himself the teacher of some of the Framers and a major influence on all American lawyers of their generation,[93] could confidently write:

> The principal duty of the king is to govern his people according to law. . . . And this is not only consonant to the principles of nature, of liberty, of reason, and of society, but has always been esteemed an express part of the common law of England, even when [the royal] prerogative was at the highest. "The king," says Bracton, who wrote under Henry III, "ought not to be subject to man, but to God, and to the law; for the law maketh the king."[94]

As we shall show below, American readers of the Framers' period were unquestionably aware of the English constitutional record.[95] They would not have understood the executive power to include the right to leave laws unenforced because of policy disagreements with the legislature.

A. The President's Duty to Enforce the Law

The President's constitutional duty to enforce the laws stands as the main textual obstacle to claims of a broad power of prosecutorial discretion. Article II, Section Three of the Constitution states that the President "shall

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93. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 7–8 (noting that American lawyers of the Founding period relied "heavily and preeminently" on Blackstone); Lord Phillips, *Foreword* to ERIC STOCKDALE & RANDY J. HOLLAND, MIDDLE TEMPLE LAWYERS AND THE AMERICAN REVOLUTION xii (2007) (reporting that two signers of the Declaration of Independence dined with William Blackstone as students in 1769); STOCKDALE & HOLLAND, *supra*, 15–17 (explaining that Blackstone's *Commentaries* were heavily studied and influential in the American colonies both before and after the Revolution). The British statesman Edmund Burke remarked that nearly as many copies of Blackstone's *Commentaries* had been sold in America as in England. *See* EDMUND BURKE, Speech on Moving His Resolutions for Conciliation with the Colonies (Mar. 22, 1775), *in* 2 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 101, 125 (6th ed. 1880). Thomas Jefferson acknowledged (though he also deplored) Blackstone's immense influence on American legal culture. Letter from Thomas Jefferson to James Madison (Feb. 17, 1826), *in* 16 THE WRITINGS OF THOMAS JEFFERSON 155, 156 (Albert Ellery Bergh ed., 1907). Commentators have long noted Blackstone's direct influence on the American Constitution, including its treatment of executive power. *See* C. ELLIS STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES CONSIDERED IN RELATION TO COLONIAL AND ENGLISH HISTORY chs. V–VI (2d rev. ed. 1894).

94. 1 WILLIAM BLACKSTONE, COMMENTARIES *233–34 (citations omitted).

95. They could have learned it from David Hume's *The History of England*, which includes a full account of the legal history leading up to the Glorious Revolution and the constitutional settlement after it, and was widely read in America at the time. DAVID HUME, THE HISTORY OF ENGLAND: FROM THE INVASION OF JULIUS CAESAR TO THE ABDICATION OF JAMES THE SECOND, 1688 (1849–51); Forrest McDonald, *A Founding Father's Library*, 1 LITERATURE OF LIBERTY 4, 7–10 (1978) (describing Hume as among the most popular British historians in America and reporting that Jefferson and Hamilton disagreed in their opinions of his *History*). In his Revolutionary Era writings on judicial independence, John Adams cites to and follows the account in Hume's *History* of the legal and constitutional controversies over the dispensing power that arose in the reign of James II. *See* John Adams, *The Independence of the Judiciary: A Controversy Between William Brattle and John Adams, Essay of 18 Jan. 1773*, *in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 79, 83–84 (C. Bradley Thompson ed., 2000) (quoting multiple sections of Hume's *History* in his discussion of the judiciary).

take Care that the Laws be faithfully executed."[96] Early American courts and commentators on the Constitution understood the Take Care Clause to impose a duty on the President to enforce the law, regardless of his own administration's view of its wisdom or policy.[97]

In grammatical form, the Take Care Clause is an imperative: it instructs or admonishes the President to "take Care." The 1828 edition of Noah Webster's *American Dictionary of the English Language* explains the meaning of the noun "care" as including "[c]aution; a looking to; regard, attention, or heed, with a view to safety or protection, as in the phrase, 'take care of yourself.'"[98] In illustrating the various uses of the verb "take," he mentions "[t]o take care, to be careful; to be solicitous for" and "[t]o take care of, to superintend or oversee; to have the charge of keeping or securing."[99] Thus, the Take Care Clause appears to charge the President with the duty or responsibility of executing the laws, or at least of supervising the performance of those who do execute them.

What does it mean, then, to "execute" the laws "faithfully"? According to the 1755 edition of Dr. Samuel Johnson's *Dictionary of the English Language*, it means "[t]o put in act; to do what is planned or determined."[100] Johnson cites Richard Hooker's *Laws of the Ecclesiastical Polity* for the illustration: "Men may not devise laws, but are bound for ever to use and execute those which God hath delivered."[101] The adjective "executive," according to Johnson, derives from the verb and means "[a]ctive; not deliberative; not legislative; having the power to put in act the laws."[102] And Johnson defines the meanings of the adverb "faithfully" to include both "[w]ith strict adherence to duty and allegiance" and "[w]ithout failure of performance; honestly; exactly."[103]

The Take Care Clause is thus naturally read as an instruction or command to the President to put the laws into effect, or at least to see that they are put into effect, "without failure" and "exactly." It would be implausible and unnatural to read the Clause as creating a power in the President to deviate from the strict enforcement of the laws.[104] The

96. U.S. CONST. art. II, § 3.

97. *See, e.g.*, WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 147–50 (2d ed. 1829) ("Every individual is bound to obey the law, however objectionable it may appear to him: the executive power is bound not only to obey, but to execute it.").

98. 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 32 (1828).

99. 2 *id.* at 88.

100. 1 SAMUEL JOHNSON, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE 736 (1755), *available at* http://johnsonsdictionaryonline.com/?page_id=7070&i=736.

101. *Id.* (citing to 3 RICHARD HOOKER, LAWS OF THE ECCLESIASTICAL POLITY 187 (1888)).

102. *Id.* at 737.

103. *Id.* at 763.

104. *See* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 722 ("The Faithful Execution Clause imposes a duty of faithful law execution on the only officer who enjoys the executive power. Whether the chief executive executes the law himself or whether he executes through his executive subordinates, the president must faithfully execute the

President's responsibility is primarily supervisory: he is not charged with executing the laws himself. Not only would this obviously have been impossible (how could the President collect customs in both Charleston and Boston at once?[105]), but it is reflected in the phrasing of the Clause. It does not say that the President "shall take Care to execute the laws faithfully," but rather that he take care that they "be faithfully executed."[106] Others will "execute" the laws; the President's role is to see to it that they do so "faithfully." Furthermore, the next clause charges him to "Commission all the Officers of the United States,"[107] underscoring that he will be provided with subordinates who will assist him in the tasks of executing the laws, and for whose performance he will be accountable.

That the Take Care Clause prescribes a duty is clear, not only because it is the more natural reading of the Clause, but also because of its position in relation to the Vesting Clause. The Vesting Clause is, indeed, a broad grant of power, comparable to those for Congress and the federal judiciary. But if the Vesting Clause confers the entirety of the "executive power" on the President, what additional power would the Take Care Clause confer? It seems more likely that the Vesting Clause confers a power that could, at least initially, be understood to subsume a power to decline to execute the laws, but that the Take Care Clause dispels that suggestion by requiring the President to ensure that the laws are executed.[108]

Finally, what does the Take Care Clause mean by "the laws"? We join those legal scholars who conclude that the President has no duty to enforce statutory law or treaty provisions that he reasonably and in good faith considers to be unconstitutional.[109] Indeed, we would go further and

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law."). This is not to deny that in other respects the Take Care Clause is a conveyance of power. Like the general grant of the executive power, the duty to "take Care that the Laws be faithfully executed" both restricts and empowers the President. They make clear that the President cannot suspend the law of the land at his whim, as British kings had, but they also give the President authority both to enforce the law and to interpret it. Enforcing the law gives the President the right to compel the obedience of private individuals, and even states, to the Constitution, treaties, and acts of Congress. Enforcement also implies interpretation. In order to carry out the laws, an Executive must determine their meaning. Sometimes those laws will be clear, as when the Constitution sets the minimum age for a President, but more often than not, the laws are ambiguous or delegate decision making to the Executive.

105. As President George Washington noted, it would be an "impossibility" for "one man" to perform "all the great business of the State." 30 THE WRITINGS OF GEORGE WASHINGTON 334 (John C. Fitzpatrick ed., 1939); David M. Driesen, *Toward A Duty-Bound Theory of Executive Power*, 78 FORDHAM L. REV. 71, 83 (2009).

106. U.S. CONST. art. II, § 3.

107. *Id.*

108. *See* Prakash, *supra* note 104, at 726 n.114 ("[T]he [Faithful Execution] clause is best viewed as imposing a duty rather than as ceding a separate presidential power . . . .").

109. *See, e.g.*, J. Randy Beck, Book Review, 16 CONST. COMMENT. 419, 426 (1999) (arguing the President owes a "higher allegiance" to the Constitution than to statutes passed by Congress); William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 505 (1989) (summarizing the debate and adopting the view that the Supreme Court need not police constitutional conflicts between the Legislative and Executive Branches);

maintain that the President has a duty *not* to enforce statutes that he reasonably and in good faith considers unconstitutional. The obligation to faithfully execute the laws requires the President to obey the Constitution first above any statute to the contrary. As the Supreme Court recognized in *Marbury v. Madison*,[110] judicial review flows from the principle that a court cannot enforce a law that conflicts with the Constitution itself.[111] James Wilson, for one, explicitly compared the President's duty to obey the Constitution first to judicial review: "[T]he legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. . . . In the same manner, the President of the United States could shield himself, and refuse to carry into effect an act that *violates* the Constitution."[112] As Akhil Amar has written, "In America, the bedrock principle was not legislative supremacy but popular sovereignty. The higher law of the Constitution might sometimes allow, and in very clear cases of congressional usurpation might even oblige, a president to stand firm against a congressional statute in order to defend the Constitution itself."[113]

Two other constitutional clauses—the Presidential Oath Clause[114] and the Suspension Clause[115]—shed light, albeit indirectly, on the meaning of the Take Care Clause. The Presidential Oath Clause prescribes the following oath: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."[116] The language of "faithful execution" obviously echoes the Take Care Clause. Of special note, the phrase "to the best of my Ability" qualifies only the duty to preserve, protect, and defend the Constitution; the duty to "faithfully execute" the Presidential Office, like the duty to take care that the laws are faithfully executed, is unqualified. By contrast, the New York State Constitution of 1777 charged the Governor "to take care that the laws are faithfully executed to the best of his ability."[117]

Saikrishna B. Prakash, *The Executive's Duty to Disregard Unconstitutional Law*, 96 GEO. L.J. 1613, 1616 (2008) (arguing that the Constitution "*requires* the President to disregard unconstitutional statutes").

110. 5 U.S. (1 Cranch) 137 (1803).

111. Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 914 (2003).

112. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 445–46 (Jonathan Elliot ed., 1907).

113. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 179 (2005).

114. U.S. CONST. art. II, § 1, cl. 8.

115. *Id.* art. I, § 9, cl. 2.

116. *Id.* art. II, § 1, cl. 8.

117. N.Y. CONST. art. XIX, *available at* http://avalon.law.yale.edu/18th_century/ny01.asp. New York's provision is relevant in understanding both the Presidential Oath and Take Care Clauses: as Alexander Hamilton argued in The Federalist No. 69, the powers and duties of the President are closer to those of the Governor of New York than to the King of England. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 75, at 463.

The Suspension Clause states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[118] This Clause is the only reference in the constitutional text to the power, asserted by the English monarchy before 1689, to "suspend" the laws.[119] The location of the Clause in Article I suggests that the power to suspend the habeas writ was considered to be a legislative, not an executive, power. Moreover, the Clause tracks English constitutional practice, which vested the power to suspend the writ in Parliament alone.[120] The Suspension Clause subtly underscores that by 1787 the executive power did not include a suspending power.

The drafting history of the Take Care Clause at the Philadelphia Convention supports the natural reading that the text imposes a duty and a constraint. James Wilson, later an Associate Justice of the Supreme Court, introduced a draft dealing with the Executive that read in part: "It shall be his duty to provide for the due & faithful exec—of the laws."[121] The Committee of Detail altered this draft to read: "he shall take care that the laws of the United States be duly and faithfully executed."[122] The Committee on Style simplified that version, drafting the final form of the Clause: "he shall take care that the laws be faithfully executed."[123] Years after the Convention, Wilson explained that the Clause meant that the President has "authority, not to make, or alter, or dispense with the laws, but to execute and act the laws, which [are] established."[124]

Wilson, a Pennsylvanian, may have been thinking of his own state constitution. Similar provisions had existed in that colony's and state's charters and constitutions between 1682 and 1776.[125] The 1776 Pennsylvania Constitution provided that the state's executive was "to take care that the

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118. U.S. CONST. art. 1, § 9, cl. 2.

119. The Pardon Clause implicitly refers to a facet of the dispensing power. *See* U.S. CONST. art. II, § 2, cl. 1. ("[H]e shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.").

120. *See* Saikrishna Bangalore Prakash, *The Great Suspender's Unconstitutional Suspension of the Great Writ*, 3 ALB. GOV'T L. REV. 575, 592–602 (2010) (reviewing the legal and constitutional background of the Suspension Clause and concluding that the power is exclusively congressional). Parliament had repeatedly suspended the writ from 1689 onwards, although normally for fixed, brief periods. *See* Clarence C. Crawford, *The Suspension of the Habeas Corpus Act and the Revolution of 1689*, 30 ENG. HIST. REV. 613, 620–21 (1915) (quoting a substantial portion of a 1689 statute). Americans in the Founding period were well aware of the English practice: the habeas cases of two Americans, Stephen Sayre and Ebeneezer Platt, had attracted much attention in the 1770s. PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 250–51 (2010).

121. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 171 (Max Farrand ed., 1911).

122. *Id.* at 185.

123. *Id.* at 597, 600.

124. 2 JAMES WILSON, *Lectures on Law Part 2*, *in* COLLECTED WORKS OF JAMES WILSON 829, 878 (Kermit L. Hall & Mark David Hall eds., 2007).

125. CHARTER OF LIBERTIES AND FRAME OF GOVERNMENT OF THE PROVINCE OF PENNSYLVANIA IN AMERICA (1682), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 271, 277 (Donald S. Lutz ed., 1998) ("[T]he Governor . . . shall take care, that all laws, statutes and ordinances . . . be duly and diligently executed.").

laws be faithfully executed."[126] Other state constitutions contained similar provisions. The New York State Constitution of 1777 charged the Governor "to take care that the laws are faithfully executed to the best of his ability."[127] Likewise, the Virginia Constitution of 1776 roundly declared that the executive was to "exercise the executive powers of government, according to the laws of this Commonwealth; and shall not, under any pretense, exercise any power or prerogative, by virtue of any law, statute or custom of England."[128]

B. The English Constitutional Background

The federal Constitution, unlike some state constitutions of the Founding period, contains no express provision precluding the President from "dispensing with" or "suspending" the laws.[129] Moreover, there is apparently no evidence explicitly linking the Take Care Clause to the elimination of those powers.[130] Nonetheless, scholars have argued that the Take Care Clause has that purpose.[131] They claim that it is closely related to the English Bill of Rights of 1689,[132] which formed an essential part of the great constitutional settlement that wrote the victory of the Glorious Revolution into law[133] and included in its first two sections prohibitions on the suspending and dispensing powers.[134] We join that view. The

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126. PA. CONST. of 1776, § 20, *available at* http://avalon.law.yale.edu/18th_century/pa08.asp.

127. N.Y. CONST. of 1777, art. XIX, *available at* http://avalon.law.yale.edu/18th_century/ny01.asp.

128. VA. CONST. of 1776, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1910, 1910–11 (Ben Perley Poore ed., 2d ed. 1878).

129. Compare the Vermont Constitution of 1786, which stated: "The power of suspending laws, or the execution of laws ought never to be exercised, but by the Legislature, or by authority derived from it, to be exercised in such particular cases only as the Legislature shall expressly provide for." VT. CONST. of 1786, ch. 1, art. XVII, *available at* http://avalon.law.yale.edu/18th_century/vt02.asp. Similarly, the Maryland Constitution of 1776, Section VII, declared that "no power of suspending laws, or the execution of laws, unless by or derived from the Legislature, ought to be exercised or allowed." MD. CONST. of 1776, sec. VII, *available at* http://avalon.law.yale.edu/17th_century/ma02.asp.

130. Prakash, *supra* note 104, at 726 n.113.

131. *See* CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS 160 n.58 (1998) (cataloguing authorities on the Take Care Clause and its link to the elimination of certain executive powers).

132. 1 W. & M., 2d sess., c. 2 (Eng.); MAY, *supra* note 131, at 16.

133. For important scholarly accounts of the constitutional and political history of the Glorious Revolution, see generally CORINNE COMSTOCK WESTON & JANELLE RENFROW GREENBERG, SUBJECTS AND SOVEREIGNS: THE GRAND CONTROVERSY OVER LEGAL SOVEREIGNTY IN STUART ENGLAND 229–59 (1981); Carolyn A. Edie, *Revolution and the Rule of Law: The End of the Dispensing Power, 1689*, 10 EIGHTEENTH-CENTURY STUD. 434 (1977) [hereinafter Edie, *End of the Dispensing Power*]; Carolyn A. Edie, *Tactics and Strategies: Parliament's Attack Upon the Royal Dispensing Power 1597–1689*, 29 AM. J. LEGAL HIST. 197 (1985) [hereinafter Edie, *Tactics and Strategies*].

134. 1 W. & M., 2d sess., c. 2 (Eng.) ("That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parlyament is illegall. That the

connection between the executive duty to enforce the law and the absence of any power to dispense with the law is conceptual and analytical, not merely historical. And it is scarcely conceivable that a federal Executive modeled on the Governor of New York should have been vested with a power that had long since been denied to the English King.

English monarchs had long claimed an extraordinary power to "dispense with" the law, along with a related but less significant power to "suspend" the law.[135] In *The Case of Monopolies*,[136] Lord Coke had explained the royal dispensing power in this way: Because an Act of Parliament "may be inconvenient to divers particular persons, in respect of person, place, time, &c. . . . the Law hath given power to the King, to dispense with particular persons."[137] Sir Matthew Hale,[138] writing before the Glorious Revolution, distinguished two kinds of royal dispensation with laws: "that which dispenseth with the penalty, not the obligation, as a pardon, . . . and that which dispenseth both with the penalty and obligation of a law and is precedent . . . ."[139] In connection with the latter category, Hale reports that "[t]he king may dispense with such an act of parliament" when "he is immediately trusted in the managing thereof," giving, among other cases, that of the appointment of a sheriff to office for longer than the statutorily prescribed period of one year "because he is the king's immediate officer."[140]

There were some limits to the dispensing power. For example, the King could "dispense with" many kinds of statutes, but not with common law.[141]

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pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authoritie as it hath beene assumed and exercised of late is illegall."). Likewise, the preamble to the Bill of Rights condemned James II for "Assumeing and Exerciseing a Power of Dispensing with and Suspending of Lawes and the Execution of Lawes without Consent of Parlyament." *Id.* Note that Section Two refers only to the illegality of the dispensing power "as it hath been assumed and exercised of late," i.e., during the reign of James II. The Bill of Rights did not eradicate the royal dispensing power as such. That was, however, accomplished by a later act of Parliament that can also be regarded as part of the great post-revolutionary constitutional settlement, and which prohibited dispensing with the laws except insofar as authorized by Parliament. *See* Edie, *End of the Dispensing Power*, *supra* note 133, at 449 (discussing the act of Parliament that eradicated the royal dispensing power).

135. The "suspending power abrogated a statute across the board, whereas the dispensing power nullified it only as to those specifically granted exemptions." MAY, *supra* note 131, at 4. In both thought and practice, however, the distinction between the two powers was often blurred. JACQUELINE ROSE, GODLY KINGSHIP IN RESTORATION ENGLAND: THE POLITICS OF THE ROYAL SUPREMACY, 1660–1688, at 91 (2011).

136. 1 SIR EDWARD COKE, *The Case of Monopolies*, *in* THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 394 (Steve Sheppard ed., 2003).

137. *Id.* at 403.

138. On Hale, see Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1702–21 (1994).

139. SIR MATTHEW HALE, THE PREROGATIVES OF THE KING 177 (D.E.C. Yale ed., 1976). For an illuminating guide to Hale's views on the dispensing power, see *id.* at xlviii–lvi.

140. *Id.* at 177.

141. For a fuller analysis of the traditional legal limitations on the royal dispensing power, see GLENN BURGESS, ABSOLUTE MONARCHY AND THE STUART CONSTITUTION 197–98 (1996) and ROSE, *supra* note 135, at 91–92.

In the leading case of *Godden v. Hales*,[142] Sir Edward Herbert summarized the justification for the dispensing power:

> [T]he law of man may be dispensed with by the legislator, for a law may either be too wide or too narrow, and there may be many cases which may be out of the conveniences which did induce the law to be made; for it is impossible for the wisest lawmakers to foresee all the cases that may be, or are to be remedied, and therefore there must be a power somewhere, able to dispense with these laws.[143]

By and large, England had no principled difficulty with the dispensing power before the reign of James II, and in fact found it convenient.[144] Since Parliaments met rarely and were inexpert at drafting, the power enabled the monarch to keep the legal system both more attuned to emerging conditions and more equitable in practice.[145] True, there had been intermittent criticisms of particular exercises of the dispensing power, but there was no demand for its abolition.[146] Even after James's fall in 1688, English lawyers found themselves unable to say that the dispensing power was *illegal*, even if that monarch had abused it.[147]

James II and, occasionally, his predecessors did land in serious trouble when they used the dispensing power to accomplish important policy objectives of their own that cut against the clear preferences of Parliament, as expressed in statutory law.[148] When the subject matter of a royal dispensation was a comparatively minor matter, its use was generally unquestioned.[149] But "[t]he use of the power made by James was of an altogether different order: he used it to systematically dispense with a vast array of religious legislation and rules governing the universities. There was no 'emerging inconvenience' to justify the use of the power. . . ."[150] His broad use of the dispensing power was a major cause of the Glorious Revolution. To the scandal and consternation of his Protestant subjects, the King repeatedly "dispensed" his fellow Roman Catholics from their obligations under the Test Acts of 1673 and 1678.[151] The First Test Act was designed to ensure that anyone holding public office, whether civil or military, would denounce the Roman Catholic doctrine of transubstantiation

142. *The Trial of Sir Edward Hales*, *in* 11 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 1166 (T.B. Howell ed., 1816).

143. *Id.* at 1196.

144. Dennis Dixon, Godden v Hales *Revisited—James II and the Dispensing Power*, 27 J. LEGAL HIST. 129, 134–36 (2006).

145. *Id.* at 135.

146. *Id.*

147. *See id.* (noting that many notable Whig lawyers spoke out against the abolition of the dispensing power after James's fall).

148. *See id.* at 136 (citing episodes from Elizabeth I and Charles II).

149. *Id.* at 135–36.

150. *Id.* at 136.

151. *Id.* at 129–30.

and receive the Anglican sacrament.[152] Parliament's intention was to exclude Roman Catholics, who could not conscientiously take these tests, from holding public office more than temporarily.[153] The Second Test Act made certain exceptions (including one for the King himself), but essentially continued this exclusionary policy.[154] Parliament was determined to ensure that Roman Catholics could not make public policy or threaten the Protestant ascendancy by serving as public ministers, advisers, officials, or military personnel.[155]

James began using his dispensing power extensively to override the Test Acts, filling offices with his fellow Roman Catholics.[156] These included military officers, not only in England, but also in Ireland, whose population was largely Roman Catholic.[157] Protestants in both England and Ireland become uneasy at the prospect of a military that was largely in Catholic hands.[158] In January 1686, James appointed Sir Edward Hales, a Catholic and a close associate, to a colonelcy in the infantry, under a royal warrant dispensing him from the Test Acts.[159] Hales's appointment provided the King with the opportunity to seek judicial validation of his dispensing power. Hales's footman, a Mr. Godden, brought a collusive suit against his employer for the 500 pounds that the Test Act allowed to informers.[160] *Godden v. Hales* thus became the vehicle by which the King's power could be tried. To ensure a successful outcome, the King dismissed six of the twelve royal judges before the case was heard because they would not promise to sustain the validity of his use of the dispensing power.[161] In the end, eleven of twelve judges (some newly appointed for the occasion) upheld the King's dispensing power:

> The most provocative aspect of *Godden v. Hales* was the proposition now explicitly advanced in a court of law that the king as the only law-maker in parliament might rightfully and legally exercise the dispensing power to set aside statutes . . . . The [Court's] statement that the laws of England were the king's laws could be interpreted to mean that the king alone made law in parliament; and

152. *Id.* at 136.

153. *See id.* at 137 (observing that, unlike comparatively flexible nonconformists, Catholics could not comply with the Act's religious requirements and therefore could remain in office only until the next rounds of tests were administered).

154. *Id.*

155. *See id.* at 137 (explicating Parliament's belief that by excluding Catholics from various government posts, Catholicism could never be in the political ascendancy).

156. *Id.* at 130.

157. JOHN MILLER, JAMES II 212 (2000).

158. *See* Edie, *End of the Dispensing Power*, *supra* note 133, at 439–40 (remarking that English subjects feared James II's use of the dispensing power to bring Catholics into the army).

159. Dixon, *supra* note 144, at 137.

160. ERNEST C. THOMAS, *Godden v. Hales*, *in* LEADING CASES IN CONSTITUTIONAL LAW BRIEFLY STATED 17 (Charles L. Attenborough, 3d ed. 1901); *see supra* note 41.

161. Dixon, *supra* note 144, at 138.

> this proposition led in turn to the conclusion that the king, as the sole law-maker in parliament, possessed the inseparable prerogative of dispensing with laws in particular cases and upon particular necessary reasons. He was the sole judge of those reasons and necessities.[162]

James's actions and the Court's results in *Godden v. Hales* set in motion the events that led to his fall later in the same year. His son-in-law and eventual successor, the Dutch Prince William of Orange, worked to turn English public opinion against James. William published a series of *Declarations of Reasons* for his armed intervention in England's affairs.[163] This propaganda effort was successful in discrediting James and helped bring William (and his wife, Mary) to the throne in James's stead.[164] William's propaganda made the King's dispensing power the central target of its attacks.[165]

William's military and political victory over James led to fundamental constitutional changes in English law, most of which have entered into the broad stream of our own constitutional history. Of particular relevance here, that victory enabled Parliament to abolish the royal dispensing power altogether. On December 16, 1689, Parliament formally did so.[166] Thenceforward, English law has acknowledged no dispensing power unless specifically provided for by Act of Parliament.[167]

By the time of the Founding, it had become entirely obvious that the King's dispensing power was gone. Lord Mansfield, a leading eighteenth-century English jurist who, like Blackstone, exercised substantial influence on the Framers, stated that by 1766, the King's prerogative power no longer included either a dispensing or a suspending power:

> I can never conceive the prerogative to include a power of any sort to suspend or dispense with laws, for a reason so plain that it cannot be

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162. WESTON & GREENBERG, *supra* note 133, at 235–36 (footnotes omitted).

163. Tony Claydon, *William III's* Declaration of Reasons *and the Glorious Revolution*, 39 HIST. J. 87, 87–88 (1996).

164. For accounts of the contents and distribution of William's Declarations, see *id.* at 89–97; Lois G. Schwoerer, *Propaganda in the Revolution of 1688–89*, 82 AM. HIST. REV. 843, 851–60 (1977).

165. For example, in his *Prince of Orange's Declaration, 19 December 1688*, William noted:

> [The King's advisers] did invent and set on foot the King's dispensing Power; by virtue of which they pretend, that, according to Law, he can suspend and dispence with the Execution of the Laws, that have been enacted by the Authority of the King and Parliament, for the Security and Happiness of the Subject; and so have rendered those Laws of no Effect: Though there is nothing more certain, than that, as no Laws can be made but by the joint Concurrence of King and Parliament, so likewise Laws so enacted, which secure the publick Peace and Safety of the Nation, and the Lives and Liberties of every Subject in it, cannot be repealed or suspended but by the same Authority.

10 H.C. JOUR. (1688) 1 (Eng.), *available at* http://www.british-history.ac.uk/report.aspx?compid=28773.

166. Edie, *End of the Dispensing Power*, *supra* note 133, at 449.

167. Dixon, *supra* note 144, at 135.

> overlooked, unless because it is plain; and that is, that the great branch of the prerogative is the executive power of government, the duty of which is to see to the execution of the laws, which can never be done by dispensing with or suspending them.[168]

Versed in England's constitutional history, the Framers surely understood that the Constitution's grant of the executive power did not include dispensation, and that to charge the President with the "faithful execution" of the laws underscored that fact.[169] England's constitutional moment in 1689 was to become, nearly a century later, very much our own. "The president of the United States cannot control [an act of Congress], nor dispense with its execution . . . ."[170] "The Executive Branch does not have the have the dispensing power on its own . . . ."[171]

C. The Presidential "Prerogative"

Our argument that the President has a duty to execute the law, and no power not to execute it, is still incomplete. It has not so far addressed the question whether there is a presidential prerogative that would authorize deviation from, or even outright violation of, the law. By the "prerogative," we mean the authority to violate statutory law on the grounds of compelling public necessity.[172] To conclude that the Constitution encapsulates a grant of prerogative power would be to contradict our claim that the Constitution recognizes *no* general power in the President not to execute the law.

In order to analyze the question of the prerogative, we must turn to the political theory of John Locke. His *Second Treatise of Civil Government*, distinguished between the executive and legislative powers: the legislature held the "Supream [sic] Power" to set private rules of conduct, while the

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168. Lucius Wilmerding, Jr., *The President and the Law*, 67 POL. SCI. Q. 321, 335 (1952) (quoting Lord Mansfield, *A Speech in Behalf of the Constitution Against the Suspending and Dispensing Prerogative, &c.*, *in* 16 PARL. HIST. ENG. (1766) 267 (Eng.)).

169. The omission of any explicit reference in the Constitution to the nonexistence of a dispensing power is fully intelligible in this light. First, as of 1787, the Vesting Clause could not be understood to confer a dispensing power; second, any lingering suggestion that the President had a dispensing power was erased by the Take Care Clause. Not given to superfluities, the drafters of the Constitution did not refer to dispensations.

170. United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806). *Smith* was decided by Justice William Paterson, who had previously been a New Jersey delegate to the Philadelphia Convention. *See* JOHN E. O'CONNOR, WILLIAM PATERSON: LAWYER AND STATESMAN 1745–1806, at 131 (1979) (describing Paterson's participation in the convention).

171. OPM v. Richmond, 496 U.S. 414, 435 (1990) (White, J., concurring) (asserting as such in an opinion joined by Justice Blackmun).

172. "Prerogative" is also sometimes used to designate particular presidential authorities, such as the pardon power or the power to conduct the Nation's foreign affairs. That the President has "prerogative powers" in that sense is, of course, undeniable. *See* U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . and he shall have Power to grant Reprieves and Pardons for Offenses against the United States . . . ."). Reliance on a claim of prerogative is different from the claim that execution of the law would, in a particular application, unconstitutionally interfere with or undermine the legitimate exercise of an Article II power.

executive's primary duty was to implement the laws.[173] Because legislatures could not always remain in session, society needs "a power always in being which should see to the execution of the laws that are made and remain in force."[174] But Locke also described other dimensions to the executive power. The executive possessed key lawmaking powers such as the right to call or dissolve Parliament, the veto, and the "federative" power over "war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth."[175] Locke discerned that the federative and the executive "are always almost united" because the federative "is much less capable to be directed by antecedent, standing, positive laws."[176] These functions were to be performed by the executive—the part of government that is always operative and able to swiftly adapt to new circumstances or dangers.[177] Locke did not recommend separating the functions, which he predicted would lead to "disorder and ruin," by dividing "the force of the public" into "different commands."[178]

Locke's analysis of the federative power also identified the roots of the prerogative. Unanticipated threats and emergencies were to be dealt with by the executive, because legislatures could not sit continuously, could not write laws to encompass every contingency, and were badly designed to take immediate action. By contrast, the executive was always in being and could act swiftly and decisively to events. As Locke noted, the prerogative operated where general laws could not, and that area "must necessarily be left to the discretion of him that has the executive power in his hands."[179] The use of the prerogative was necessary because the legislature could not move quickly enough "for the dispatch requisite to execution."[180] Sometimes, Locke observed, the executive's resort to prerogative in an emergency could conflict with standing legislation, written before and without anticipation of the current circumstances. The prerogative allows the executive "to act according to discretion for the public good, without the prescription of the law, and sometimes even against it."[181]

Locke provided no definitive resolution to the conflict between Parliament's supreme power of legislation and the prerogative. To be sure, the executive's authority had to be exercised in the public interest and for the

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173. JOHN LOCKE, *The Second Treatise of Civil Government*, *in* TWO TREATISES OF GOVERNMENT § 143–44, at 194–95 (Thomas I. Cook ed., Hafner Publ'g Co. 1965) (1690).

174. *Id.* § 144, at 195.

175. *Id.* § 146, at 195.

176. *Id.* § 147, at 195–96.

177. *See id.* ("[W]hat is to be done with foreigners . . . must be left in great part to the prudence of those who have this power committed to them, to be managed by the best of their skill for the advantage of the commonwealth.").

178. *Id.* § 148, at 196.

179. *Id.* § 159, at 203.

180. *Id.* § 160, at 204.

181. *Id.*

common good—unlike the royal prerogative. But the "old question" remained of how to resolve conflicts between emergency power and the standing laws.[182] There were no pre-existing answers to this problem for Locke, and there was "no judge on earth" who could resolve it.[183] Attempting to define the executive prerogative's full scope ahead of time would be self-defeating.

Although Locke's influence on the Founding generation is undoubted, its extent is arguable.[184] Legal scholars and historians have long debated whether the Framers understood the "Executive power" to exclude Locke's conception of the prerogative.[185] The question is complicated by the fact that Locke's conception of "the prerogative" includes at least two different aspects, one of which might reasonably be thought to be encompassed in the grant of executive power. Locke includes within the prerogative both: (1) the power to take discretionary actions for the sake of the public good in unprovided-for cases, i.e., matters that the law simply does not address, and (2) the power to act in an emergency or other extreme situation, for the sake of preserving the society, in a manner contrary to law.[186] We can call these the "law-supplementing" and the "law-violative" forms of the prerogative. Locke writes:

> Many things there are which the law can by no means provide for; and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good

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182. *Id.* § 166–68, at 206–07.

183. *Id.* § 168, at 207.

184. Some scholars have asserted that "Locke was the preeminent influence on the American Founding." George Thomas, *As Far as Republican Principles Will Admit: Presidential Prerogative and Constitutional Government*, 30 PRESIDENTIAL STUD. Q. 534, 537 (2000). But that is exaggerated. *See* Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 860 (1978) (cautioning against attributing too much influence to Locke). One quantitative study ranked Locke third among political thinkers most frequently cited by Americans of the Founding period—roughly as often as Hume, but well below both Montesquieu and Blackstone. DONALD S. LUTZ, A PREFACE TO AMERICAN POLITICAL THEORY 136 tbl.5.2 (1992).

185. Thus, Clinton Rossiter wrote that "[t]he Lockian theory of prerogative has found a notable instrument in the President of the United States, and executive initiative has come to be the basic technique of constitutional dictatorship in this country." CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 218 (1948). For various viewpoints, contrast the views expressed in EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957, at 14–15 (4th rev. ed. 1957) [hereinafter CORWIN, OFFICE AND POWERS] (arguing the presidency was designed to reproduce the English monarchy without the corruption) and Edward S. Corwin, *War, The Constitutional Moulder*, NEW REPUBLIC, June 9, 1917, *reprinted in* PRESIDENTIAL POWER AND THE CONSTITUTION: ESSAYS 23 (Richard Loss ed., 1976) (defending the claim that the Framers incorporated Lockean prerogative into Presidential power), with David Gray Adler, *The Framers and Executive Prerogative: A Constitutional and Historical Rebuke*, 42 PRESIDENTIAL STUD. Q. 376, 388 (2012) (asserting that the Framers "delivered a robust historical and constitutional rebuke" to the prerogative power) and Jack N. Rakove, *Taking the Prerogative out of the Presidency: An Originalist Perspective*, 37 PRESIDENTIAL STUD. Q. 85, 91, 95 (2007) (noting that the Framers circumscribed but did not entirely eliminate prerogative power).

186. LOCKE, *supra* note 173, § 159, at 203.

> and advantage shall require; nay, it is fit that the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of nature and government, viz., that, as much as may be, all the members of the society are to be preserved . . . .[187]

Although the two facets of Locke's prerogative are not always easy to separate, the law-supplementing form of the prerogative seems less controversial in American practice. An early example is President John Adams's arrest of Jonathan Robbins under an extradition treaty with Great Britain.[188] In the absence of an act of Congress, Congressman John Marshall argued, the Executive had the power to give effect to the treaty by choosing his own means.[189] In 1807, Thomas Jefferson claimed that the Executive had some power to fill in, or even vary, the details by which a law was to be executed. He wrote, "if means specified by an act are impracticable, the constitutional [executive] power remains, and supplies them. . . . This aptitude of means to the end of a law is essentially necessary for those who are executive; otherwise the objection that our government is an impracticable one, would really be verified."[190] Another classic example in this line is the Supreme Court's decision, *In re Neagle*,[191] which held that in the absence of an act of Congress the President could assign a United States Marshall to protect a Supreme Court Justice.[192] And in *Loving v. United States*,[193] the Supreme Court suggested that the President could prescribe rules and regulations for the military, such as aggravating factors for capital military crimes.[194] Interstitial lawmaking of this kind offends no act of Congress and seems well recognized in American constitutional practice.

The law-violative form of Locke's prerogative, however, has been highly controversial. Locke argues that "a strict and rigid observation of the laws may do harm—as not to pull down an innocent man's house to stop the fire when the next to it is burning."[195] A private person who performed such an act, Locke argues, should merit a royal pardon.[196] His analogy further

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187. *Id.*

188. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 684 (1952) (Vinson, C.J., dissenting).

189. *Id.*; *see also* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 339–51 (1990) (discussing Marshall's argument in the House of Representatives in which Marshall supported the use of executive power in the Robbins affair).

190. Letter from Thomas Jefferson to Governor William H. Cabell (Aug. 11, 1807), *in* 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 93, at 318, 320.

191. 135 U.S. 1 (1890).

192. *Id.* at 66–68, 76.

193. 517 U.S. 748 (1996).

194. *Id.* at 773–74. Writing for the majority, Justice Kennedy noted that Congress may delegate authority to the executive power. *Id.* at 767 ("Under Clause 14 [of Article I], Congress, like Parliament, exercises a power of precedence over, not exclusion of, Executive authority. *Cf.* United States v. Eliason, 16 Pet. 291, 301 (1842) ('The power of the executive to establish rules and regulations for the government of the army, is undoubted').").

195. LOCKE, *supra* note 173, § 159, at 203.

196. *Id.*

suggests that the executive itself is empowered to destroy private property when such destruction is necessary to prevent a greater harm.

An argument based on such prerogative may be thought to have particular appeal to those who, like us, have defended a robust conception of presidential authority over national security and foreign affairs, especially in time of crisis.[197] But even if a presidential prerogative exists in that form, we do not believe that it would encompass an action like President Obama's recent immigration decision. To explain why it does not, we must review both critical episodes in American constitutional practice, such as the Louisiana Purchase and the Civil War, and key cases in the nation's jurisprudence, such as the Steel Seizure crisis.

Any prerogative would not extend to the immigration decision because the President's constitutional authority should only extend to national security and foreign affairs. Republican government suffers from an inherent difficulty. Representative, deliberative legislatures have institutional difficulty in anticipating and providing for unforeseen events. The Executive is the only branch constantly in being that can respond swiftly and decisively to emergency. The challenge is investing the Executive with sufficient discretion to handle crisis without veering into a dictatorship. The record of American constitutional practice shows that the Executive possesses adequate powers under the Constitution to cope with extreme national emergencies. Ever since Abraham Lincoln's presidency, the nation's emergency powers have rested within the President's Article II powers, not outside it.[198]

The controversy over the placement of the prerogative can be illustrated through the differences between Presidents Thomas Jefferson and Abraham Lincoln. President Jefferson had a strict view of the separation of powers including the equal right of each branch of government to interpret the Constitution for itself. Take, for example, his handling of those charged under the Alien and Sedition Acts of 1798.[199] Jefferson pardoned the ten individuals convicted under the law and ordered all pending prosecutions dropped. Even though Congress had passed the law and the courts had upheld it, Jefferson argued that he had a duty to review its consistency with the Constitution:

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197. *See, e.g.*, Robert J. Delahunty & John Yoo, *Making War*, 93 CORNELL L. REV. 123, 167 (2007). ("[W]e find that the Declare War Clause was *not* understood to vest Congress with the exclusive power to wage war or, even more broadly, to control any governmental activity that might even *signal* war."). *See generally* YOO, *supra* note 3.

198. *See* YOO, *supra* note 7, at 209 ("Lincoln's greatness in preserving the Union depended crucially on his discovery of the broad executive powers inherent in Article II for use during war or emergency.").

199. *See* John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 426–27 (2008) (articulating the argument for presidential equality and asserting the Executive Branch could independently and equally interpret the Constitution).

> On coming into office, I released these individuals by the power of pardon committed to executive discretion, which could never be more properly exercised than where citizens were suffering without the authority of law, or, which was equivalent, under a law unauthorized by the Constitution, and therefore null.[200]

Jefferson used the unique powers of the Presidency to refuse executing a law.

Jefferson rejected the notion that the courts have the last word on constitutional meaning. As he explained in a letter to Abigail Adams, the Executive and Judiciary are "equally independent" in reviewing the constitutionality of the laws.[201] "You seem to think it devolved on the judges to decide on the validity of the sedition law," he wrote, "But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them."[202] While the courts have the right to interpret the Constitution and uphold a law, the President can hold a different view and refuse to bring prosecutions against those who violate the law or pardon those already convicted.

Jefferson believed that the President's understanding of the Constitution should guide him in his use of the Executive Branch's unique powers. He thought that Presidents ought to veto laws that he judged unconstitutional, but at the same time, he believed that the President should not veto laws simply because of policy disagreements.[203] Similarly, as the Alien and Sedition Acts episode shows, he believed a President should decline to prosecute unconstitutional laws.[204] As with the veto, Jefferson nowhere appears to have believed that Presidents could decline to enforce a law purely out of disagreement with its policy; that would have been hard to square with his view that Presidents could not even veto laws on that ground.

Rather, Jefferson's claim of an extraordinary presidential authority had to reach outside the Constitution altogether. This was made clear in the 1803 Louisiana Purchase—perhaps Jefferson's greatest act as chief executive. But an act that raised constitutional issues about the acquisition of new territory by the United States and whether it could evolve into a full-fledged member of the Union. Even though the Louisiana Purchase avoided war with France and Spain, and doubled the size of the nation, Jefferson believed it had no constitutional authorization.[205] The Constitution does not clearly provide for the addition of new territory to the Union. Article IV, Section Three

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200. Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), *in* 15 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 93, at 212, 214.

201. Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 93, at 49, 50.

202. *Id.*

203. YOO, *supra* note 7, at 107.

204. *Id.*

205. Yoo, *supra* note 199, at 435, 437.

recognizes Congress's power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[206] But the Property Clause seems to describe Congress's power over land and property that is already in the possession of the United States; it does not address the process of acquiring the new territory in the first place.[207] But Article IV, Section Three also sets out a process for the admission of new states to the Union: "New States may be admitted by the Congress into this Union," but the formation of a new state from within the territory of an existing state would require the existing state's permission.[208] If the Constitution provided no process for adding new territory, but still set out a procedure for the entry of new states, where would these new states come from?

Jefferson, for one, reconciled these conflicting provisions by concluding that the admissions process for new states could only apply to territory held by the United States in 1789. The territory governed by the Northwest Ordinance, which gave rise to Midwestern states such as Ohio, could still become states. But Jefferson doubted whether the territory of the Louisiana Purchase could ever become states. The Constitution prohibits the formation of new states out of the borders of existing states without their consent as well as the consent of Congress.[209] Jefferson's Attorney General agreed with the President, but proposed a solution to the problem by urging that the boundaries of existing states be enlarged to include the Louisiana Purchase.[210] Treasury Secretary Albert Gallatin, on the other hand, argued that the federal government has powers that extended beyond those explicitly set out in the Constitution to include the sovereign powers held by all other nations.[211] The United States, under Gallatin's view, could acquire new territory and add states even if the Constitution did not provide for it.

Jefferson quietly approved Gallatin's reasoning. But in order to maintain fidelity to his vision of the Constitution as granting only narrow powers, he had to confess that the new territory would enter the Union as a matter of "expediency."[212] In an 1803 letter, he wrote that "[o]ur confederation is certainly confined to the limits established by the revolution. The general government has no powers but such as the constitution has given it; and it has not given it a power of holding foreign territory, [and] still less of incorporating it into the Union."[213] For the Louisiana Purchase to

206. U.S. CONST. art. IV, § 3, cl. 2.

207. GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 27–30 (2004).

208. U.S. CONST. art. IV, § 3, cl. 1.

209. YOO, *supra* note 7, at 118.

210. *Id.*

211. 4 DUMAS MALONE, JEFFERSON AND HIS TIME 312 (1970).

212. *Id.*

213. Letter from Thomas Jefferson to John Dickinson (Aug. 9, 1803), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 261, 262 (Paul L. Ford ed., 1897).

eventually give birth to states, Jefferson admitted, "[a]n amendment to the Constitution seems necessary."[214] Writing in a similar vein to John Breckinridge, a leading Jeffersonian in the Senate, the President more explicitly relied upon Locke's theory of the prerogative. "The executive in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution," Jefferson wrote.[215] It was now up to Congress to support the unconstitutional act. "The Legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify and pay for it, and throw themselves on their country for doing for them unauthorized, what we know they would have done for themselves had they been in a situation to do it."[216] Although he did not ultimately follow this course in public, Jefferson concluded that the President should seek atonement before the public for violating the Constitution due to necessity. "[W]e shall not be disavowed by the nation," he predicted, "and their act of indemnity will confirm and not weaken the Constitution, by more strongly marking out its lines."[217]

Jefferson believed the Louisiana Purchase to be sufficiently unconstitutional that he drafted at least two constitutional amendments to specifically allow the territory's addition to the Union.[218] But necessity even forced him from that route of escape from his constitutional dilemma. Shortly after American envoys reached an agreement in Paris, further word reached Jefferson that Napoleon was considering reneging on the deal.[219] The time needed for a constitutional amendment might give Napoleon the time to change his mind.[220] Jefferson sent letters to Congress advising members to drop any constitutional objections to the treaty: "nothing must be said on that subject which may give a pretext for retracting; but that we should do sub silentio what shall be found necessary."[221] With Senator William C. Nicholas, for example, Jefferson agreed that "[w]hatever Congress shall think it necessary to do, should be done with as little debate as possible, and particularly so far as respects the constitutional difficulty."[222] Nevertheless, Jefferson still believed the President and Congress were

214. *Id.*

215. Letter from Thomas Jefferson to John Breckinridge (Aug. 12, 1803), *in* 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 93, at 407, 411.

216. *Id.*

217. *Id.*

218. Drafts of an Amendment to the Constitution (July 1803), *in* 8 THE WRITING OF THOMAS JEFFERSON, *supra* note 213, at 241, 241–49.

219. YOO, *supra* note 7, at 120.

220. *Id.*

221. Letter from Thomas Jefferson to John Breckinridge (Aug. 18, 1803), *in* 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 213, at 244 n.1; *see also* Letter from Thomas Jefferson to Thomas Paine (Aug. 18, 1803), *in* 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 213, at 245 n.1 (requesting the same).

222. Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), *in* 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 93, at 417, 418.

violating the Constitution. Adding the Lousiana Purchase, he admitted would create a precedent that would allow the United States to add "England, Ireland, Holland, etc. into it."[223] Such methods of interpretation, Jefferson warned, would "make our powers boundless" and would render the Constitution "a blank paper by construction."[224] Jefferson claimed that it would be better to stick with a narrow interpretation of Congress's powers, and then "ask an enlargement of power from the nation, where it is found necessary."[225]

Jefferson claimed that circumstances could justify presidential action beyond the Constitution. If he had limited the Presidency to his narrow interpretation of the government's powers, he could not have carried out the Louisiana Purchase as a simple treaty. Jefferson's dilemma, however, was of his own creation. Article IV, Section Three, for example, requires that states must approve the admission of new states created from within the former's existing borders.[226] If Jefferson were correct, and no territory could be added to the Union, then all new states would fall into this category. There would be no class of states that would fall under Section Three's simple approval by Congress alone.[227] Congress's sole approval must extend, therefore, to the creation of states out of new territory.

Jefferson's cramped reading of Section Three, and his broader allegiance to a strict construction of the Constitution, ironically forced him into the arms of the prerogative. In his letter to Breckinridge, Jefferson compared himself to a guardian acting in the best interests of his ward.[228] He had to seize the opportunity "which so much advances the good of the[] country."[229] Unforeseen circumstances required him to exceed his legal powers to protect the greater good.[230] Jefferson looked for ultimate approval not from the Constitution, but from the people through their representatives in Congress.[231]

Two years after he left office, Jefferson provided a more complete defense of the prerogative. In an 1810 letter, he asked whether "circumstances do not sometimes occur, which make it a duty in officers of high trust, to assume authorities beyond the law."[232] Jefferson found the question "easy" in principle, though "embarrassing in practice":

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223. *Id.*

224. *Id.* at 419.

225. *Id.* at 418–19.

226. U.S. CONST. art. IV, § 3, cl. 1.

227. *Id.*

228. Letter from Thomas Jefferson to John Breckinridge, *supra* note 215, at 411.

229. *Id.*

230. *Id.*

231. *Id.*

232. Letter from Thomas Jefferson to J. B. Colvin (Sept. 20, 1810), *in* 12 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 93, at 418, 418.

> A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.[233]

Jefferson illustrated with examples from the Revolution: Washington had destroyed private property for tactical reasons, while Jefferson as Governor of Virginia had seized men and confiscated material needed for the fight.[234] He also raised the possibility during his presidency of acquiring the Floridas without any congressional appropriation.[235] "Ought the Executive, in that case . . . to have secured the good to his country, and to have trusted to their justice for their transgression of the law?"[236] Jefferson's answer was yes.[237] Jefferson argued that "a law of necessity and self-preservation" was at stake, and that law "rendered the *salus populi* supreme over the written law."[238]

Prerogative, Jefferson believed, could only be invoked by the nation's highest officers, and only in moments of real crisis. But when "consequences are trifling, and time allowed for a legal course," he maintained, "overleaping the law" was worse than "a strict adherence to its imperfect provisions."[239] If an executive misjudged the circumstances, he deserved to be judged harshly. "It is incumbent on those only who accept of great charges, to risk themselves on great occasions, when the safety of the nation, or some of its very high interests are at stake."[240] Jefferson trusted that his fellow Americans would "put themselves into his situation" and judge his decisions based on what he knew at the time.[241]

Jefferson, however, left many of the most important details unfilled. He did not define when the national security was sufficiently threatened to trigger the prerogative. A good officer would somehow know when to disregard his orders that did not suit new circumstances.[242] Jefferson does not limit the Executive's prerogative to self-defense; he also approves of taking advantage of favorable circumstances to advance the nation's interests.[243] Jefferson believed that a President could act decisively, even without congressional approval, to seize a golden opportunity such as the

233. *Id.*
234. *Id.* at 418–19.
235. *Id.* at 419.
236. *Id.* at 419–20.
237. *Id.* at 420.
238. *Id.* at 421.
239. *Id.*
240. *Id.* at 421–22.
241. *Id.* at 421.
242. *Id.* at 422.
243. *Id.* at 421–22.

purchase of Louisiana.[244] Afterwards, he could remedy the constitutional breach by seeking congressional ratification.[245]

There are two constitutional possibilities for the prerogative. First, Article II's grant of the executive power to the President to respond to unforeseen emergencies, even to the point of violating statutory law. Presidents might seek approval from Congress after the crisis ends, but as a matter of political harmony rather than constitutional requirement. A second approach would refuse to recognize the existence of an emergency power within the Constitution. A President may violate the law out of national necessity, but he acts unconstitutionally. Viewing the prerogative in this way, Jefferson thought, would prevent the President from permanently ratcheting up executive power after every emergency. As Jeremy Bailey and Gary Schmitt have each argued, Jefferson's appeal to the prerogative allowed him to purchase Louisiana but keep true to his vision of a Constitution of narrow federal powers.[246]

It was for Lincoln to resolve this question by firmly planting emergency powers within the Constitution. Some prominent scholars have compared Lincoln to a "despot," in the words of Arthur M. Schlesinger, and his presidency to a "dictatorship" in the words of both Edward Corwin and Clinton Rossiter.[247] Lincoln considered the possibility that preserving the Union could justify the exercise of extraconstitutional powers. In 1864, he asked in a letter: "Was it possible to lose the nation, and yet preserve the constitution?"[248] Preserving the nation had to come first, for without the nation there could be no Constitution. "I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation."[249] To Lincoln, the law of necessity applied equally to the nation as to the individual. "By general law life *and* limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb."[250]

While Lincoln exercised his powers broadly, however, he did not seek them beyond the Constitution. Responding to a dire threat to the nation's security, he relied on his power as Commander in Chief to give him control

244. *Cf. id.* at 419–20 (hypothesizing about performing a similar act to purchase the Floridas).

245. *Cf. id.* at 420 (discussing the retroactive congressional sanctioning of supplying those involved in the "Chesapeake affair").

246. JEREMY D. BAILEY, THOMAS JEFFERSON AND EXECUTIVE POWER 15–22 (2007); Gary J. Schmitt, *Jefferson and Executive Power: Revisionism and the "Revolution of 1800,"* PUBLIUS, Spring 1987, at 7, 22–25.

247. CORWIN, OFFICE AND POWERS, *supra* note 185, at 20; ROSSITER, *supra* note 185, at 224; ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 59 (1973).

248. Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 585, 585 (Don E. Fehrenbacher ed., 1989).

249. *Id.*

250. *Id.*

over decisions ranging from tactics and strategy to Reconstruction policy. Lincoln believed his constitutional duty to execute the laws, his role as chief executive, and his presidential oath gave him the authority to wage war against those who sought to secede. "[M]y oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that constitution was the organic law."[251] While Lincoln entertained the question of the prerogative, he refused to believe that the Constitution was so defective as to lack the means for its own self-preservation.[252]

Lincoln found the source of the nation's right of self-preservation in the Executive Power Clause.[253] It allowed Lincoln to respond to secession with military force: without Congress, he raised an army, invaded and blockaded the South, imposed an occupation government of recaptured territory, and suspended the writ of habeas corpus.[254] Lincoln consistently maintained that the power to handle this most dire threat to the nation's security rested within the Constitution's war powers.[255]

Lincoln's first exercised this authority to decide that secession was unconstitutional and could be stopped by military force. Today, we assume that Lincoln was correct, but the question of constitutional exit goes unanswered in the constitutional text and would not be resolved by the Supreme Court until after the Civil War.[256] His predecessor, James Buchanan, had announced that secession was illegal but that he lacked the constitutional authority to stop it.[257] Lincoln, however, immediately concluded that the Confederate States were effectively blocking the proper operation of the constitutional system and refusing to accept the results of the ballot box. They had seceded before Lincoln had even taken the oath of office, not to mention before the new Republican Congress had passed any new restrictions on slavery. In his First Inaugural Address, Lincoln restated his campaign promise to leave slavery untouched in the Southern states,

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251. *Id.*

252. *Id.*

253. YOO, *supra* note 7, at 202.

254. *Id.*

255. *Id.*

256. *See* Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868) ("The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.").

257. In his December 1860 annual message to Congress, Buchanan concluded that even though the South could not secede, he could not "make war against a State," leaving the federal government powerless. President James Buchanan Fourth Annual Message (Dec. 3, 1860), *in* 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3157, 3166 (James D. Richardson ed., 1897). After the Confederate States of America formed, Buchanan again declared that the executive power did not include the use of force against a state, and humbly requested that Congress, "the only human tribunal under Providence possessing the power to meet the existing emergency," do something. H. JOURNAL, 36th Cong., 2d Sess. 158 (1861); *see also* DANIEL A. FARBER, LINCOLN'S CONSTITUTION 76 (2003).

which he considered a matter of their own "domestic institutions."[258] He promised to execute the laws passed to enforce the Fugitive Slave Clause, even if he disagreed with them, and to continue to recognize "the institution of slavery in the States where it exists."[259] But the South had to accept that the Union was perpetual.[260] It preexisted the Constitution and the Articles of Confederation.[261] According to Lincoln, no state could ever secede; therefore, the Southern states remained part of the nation, and "the Union [was] unbroken."[262]

The President's duty to enforce federal law became one of Lincoln's central constitutional powers to stop secession. Lincoln relied on something of a fiction: he maintained that secession justified a swift presidential response because the southern states impeded his execution of the laws. He consistently claimed that it was a conspiracy of individuals, not the states themselves, that prevented the execution of the laws. The Constitution required the use of force, if necessary, to see "that the laws of the Union be faithfully executed in all the States."[263] The Constitution gave Lincoln no choice but to put down the rebellion. "*You* have no oath registered in Heaven to destroy the government," Lincoln told the South, "while *I* shall have the most solemn one to 'preserve, protect and defend' it."[264]

Lincoln called Congress into special session but, significantly, not until July 4, well after he had called up an army and deployed the navy against the South.[265] Lincoln responded to growing criticism of his actions as executive dictatorship, led in part by Chief Justice Taney's decision in *Ex parte Merryman*,[266] in his message to the special session. Lincoln stressed that the Confederacy had fired the first shot at Fort Sumter in order to preempt the process of "time, discussion, and the ballot-box."[267] In response, "no choice was left but to call out the war power of the Government; and so to resist force, employed for its destruction, by force, for its preservation."[268] Although Congress had not yet authorized his initial military responses, Lincoln claimed that he had sufficient public support. "These measures, whether strictly legal or not, were ventured upon, under what appeared to be

258. President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, *supra* note 248, at 215, 215.

259. *Id.* at 215–17.

260. *Id.* at 217.

261. *Id.* at 217–18.

262. *Id.* at 218.

263. *Id.* at 218–19, 223–24.

264. *Id.* at 224; *see also* Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 706–07 (2004) (reviewing DANIEL FARBER, LINCOLN'S CONSTITUTION (2003)) (explaining Lincoln's belief in a duty to defeat secession).

265. President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, *supra* note 248, at 246, 248–50.

266. 17 Fed. Cas. 144 (C.C.D. Md. 1861).

267. Lincoln, *supra* note 265, at 247.

268. *Id.* at 250.

a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them."[269]

Lincoln asked Congress to provide retroactive approval for his actions. "It is believed that nothing has been done beyond the constitutional competency of Congress."[270] Congress enacted a statute that did not explicitly authorize war against the South, but supported Lincoln's actions.[271] In *The Prize Cases*,[272] a 5–4 majority of the Court upheld Lincoln's actions before Congress's authorization passed in July.[273] Lincoln did not need Congress's approval to immediately react to Fort Sumter. "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."[274] It did not matter whether the attacker was a foreign nation or a seceding state. The firing on Fort Sumter constituted an act of war against which the President automatically had authority to use force. "And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be '*unilateral*.'"[275] The Court expressly declared that the scope and nature of the military response rested within the hands of the Executive. "Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him* . . . ."[276] Judicial review would not extend to the President's decisions on whether to consider the Civil War a war, and what type of military response to undertake. The Justices only entertained the need for legislative approval as a hypothetical to buttress their conclusion, and never held that Congress's approval was necessary as a constitutional matter.[277]

No decision better illustrates Lincoln's view of the Presidency than Emancipation. Lincoln freed the slaves not under a claim of prerogative—even though it ran squarely against *Dred Scott v. Sandford*[278]—but under his

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269. *Id.* at 252.

270. *Id.*

271. Act of Aug. 6, 1861, Sess. I, ch. 63, § 3, 12 Stat. 326, 326.

272. 67 U.S. (2 Black) 635 (1863).

273. *Id.* at 665–66.

274. *Id.* at 668.

275. *Id.*

276. *Id.* at 670.

277. As the Justices noted:

> If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency.

Id. at 670.

278. 60 U.S. (19 How.) 393 (1857).

authority as Commander in Chief.[279] Whether the federal government could abolish slavery remained unanswered at the time. Lincoln had even campaigned on the plank that slavery was a matter of state law and could not be touched where it already existed. It was unclear whether the United States had the right as a belligerent, under the laws of war, to free slaves. A nation at war generally had the right to seize enemy property when necessary to achieve its military goals, but it also could not, as an occupying power, simply take all property held by private citizens.[280]

As the cost of the war rose higher, Northern demands for an end to slavery grew louder.[281] By July 1862, Lincoln decided to free the slaves, drafted an order, and notified his cabinet.[282] Antietam provided Lincoln with the military victory he needed to provide cover for the proclamation.[283] On September 22, 1862, five days after the battle, Lincoln issued the Emancipation Proclamation under his sole constitutional powers. Lincoln remained clear that the war was not about slavery, but "for the object of practically restoring the constitutional relation between" the United States and the rebel states.[284] Nevertheless, his proclamation freed 2.9 million slaves, 74% of all slaves in the United States and 82% of the slaves in the Confederacy.[285] On January 1, 1863, Lincoln issued the final version of the proclamation, "by virtue of the power in me vested as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion against the authority and government of the United States."[286] The President justified the Emancipation Proclamation "as a fit and necessary war measure for suppressing said rebellion."[287]

Lincoln's invocation of presidential power to justify the Emancipation Proclamation also carried built-in limits. As a war measure, he believed, the proclamation could not free any slaves in the loyal states, nor remake the Southern economic and political order. Lincoln even believed that the Emancipation Proclamation could not permanently free the slaves, but could only remain in effect while necessary to defeat the enemy. Shortly before issuing the preliminary proclamation, Lincoln wrote to Republican

279. For general discussion, see DAVID HERBERT DONALD, LINCOLN 375 (1995).

280. For general discussion, see JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 371–85 (1926).

281. YOO, *supra* note 7, at 218.

282. DONALD, *supra* note 279, at 365.

283. *Id.* at 369, 374.

284. *Id.* at 375.

285. PHILLIP SHAW PALUDAN, THE PRESIDENCY OF ABRAHAM LINCOLN 155 (1994).

286. President Abraham Lincoln, Final Emancipation Proclamation (Jan. 1, 1863), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, *supra* note 248, at 424, 424.

287. *Id.* Some of Lincoln's contemporaries, including former Supreme Court Justice Benjamin Curtis, criticized the legality of the Proclamation. *See* BENJAMIN R. CURTIS, EXECUTIVE POWER 21 (1862) ("The necessary result of [Lincoln's] interpretation of the Constitution is, that, in time of war, the President has any and all power, which he may deem it necessary to exercise, to subdue the enemy . . . .").

newspaper editor Horace Greeley, and through him to a broad readership, that his goal was to restore "the Union as it was."[288] Emancipation would stay in effect only as long as necessary to achieve victory. "My paramount object in this struggle *is* to save the Union, and is *not* either to save or to destroy slavery," Lincoln wrote.[289] "If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that."[290]

Lincoln made clear that the Commander in Chief Clause allows measures based on military necessity that would not be legal in peacetime. "I think the constitution invests its commander-in-chief, with the law of war, in time of war," he wrote.[291] Freeing the slaves was a form of preventing the enemy from using property to conduct its war effort. "Armies, the world over, destroy enemies' property when they can not use it; and even destroy their own to keep it from the enemy."[292] "Civilized belligerents do all in their power to help themselves, or hurt the enemy, except a few things regarded as barbarous or cruel," such as the massacre of prisoners or noncombatants.[293]

Emancipation both denied the South a vital resource and brought black soldiers into the Union war effort. Lincoln claimed that Union generals "believe the emancipation policy, and the use of colored troops, constitute the heaviest blow yet dealt to the rebellion."[294] Lincoln understood that as a war measure, emancipation would end with the war's end.[295] In 1864, Lincoln pressed for an end to slavery that would survive the war with the Thirteenth Amendment.

Lincoln domesticated Jefferson's prerogative. Rather than claim an extraconstitutional power, Lincoln located the President's ability to respond to the greatest threat to the nation's existence in his executive and Commander in Chief powers and his duty to execute the laws. But regardless of whether the prerogative rests within the Constitution or outside of it, American constitutional practice shows that it has been reserved to national security and foreign affairs. Constitutional text and structure confirms this, in part, by the open-ended nature of its distribution of the foreign affairs power. Many significant foreign affairs powers, such as the authority to develop foreign policy, to communicate with foreign nations, to

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288. Letter from Abraham Lincoln to Horace Greeley (Aug. 22, 1862), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, *supra* note 248, at 357, 358.

289. *Id.*

290. *Id.*

291. Letter from Abraham Lincoln to James C. Conkling (Aug. 26, 1863), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, *supra* note 248, at 495, 497.

292. *Id.*

293. *Id.*

294. *Id.*

295. YOO, *supra* note 7, at 220–22.

make nontreaty international agreements, and to break international agreements, are not specifically enumerated in the constitutional text. The Constitution "seems a strange, laconic document," Professor Louis Henkin wrote, characterized by troubling lacunae that leave many powers of government not mentioned.[296] The Constitution's silence has led some commentators to fall back on extraconstitutional sources, practice, or inferences from the Constitution's structure to support their preferred system for managing foreign affairs.[297]

The Constitution generally does not establish a fixed process for foreign relations decision making. Rather, it allocates different powers to the President, Senate, and Congress, which allows them to shape different processes depending on the contemporary demands of the international system at the time and the relative political position of the different branches.[298] The basic questions of war and peace remain open even today because the demands of foreign relations are unpredictable and ever changing, while the costs of mistake are so dear. There has been no definitive settlement of the power to make war or the place of treaties in our constitutional system. In essence, previous scholars have sought to articulate a legal order of fixed rules to rectify the disorder of foreign affairs, usually by adopting the template set by our domestic lawmaking system—that is, Congress legislating, the President executing, and the Judiciary adjudicating.[299] The unsettled nature of foreign affairs, however, does not arise from a systematic defect in the constitutional regime. The conflict among the branches of government over foreign affairs is not a flaw in the constitutional design, but is instead its conscious product. The Constitution does not establish a strict, legalized process for decision making. Instead, it establishes a flexible system permitting a variety of procedures. This not only gives the nation more flexibility in reaching foreign affairs decisions, it gives each of the three branches of government the ability to check the initiatives of the others in foreign affairs. The deepest questions of American foreign relations law remain open because the Constitution wants it that way.

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296. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 13–14 (2d ed. 1996).

297. *See id.* at 15 (arguing that attempts to define the foreign affairs power requires extrapolating from the Constitution, "reading between lines," and "stretching of language").

298. *See* U.S. Const. art. I, § 8, cl. 3 (granting Congress the general power to regulate international commerce); *id.* art. II § 2, cl. 2 (granting the President the power to make foreign treaties with two-thirds consent by the Senate).

299. *See* Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2364–65 (2006) (praising the Supreme Court in *Hamdan* for reinstituting checks and balances to protect against abuse of executive authority); Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. REV. 1338, 1340 & n.7 (1993) (reviewing JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993)) (placing the author within the "prominent chorus of legal academics advocating a more formalist approach to war powers disputes generally, through heightened participation by the courts and enhanced statutory responsibilities for Congress," and citing examples).

This approach helps explain practice better than competing theories, which have generally criticized practice as inconsistent with the Constitution.[300] Our approach explains variations in the different institutional arrangements over time, or between issues, by the wide discretion provided to the political branches to shape decision making in foreign affairs as they wish. Take war powers, for example. World Wars I and II might have led to the assumption that a congressional declaration of war is needed to trigger the President's powers as Commander in Chief. Formal declarations of war, however, have constituted the exception rather than the rule. The United States has declared war only 5 times, but has committed military forces into hostilities abroad more than 215 times in its history.[301] In some cases, such as the Quasi-War with France in 1798, the Vietnam War, the Persian Gulf War, and most recently the conflicts in Afghanistan and Iraq, Congress has "authorized" the President to engage in military operations, but more often it has not.[302] When President Truman sent American troops into Korea in 1950, he did not seek congressional approval, relying instead on his inherent executive and Commander in Chief powers.[303] In the Vietnam conflict, President Johnson never obtained a declaration of war nor unambiguous congressional authorization, although the Gulf of Tonkin Resolution expressed some level of congressional support for military intervention.[304] American actions in Grenada, Panama, Somalia,

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300. *See, e.g.*, BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 4–5 (2010) (maintaining that executive power is the greatest potential threat to the Constitution and citing the war on terror as an example of illegality); SCHLESINGER, *supra* note 247, at viii–ix (asserting that expansion of executive powers, especially in the military realm, threatens the Constitution); Koh, *supra* note 299, at 2358–59 (positing an executive tendency to assume inherent authority beyond legitimate bounds).

301. CONG. RESEARCH SERV., INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1789–1989 (1989), *reprinted in* THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 650, 650 (2d ed. 1993).

302. Memorandum from the Office of the Legal Adviser, U.S. Dep't of State, on The Legality of United States Participation in the Defense of Viet-Nam (Mar. 4, 1966), *reprinted in* 1 THE VIETNAM WAR AND INTERNATIONAL LAW 583, 597 (Richard A. Falk ed., 1968) (stating that presidents have utilized military forces at least 125 times to date without some form of congressional authorization).

303. Memorandum from Dep't of State, Authority of the President to Repel the Attack in Korea (July 3, 1950), *in* DEP'T OF STATE BULLETIN, JULY 3, 1950, at 173, 173–78. In the Korean War, the vast majority of congressmen approved of President Truman's military response to the North Korean invasion, but Congress recessed soon after the initiation of the war and President Truman chose not to ask for formal congressional approval when Congress returned. DEAN ACHESON, PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT 414–15 (1969).

304. While presidential critics such as Ely and Henkin generally attack unilateral executive war making in the postwar period, they find the Gulf of Tonkin Resolution to amount to acceptable congressional authorization for war, even though it was not a declaration of war. *See* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 16 (1993) (maintaining that the Gulf of Tonkin Resolution was broad enough to authorize Johnson's later actions in Vietnam); HENKIN, *supra* note 296, at 101 (claiming that the President only needed congressional approval, which he had in the form of the Gulf of Tonkin Resolution). Other critics, however, believe the Vietnam War was unconstitutional. *See, e.g.*, SCHLESINGER, *supra* note 247, at 177–207 (arguing that the Resolution was not a declaration of war, but a vague statement of

and Kosovo received no express congressional authorization.[305] Statutory efforts to control presidential war making, such as the 1973 War Powers Resolution,[306] have met with little success.[307]

Thus, if broad executive powers were to exist anywhere, they would exist in foreign affairs, where the limitations of republican government are most pronounced. Furthermore, it is here where the Constitution is most vague, hence giving the President the opportunity to act with the most discretion. In contrast, the domestic powers of the government are strictly defined and limited. Article I makes clear that it limits the power of Congress to the powers "herein" enumerated, the most prominent of which are the Commerce Clause and the Taxing and Spending powers.[308] Unlike the "invitation to struggle" that is the foreign affairs Constitution,[309] the process for enacting legislation is strict and defined. Both Houses of Congress must approve legislation, which must then be signed by the President as required by Article I, Section Seven of the Constitution.[310]

Domestic affairs permit a constitutional design framed to slow down, rather than speed up, federal action. Challenges at home do not tend toward the unforeseen and unprecedented. Domestic issues involve systematic social and economic problems, rather than divining the intentions and countering the actions of international competitors. Sometimes the most difficult problems, such as balancing the federal budget or fixing entitlement programs, can build for decades before they reach a point of crisis. Even sporadic events, such as natural disasters and economic fluctuations, might be predicted and provided for, just as with private insurance.

Furthermore, domestic and foreign affairs differ in their costs of inaction. With the latter, passivity may allow a sudden attack or a serious foreign setback to occur. With the former, however, passivity may allow for better policy. Inaction provides for more time to collect information, consider alternatives, and deliberate on the best policy. As the analysis of rules versus standards suggests, errors decrease under a more flexible

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opinion that the Founding Fathers would have opposed); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 62–63 (1991) (agreeing that the Constitution does not permit Congress to grant—without a declaration of war—the President authority to order military engagements similar in scale to the Vietnam Conflict and Operation Desert Storm); Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CALIF. L. REV. 623, 690–92 (1972) (contending that the Gulf of Tonkin Resolution did not give the President authority to send ground troops to Vietnam).

305. *See* RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R41199, THE WAR POWERS RESOLUTION: AFTER THIRTY-SIX YEARS 49–69 (2010) (indicating that presidents cite inherent executive and Commander in Chief powers as a source of authority when disclosing military actions to Congress as required by the War Powers Act).

306. 50 U.S.C. §§ 1541–48 (2006).

307. *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 86 (2010) (reporting that the Resolution is in effect "a dead letter" because of Congress's inability to enforce it).

308. U.S. CONST. art. I, § 8, cl. 1, 3.

309. CORWIN, OFFICE AND POWERS, *supra* note 185, at 201.

310. U.S. CONST. art. I, § 7, cl. 2.

approach that considers the totality of the circumstances.[311] The trade-off is that gathering more information and considering more alternatives drives decision costs up.[312] Domestic matters can tolerate longer decision processes and higher costs because the government has more time to act. Foreign affairs, however, impose greater costs on slower decisions because of the harms that can occur to the nation from a sudden attack or foreign setback.

In addition, the Constitution can treat presidential prerogative differently in foreign affairs than in domestic affairs because of federalism. In foreign affairs, the President is the only branch that can respond to a looming threat or emergency. If the Executive fails to act, the United States has failed to act. There is no backup system. In fact, Article I, Section Ten of the Constitution does its best to prohibit states from acting in national security affairs.[313] Even when Section Ten permits states to respond where the federal government cannot, such as in cases of imminent danger, the forces available to decentralized states may well prove inadequate to a nation-state level threat.

Domestic affairs give rise to opposite demands. The Constitution's structure recognizes that states provide the default system for addressing social and economic problems. Indeed, the common law of the states provides a universal, background level of regulation in the absence of any federal action. The Constitution's enumeration of Congress's powers in Article I, Section Eight means that federal intervention in any subject is interstitial, specialized, and limited, while state common law is general and universal. This contrast between federal and state law remains the core principle of *Erie Railroad Co. v. Tompkins*'s[314] holding that "[t]here is no federal general common law."[315] Unlike foreign affairs, if the President fails to act to solve a domestic problem, the states can act instead. The states are not constitutionally disabled; rather, the Constitution is biased in favor of state initiative. And the decentralized nature of the federal government may in fact lead to superior policy outcomes when facing the type of systematic, persistent problems that characterize domestic affairs.

Prerogative in foreign affairs may also have posed less trouble for the Framers not just because the potential benefits were so great, but because the expected costs would have been lower. The danger of the prerogative is the possibility that a President might convert emergency measures into a permanent authoritarian government. This threat is less likely with foreign rather than domestic challenges. Threats from abroad may be more harmful

311. *See* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 403 (1985) (explaining that flexible standards can help avoid unnecessary punishment).

312. *See* Charles R. Adrian & Charles Press, *Decision Costs in Coalition Formation*, 62 AM. POL. SCI. REV. 556, 557 (1968) (concluding that decision costs are, in part, a function of information gathering).

313. U.S. CONST. art. I, § 10.

314. 304 U.S. 64 (1938).

315. *Id.* at 78.

but of shorter duration than those at home. A military danger, even war, could inflict destruction on the nation, but it will be of limited duration—with a beginning and end point—that is dictated by the foreign actor, the nature of the attack, and the conclusion of the war. America's longest and most destructive wars, such as the Civil War, World Wars I and II, or even Vietnam and Iraq, have all ended. Although usually not involving large-scale hostilities, the long Cold War also came to an end. Even if a President exercises a prerogative to handle such threats to national security, he will still need Congress's support for any long-term military action because of the legislature's sole control of the power of the purse and the raising of the military—powers which we do not think the prerogative can overcome.[316]

A prerogative in domestic affairs would raise the risk of the kind of authoritarianism that worried the Framers much more. Domestic challenges tend toward persistent society-wide problems that do not have set beginnings or endings nor come at the hand of a single opponent. Poverty and crime have been permanent features of the human condition; no single person or institution is responsible for their existence. Invoking a prerogative to combat such decentralized problems would produce an extraordinary executive power of long duration. To be sure, some claim that the war on terrorism has a similar feature to it—it is a national security threat but one with no foreseeable end.[317] We think that this mistakes a persistent problem (terrorism) for a war against a discrete enemy (the al Qaeda terrorist network).

D. Supreme Court "Prerogative" Cases

Supreme Court cases that are most closely on point confirm our conclusion here that if the President has any prerogative power to violate the law, it must be limited to national security and foreign affairs.

In several major cases, the Executive has claimed (in substance, albeit not in terms) the prerogative power to injure an innocent third party's interest or expectations, and so override the law, for the sake of avoiding a far greater

316. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 296 (1996) (arguing that the practical requirement of congressional funding for modern military intervention provides Congress with a powerful check on the President's war powers and providing historical examples); Philip Bobbitt, *War Powers: An Essay on John Hart Ely's* WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH, 92 MICH. L. REV. 1364, 1390 (1994) ("As a structural matter, Congress has the first and last word. It must provide forces before the President can commence hostilities, and it can remove those forces, by decommissioning them or forbidding their use in pursuit of a particular policy at any time.").

317. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004) (O'Connor, J.) (observing with concern the prospect that the "broad and malleable" underpinnings of the "war on terror" raise the prospect that the conflict may not formally end and could lead to indefinite detention); Stephen Reinhardt, *The Judicial Role in National Security*, 86 B.U. L. REV. 1309, 1309–10 (2006) (characterizing the war on terror as a "war without end" and lamenting the threats to civil liberties posed by such an indefinite conflict).

harm to the society at large. We may call the most important of these the "prerogative cases." They are *United States v. Caltex, Inc.*,[318] *Youngstown Sheet & Tube Co. v. Sawyer*,[319] and *United States v. Midwest Oil Co.*[320]

In *Caltex*, the Court denied an American corporation's request for "just compensation" under the Fifth Amendment for the U.S. Army's destruction of its refinery and petroleum products near Manila in the Philippine Islands (then a U.S. territory) in order to prevent the facilities and products from falling into the hands of the Japanese Army, which was then entering Manila.[321] Although the Court referred to the "sovereign's" common law power in such exigent circumstances to destroy private property without incurring an obligation to pay compensation for it,[322] it nowhere identified an affirmative grant of authority to the President in the constitutional text. Not even the Commander in Chief Clause was cited. If one had to find a constitutional footing for the outcome, it would be natural to identify it as a Lockean "prerogative" that was vested in the Executive. And indeed, in *Bowditch v. Boston*,[323] one of the precedents on which *Caltex* relied, the Court had spoken explicitly of "the Prerogative."[324]

By contrast, *Youngstown* might be read as the definitive rejection of the idea that the President has any "prerogative" power—or at least, a rejection of the idea that national emergencies allow the President to act in ways that would otherwise be illegal.[325] The question before the Court was whether President Truman had the authority to seize and manage the Nation's steel mills in the middle of the Korean War.[326] Justice Hugo Black, a dissenter in *Caltex*,[327] wrote the opinion for the Court. Black reasoned that if the President had the authority to seize the mills, that authority would have to

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318. 344 U.S. 149 (1952).

319. 343 U.S. 579 (1952).

320. 236 U.S. 459 (1915). For a somewhat different account of *Midwest Oil*, though also one that denies that the Court there sustained a law-violative form of the prerogative, see Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 44–47 (1993).

321. *Caltex*, 344 U.S. at 151–52, 156.

322. *Id.* at 154 ("[T]he common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved.").

323. 101 U.S. 16 (1879).

324. *Id.* at 18–19.

325. This is far from clear, however. On a different analysis, a majority of the *Youngstown* Justices in fact recognized a presidential prerogative:

> [T]hat the President does possess, in the absence of restrictive legislation, a residual or resultant power above or in consequence of his granted powers, to deal with emergencies that he regards as threatening the national security, is explicitly asserted by Justice Clark, and the same view is evidently shared, with certain vague qualifications, by Justices Frankfurter and Jackson; and the [three] dissenting Justices would apparently go further.

EDWARD S. CORWIN & LOUIS W. KOENIG, THE PRESIDENCY TODAY 43 (1956).

326. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952).

327. *Caltex*, 344 U.S. at 156.

derive either from an act of Congress or from the President's Article II powers.[328] But neither Congress nor the Constitution supplied the requisite authority: the President had been acting legislatively. But "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[329]

Black's opinion, though spare and elegant,[330] left many corners dark. For one thing, Black's reasoning seems to cast the *Caltex* holding in doubt. If the Executive may destroy an oil refinery in a military emergency, why may it not seize a steel mill? The Lockean prerogative seems to cover both situations, and, as Chief Justice Vinson argued in dissent, the wartime circumstances in which Truman acted were exigent.[331] To be sure, the destruction of the oil refinery occurred *flagrante bello*, while the seizure of the mills took place on the home front.[332] More importantly, the Government was putting the mills to *use* in its war effort, while the oil refinery had intentionally been rendered useless.[333] Still, Black did not adequately explain why the President lacked the power to *seize* the mills, even if their seizure created an obligation on the Government's part to provide the mills' owners with compensation.

Unquestionably, if the President could finance a war by seizing private assets without authorization from Congress, Congress would lose control of its most powerful tool for checking executive war making. In *Federalist No. 58*, James Madison ascribed "the continual triumph of the British house of commons over the other branches of the government" to the employment of "the engine of a money bill."[334] That Congress retains sole power over the purse remains crucial to our system of government. Though scarcely visible

328. *Youngstown*, 343 U.S. at 585.

329. *Id.* at 587.

330. *See* Michael Stokes Paulsen, Youngstown *Goes to War*, 19 CONST. COMMENT. 215, 221 (2002) (characterizing Black's opinion as contributing sound principles of law and the proper guidance for the interpretation of constitutional separation of powers issues during wartime).

331. *See Youngstown*, 343 U.S. at 679 (Vinson, C.J., dissenting) (arguing that to view the case as considering "the possibility of executive seizure of a farm, a corner grocery store or even a single industrial plant" can "arise only when one ignores the central fact of this case—that the Nation's entire basic steel production would have shut down completely if there had been no Government seizure").

332. *See Youngstown*, 343 U.S. at 583 (showing that the steel mills seized by the President were located in the United States); *Caltex*, 344 U.S. at 150–51 (revealing that the war materiel in the Philippines was destroyed while Japanese troops were breaking through into Manila).

333. *See Youngstown*, 343 U.S. at 583 ("The order directed the Secretary of Commerce to take possession of most of the steel mills and keep them running."); *Caltex*, 344 U.S. at 151 ("All unused petroleum products were destroyed, and the facilities were rendered useless to the enemy.").

334. THE FEDERALIST NO. 58 (James Madison), *supra* note 75, at 395. On the attempts by Parliaments under the Tudors and Stuarts to use their leverage over taxing and spending to control Crown policy, see J.E. NEALE, ELIZABETH I AND HER PARLIAMENTS 1584–1601, at 169–83 (1958); E.R. Turner, *Parliament and Foreign Affairs, 1603–1760*, 34 ENG. HIST. REV. 172, 172 (1919). For a theory of how Parliaments have been able to control the predatoriness of rulers, see generally MARGARET LEVI, OF RULE AND REVENUE 127–44 (1988).

in Black's opinion,[335] that principle has been the bedrock of Anglo-American constitutional law for centuries.[336] The principle traces back to yet another phase of the controversies between Parliament and the Stuart dynasty—here, Parliament's struggle against King Charles I in the *Ship Money*[337] case of 1637.[338] Yet neither the lead nor the concurring opinions in *Youngstown* cited that constitutional background.

Furthermore, Black's analysis paid insufficient attention to the fact that the presidential action took place *at home*, rather than in combat abroad.[339] This crucial point was not missed in Justice Jackson's concurrence, however. Jackson found it "sinister and alarming" to think "that a President whose conduct of foreign affairs is so largely uncontrolled . . . can vastly enlarge his mastery over *the internal affairs* of the country by his own commitment of

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335. Justice Jackson's concurrence is much more on target when it says: "Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement." *Youngstown*, 343 U.S. at 643 (Jackson, J., concurring).

336. For an American case illustrating this principle, see *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 135 (1851) (stating that it is for the "political department of the government" to indemnify a military officer who "in his zeal for the honor and interest of his country" trespasses on private rights).

337. *Proceedings in the Case of Ship-Money, Between the King and John Hampden*, *in* 1 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH-TREASON AND OTHER CRIMES AND MISDEMEANORS 505 (4th ed. 1776).

338. In the Petition of Right of 1628, Charles I had bound himself (among other things) not to raise money without the consent of Parliament. Pressed for funds for naval operations, however, the King issued writs in 1636 based on an old prerogative—the power to compel the port towns of England to build and outfit ships for the Royal Navy in time of emergency. Charles's writs, however, went beyond the older rule in that he extended the system inland; they required the payment of money; and they were not justified by any apparent emergency. A member of the House of Commons, John Hampden, refused to pay what he regarded as an illegal tax, and was tried in the famous *Ship Money Case* of 1637, in which a closely divided court ruled in the Crown's favor. Hampden became a hero, and the *Ship Money Case* was a contributory cause of the ensuing civil war between the King and Parliament. In 1641, Parliament repealed the *Ship Money Case*. *Act Declaring the Illegality of Ship-Money*, Aug. 7, 1641, 17 Car. I. cap. 14, *in* THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625–1660, at 189, 189–92 (Samuel Rawson Gardiner ed., 3d ed. 1906). The repealing Act went on to find that the Court's opinion was "contrary to and against the laws and statutes of this realm, the right of property, the liberty of subjects, former resolutions in Parliament, and the Petition of Right." *Id.* at 191. Leading Americans of the Founding period were well aware of the *Ship Money Case* and its aftermath: Charles Carroll of Carrollton, a signer of the Declaration of Independence, argued that Robert Eden, the Governor of colonial Maryland, had unilaterally imposed taxes (in the form of fees) in contravention of the constitutional principle vindicated by the repeal of the *Ship Money Case*. H. TREVOR COLBOURN, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION 138–39 (1965). For a study of the English decision, see generally D.L. Keir, *The Case of Ship-Money*, 52 LAW Q. REV. 546 (1936) (describing the historical background behind the *Ship Money* decision and its later overruling).

339. Black does observe, however, that "[e]ven though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities." *Youngstown*, 343 U.S. at 587.

the Nation's armed forces to some foreign venture."[340] Jackson pointed to the Third Amendment in support of the "obvious" proposition that "[t]hat military powers of the Commander in Chief were not to supersede representative government of internal affairs."[341] And with his customary flair, he wrote:

> I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. His command power . . . is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress.[342]

The core of the case, for Justice Black, was not the danger posed by the war-making propensities of a self-financing Executive, nor even the distinction between presidential actions in overseas combat and in domestic affairs. Rather, it lay in what he saw as the President's usurpation of Congress's domestic lawmaking power. But Black did not explain satisfactorily why Truman's action fell on the "legislative" side of the legislative–executive divide.[343] The best explanation for his opinion seems therefore to lie in its latent structure. Black presupposed—without articulation or defense—the "law enforcement" or "dictionary" conception of the Executive, in which "the President simply 'executes' the will of Congress" and has "little independent presidential authority, at least when presidential authority would directly interfere with pre-existing private rights."[344] Whatever the hold of that conception might be, it can hardly support executive action like that upheld in *Caltex*.

Black's opinion is somewhat more persuasive if one takes into account its discussion of the legislative background to Truman's action. According to Black, the Government was not arguing that the President had statutory authorization for the seizure.[345] Rather, he reasoned, the President had deliberately acted as if Congress *had* empowered him to use seizure as a tool for resolving labor–management disputes, when in fact Congress had

340. *Id.* at 642 (Jackson, J., concurring) (emphasis added).

341. *Id.* at 644.

342. *Id.* at 645–46.

343. The difficulty was more fully appreciated by a very nonformalistic Justice Holmes. *See* Springer v. Philippine Islands, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting) ("[H]owever we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments . . . .").

344. Monaghan, *supra* note 320, at 3. Monaghan argues that *Youngstown* "provides the classic illustration of this conception." *Id.*

345. *See Youngstown*, 343 U.S. at 588 ("The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President.").

considered but *rejected* granting that authority.[346] Focusing on that aspect of the opinion makes it more intelligible why Black characterized Truman's action as "legislative" rather than "executive," and hence unconstitutional. As he saw it, Truman was not acting in a legislative void or with the implied approval of Congress, but instead squarely against the decision that Congress had made to limit the President to other dispute-resolution devices.

Midwest Oil, the third case in our trilogy, further reveals the depth of the Court's reluctance to deal with the question of presidential prerogative head-on. There, the Court sought to find a legislative basis for the President's action, however tenuous. An act of Congress had declared federal lands containing petroleum to be "free and open to occupation, exploration, and purchase by citizens . . . under regulations prescribed by law."[347] On the advice of the Interior Department, however, the President issued a proclamation "withdrawing" many of the lands from private claims.[348] The proclamation was intended chiefly to prevent the federal government from having to repurchase oil that it had, in practical terms, given away.[349] This was of particular concern because the Navy had a clear interest in securing large supplies of cheap oil near its stations on the Pacific in the troubled international environment immediately preceding the First World War.[350]

The Government rested its case on two constitutional claims. First, that as Commander in Chief, the President "had power to make the [withdrawal] order for the purpose of retaining and preserving a source of supply of fuel for the Navy."[351] Second, that the President, "charged with the care of the public domain, could, by virtue of the executive power vested in him by the Constitution . . . and also in conformity with the tacit consent of Congress, withdraw, in the public interest, any public land from entry or location by private parties."[352] The defendants argued "that there is no dispensing power in the Executive and that he could not suspend a statute or withdraw from entry or location any land which Congress had affirmatively declared should be free and open to acquisition by citizens."[353]

The Court's reasoning charted a course midway between the constitutional arguments of the parties. The Court relied chiefly on the long, continuous, and unchallenged executive practice of withdrawing federal lands from private appropriation.[354] Since Congress was well aware of this

346. *Id.* at 586.

347. United States v. Midwest Oil Co., 236 U.S. 459, 466 (1915) (internal quotation marks omitted).

348. *Id.* at 475, 480.

349. *Id.* at 467.

350. *Id.*

351. *Id.* at 468.

352. *Id.* (citation omitted).

353. *Id.*

354. *Id.* at 471–72.

practice and had acquiesced in it, the Court reasoned that Congress had implicitly delegated it to the Executive.[355] Further, the Executive was acting as the agent of Congress, which had a proprietary interest in the land; and Congress, as principal, had impliedly granted its agent the power to manage the sale of the land—including its withdrawal from sale.[356] By taking recourse to the fiction of an "implied" delegation, the Court was able to sidestep the question of whether the Vesting Clause did, or did not, confer a prerogative power in an exigent case to violate the terms of an act of Congress *pro bono publico.*

Interestingly, the Court at one place *did* advance an argument on behalf of the President's action that made scant reference to legislative authorization, but seemed instead to be grounded in the Lockean prerogative:

> But when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the Government already owned. And in making such orders, which were thus useful to the public, no private interest was injured. For prior to the initiation of some right given by law the citizen had no enforceable interest in the public statute and no private right in land which was the property of the people. The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large.[357]

Our review of the Supreme Court's leading prerogative cases suggests that the Court has been uneasy *both* in recognizing the existence of a naked prerogative power in the President *and* in denying it. Instead the Court has considered whether Congress "impliedly" delegated authority for the presidential action in question.[358] In effect, the Court has posed the counterfactual question of whether Congress *would* have approved the challenged executive action *if* it had addressed the question. The conception of the President as playing the role of "agent" to a congressional "principal" is but another way of framing the question of what Congress would have willed.

Our analysis of the prerogative thus suggests that the June 15 nonenforcement decision was not and cannot be defended as a valid exercise of a prerogative power—even assuming that a presidential prerogative can be

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355. *Id.* at 474–75.

356. *Id.* at 475.

357. *Id.* at 471. It was of course untrue to say that "no private interest was injured," since the explorers and producers had at least a legally founded expectation of title, and the defendant had actually occupied, claimed, and exploited the property.

358. This tendency was exhibited not only in the *Midwest Oil* case, but also more recently in *Dames & Moore v. Regan*, 453 U.S. 654, 669, 672, 674 (1981), which can also be considered a "prerogative" case.

found in the Constitution. First, the decision was plainly not of the law-supplementing kind. Congress had not failed to speak to the removal of illegal aliens or of the DREAMers in particular. There was no "gap" in the statute to be filled. Second, the law-violative form of the prerogative is asserted in extreme or emergency situations. But no comparable urgency was present here. Third, the decision was plainly not in accord with Congress's actual or counterfactual wishes. Congress considered and rejected the DREAM Act numerous times over a decade. The June 15 nonenforcement decision was more clearly contrary to Congress's will than President Truman's seizure of the steel mills.

IV. Defenses to a Breach of the Duty of Enforcement

In ordinary moral argument and in legal reasoning alike, a breach of duty may be defended. One can attempt to justify a breach of duty by showing that doing the act in question was necessary to discharge a more important duty, or was right or permissible, or contributed to achieving a significant good.[359] One can seek to excuse it by admitting that the action was wrong, but to deny responsibility for it.[360] Or one might acknowledge that the act was a breach of duty, seek neither to justify nor excuse it, but seek forgiveness on the grounds that it was only inconsequential.[361] In many ways, the legal system mirrors this structure of reasoning.

Use of this familiar moral and legal structure, we believe, will illuminate the question of breaches of the Executive's duty to enforce the law. We shall identify what appear to be the most commonly recognized and acceptable defenses that Presidents and federal agencies have raised when charged with breach of duty for a failure to execute the laws. None of them appears to vindicate the June 15 nonenforcement decision.

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359. We take the distinction between "justification" and "excuse" from J.L. Austin, *A Plea for Excuses: The Presidential Address*, 57 PROC. ARISTOTELIAN SOC'Y 1 (1957), a classic paper by a leading "ordinary language" philosopher. *See id.* at 2 (positing that to "justify" a "bad, wrong, inept, unwelcome, or . . . untoward" action is "to admit flatly that [the actor] did do that very thing . . . but to argue that it was a good thing, or the right or sensible thing, or a permissible thing to do, either in general or at least in the special circumstances of the occasion").

360. *See id.* (asserting that to "excuse" a "bad" action is "to admit that it wasn't a good thing to have done, but to argue that it is not quite fair or correct to say *baldly* 'X [actor] did A [act],'" and subsequently explaining that "[i]n the one defence [justification], briefly, we accept responsibility but deny that it was bad: in the other [excuse], we admit that it was bad but don't accept full, or even any, responsibility").

361. *Cf. id.* at 20 (explaining that it is characteristic of "excuses to be 'unacceptable' . . . there will be cases of such a kind or of such gravity that 'we will not accept' it. . . . We may plead that we trod on the snail inadvertently: but not on a baby—you ought to look where you're putting your great feet").

A. Unconstitutional Statutes

Presidents have refused to enforce or defend acts of Congress that they maintain are unconstitutional.[362] The unconstitutionality of an act of Congress can serve as a defense to a charge of nonexecution in two ways. First, the President can argue that his duty is to enforce the "law." An unconstitutional act of Congress is void, and thus not "law." There is no duty to enforce it, and no breach of duty in not enforcing it. Alternatively, the President can argue that the Constitution is itself a "law" that he has a duty to enforce. If he is also obligated to enforce an unconstitutional statute, his duties will conflict. In that conflict, he must discharge the higher and more important duty, which is to the Constitution.

We have argued in other work that the President is not duty bound to enforce an unconstitutional law.[363] Of course, legal scholars and practitioners may disagree over whether a particular statute is, or is not, unconstitutional. During the Clinton Administration, there was a controversy over the constitutionality of a statute that would have required the Defense Department to identify military personnel who were HIV-positive and to discharge them if they tested positive.[364] Likewise, during that Administration there was also a controversy over a bill that would have precluded the President from placing U.S. military personnel under the command of foreign military officers.[365] In both cases, the Clinton Administration concluded that these measures would infringe on the

362. *See, e.g.*, Robert J. Delahunty, *The Obama Administration's Decisions to Enforce, But Not Defend, DOMA § 3*, 106 NW. U. L. REV. COLLOQUY 69, 69–70, 75–76 (2011), http://www.law.northwestern.edu/lawreview/colloquy/2011/20 (analyzing the Obama Administration's decision not to defend § 3 of the Defense of Marriage Act against constitutional challenges); Prakash, *supra* note 109, at 1617 n.20 (listing several of the "many scholarly treatments discussing whether the President may (or must) disregard unconstitutional laws"); *id.* at 1623 & n.38 (recounting President Clinton's decision not to defend an HIV/AIDS testing program that he deemed unconstitutional); *id.* at 1642 (describing President Andrew Johnson's "supposed exercise of Executive Disregard with respect to the Tenure in Office Act"); *id.* at 1655–72 (surveying the early history of "Executive Disregard" in the United States).

363. *See* YOO, *supra* note 7, at 45–46 (arguing that "[t]he obligation to faithfully execute the laws requires the President to obey the Constitution first above any statute to the contrary," and characterizing the President's refusal to enforce unconstitutional laws as "[an] aspect[] of executive control over law enforcement"); Delahunty, *supra* note 362, at 70 (declaring that "the Executive has no duty to enforce an unconstitutional statute" because "[t]he Executive is charged with the faithful execution of 'the law,' and an unconstitutional statute is not law").

364. *See* Letter from Andrew Fois, Assistant Att'y Gen., U.S. Dep't of Justice, to Senator Orrin Hatch, Chairman, U.S. Senate Comm. on the Judiciary (Mar. 22, 1996), *available at* http://journaloflaw.us/0%20JoL/1-1/JoL1-1.pdf (expounding on President Clinton's directive to the Department of Justice to decline to defend the constitutionality of § 567 of the National Defense Authorization Act for Fiscal Year 1996).

365. *See* Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C. 182, 183 (1996) (articulating the position of the Department of Justice that the bill "unconstitutionally constrains the President's exercise of his constitutional authority as Commander-in-Chief [and] undermines his constitutional role as the United States' representative in foreign relations").

President's prerogatives as Commander in Chief.[366] We ourselves have argued that congressional efforts to control the initiation of hostilities through the War Powers Resolution would violate the President's Chief Executive and Commander in Chief powers.[367] Such constitutional objections could serve as a valid defense to the charge that nonenforcement was a breach of constitutional duty.

The Obama Administration has made no claim, however, that the immigration statutes as applied are unconstitutional. Although the Supreme Court has indicated on several occasions that the President has some measure of "inherent" power over immigration,[368] the Court seems to have settled finally on the view that the formation of immigration policy "is entrusted exclusively to Congress,"[369] and that "[t]he plenary authority of Congress over aliens . . . is not open to question."[370] Furthermore, even assuming that the Court recognizes the President as having some measure of "inherent" power over immigration, that seems only to mean that the President may set immigration policy in the absence of a congressional directive. It does not seem to mean that the President's constitutional powers in the area trump those of Congress.[371] Thus, the Obama Administration did not and, in the

366. 142 CONG. REC. H12 (daily ed. Jan. 3, 1996) (statement of President William J. Clinton).

367. *See* Delahunty & Yoo, *supra* note 197, at 128–29, 166 n.233 (arguing that the Commander in Chief Clause gives the President any war powers not conveyed to Congress in Section Eight of Article I, and the Declare War Clause does not give Congress the power to block him otherwise, as is the case with the War Powers Resolution).

368. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (explaining that the right to exclude aliens "is inherent in the executive power to control the foreign affairs of the nation").

369. Fiallo v. Bell, 430 U.S. 787, 792 n.4 (1977); Kleindienst v. Mandel, 408 U.S. 753, 766–67 (1972); Galvan v. Press, 347 U.S. 522, 531 (1954).

370. INS v. Chadha, 462 U.S. 919, 940 (1983) (citation omitted). The constitutional text does not explicitly allocate authority over immigration between the political branches, nor even between the federal government and the states. As a result, the source of federal power to regulate immigration thus remains in dispute. *See* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (suggesting that the enumerated powers in the Constitution possibly imply a federal power to regulate immigration); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 274 (same); Gerald N. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1842–43 (1993) (describing a period in early American history when several states passed laws governing immigration). In the *Head Money Cases*, 112 U.S. 580, 595–96 (1884), the Court ruled that Congress held the power to enact such immigration controls, based on its authority to regulate foreign commerce. Later, in *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) and in *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893), the Court rested federal authority over immigration, not on the constitutional text, but on the (international law) conception of sovereignty. Scholars have long faulted the Court's reasoning, but it now appears to be settled doctrine that Congress, not the President, has the lead regulatory role in immigration. *See Fiallo*, 430 U.S. at 792 (holding that the legislative power of Congress over the admission of aliens is complete); Mahler v. Eby, 264 U.S. 32, 40 (1924) (explaining that the Executive cannot exercise the power to expel aliens absent congressional authority).

371. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 546–47 (2009) (concluding that the President may not act in opposition to Congress

current state of the law, could not seek to defend the June 15 nonenforcement decision on that constitutional ground.

A variation of this defense arises when the enforcement of a particular law would materially interfere with the President's discharge of a constitutional responsibility in another area, such as foreign policy or national security.[372] In last Term's *Arizona v. United States*,[373] the Supreme Court emphasized that the Executive may rightfully make discretionary nonenforcement decisions in the immigration area on the basis of its constitutional responsibilities with regard to foreign policy:

> Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.[374]

Likewise, the *Arizona* Court indicated that nonenforcement of the immigration laws may be defended in light of the Executive's constitutional responsibility to protect American nationals and interests overseas:

> Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad.
>
> It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national

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and decide whom to admit, though he may decide whom to deport under the authority delegated to the Executive by Congress).

372. We should not be interpreted as saying that the President's constitutional responsibilities with respect to foreign policy enable him to make domestic law. That is not the case, even where the President has "plainly compelling" reasons for attempting to enforce a (non-self-executing) Article II treaty against a recalcitrant state. *See* Medellin v. Texas, 552 U.S. 491, 524–27 (2008) (holding that the terms of a non-self-executing treaty can only become domestic law through the passage of legislation by Congress). Nor are we saying that the Constitution requires that any conflict between a federal statutory mandate and a presidential foreign policy goal must always be resolved in favor of the latter. What we are saying (and what we take the Supreme Court in *Arizona* to have said) is that when the President's obligation to enforce the law is balanced against his obligation to protect the nation's security and vital national interests, the President may reasonably conclude that the latter is weightier, and defend his nonenforcement decision on that basis. Congress and the President's critics may, of course, reasonably disagree, instigating a political contest over the decision.

373. 132 S. Ct. 2492 (2012).

374. *Id.* at 2499.

> sovereign, not the 50 separate States. This Court has reaffirmed that "[o]ne of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country's own nationals when those nationals are in another country."[375]

In a similar vein, the Court in *Reno v. American-Arab Anti-Discrimination Committee*[376] argued that foreign policy and national security needs warranted skepticism about the desirability of judicial review of prosecutorial decisions to bring or not to bring removal proceedings:

> What will be involved in deportation cases is not merely the disclosure of normal domestic law enforcement priorities and techniques, but often the disclosure of foreign-policy objectives and (as in this case) foreign-intelligence products and techniques. The Executive should not have to disclose its "real" reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals—and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.[377]

Nothing in the Obama Administration's nonenforcement policy indicates that it was based on foreign policy or national security considerations. The Administration did not allege that the deportation of the DREAMers would cause serious detriment to our relationship with Mexico or any other foreign nation; nor did it refer in defense of its action to any negotiations with foreign nations in which the latter had expressed concern over the deportation of the DREAMers; nor was the nonenforcement policy embodied in any international agreement. Indeed, the Administration carefully placed responsibility for the policy on DHS, rather than on the

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375. *Id.* at 2498–99 (citations omitted) (quoting Hines v. Davidowitz, 312 U.S. 52, 64 (1941)); *see also id.* at 2506–07 (explaining that maintaining a consistent foreign policy requires discretion by the Executive with respect to enforcing immigration laws). The Court has affirmed the connection between the Executive's foreign affairs powers and its enforcement of the immigration laws in others cases as well. *See, e.g.*, Jama v. ICE, 543 U.S. 335, 348 (2005) ("Removal decisions, including the selection of a removed alien's destination, 'may implicate our relations with foreign powers' and require consideration of 'changing political and economic circumstances.'" (quoting Mathews v. Diaz, 426 U.S. 67, 81 (1976))). Note, however, that the connection the Court sees between immigration enforcement and the need for a unitary national foreign policy is probably overstated. *See Arizona*, 132 S. Ct. at 2514–15 (Scalia, J., concurring in part and dissenting in part) (asserting that the states "have their own sovereign powers" which are not to be abridged for the sake of foreign policy); Legomsky, *supra* note 370, at 261–62, 268 (explaining that immigration issues affect foreign policy only in a few special cases); Neuman, *supra* note 370, at 1898 (suggesting that there is a weak correlation between the substance of immigration policy and relationships with foreign nations); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 122 (1994) (arguing that foreign nations understand that the United States is not an undifferentiated unit and that the nation as a whole is not responsible for an individual state's actions).

376. 525 U.S. 471 (1999).

377. *Id.* at 490–91.

President or the State Department, whose foreign-relations roles are much more evident. Furthermore, the Administration's policy is not nation-specific or even region-specific: it applies to all removable aliens in the DREAM Act category, regardless of national origin. It is hardly credible, therefore, to argue that the policy is designed to defuse some diplomatic tension or win other nations' good will. In these respects, the Administration's nonenforcement decision contrasts sharply with other cases in which an executive decision with respect to large-scale immigration was triggered by foreign policy issues. Consider, for example, the efforts of President Theodore Roosevelt to overcome the serious friction that U.S. immigration policy was creating with Japan. Restrictions on Japanese immigration and the treatment of ethnic Japanese on the West Coast caused acute tensions between the United States and Japan, leading to a war scare in 1907.[378] The Roosevelt Administration sought to resolve the issue through the so-called "Gentlemen's Agreement" of 1907 with Japan.[379] That agreement can be seen as part of a more extensive, near-contemporaneous settlement of the foreign policy differences between the United States and Japan, with the aim of accommodating Japan's rising power and bringing about the balance of forces that Roosevelt's Administration desired in east Asia.[380] Nothing at all comparable appears to be true of the DREAMers situation.

In summary, then, the nonenforcement of an immigration law may be justified when enforcement interferes with the President's discharge of another constitutional responsibility, such as the conduct of foreign affairs or the protection of national security. Given the extent of the President's constitutional functions, it is unsurprising that the exercise of one function may bear directly on the exercise of another. In such situations, the President will often be entitled to decide which function matters more. But these facts do nothing to justify a nonenforcement decision based on "prosecutorial discretion" alone.

An analogy may be helpful here. Consider the longstanding constitutional debate over the question whether the President had the constitutional authority to "impound" appropriated funds. Presidential impoundments (or refusals to spend, in part or whole, funds that Congress had appropriated for designated purposes) had a long, if contentious, history before Nixon's abuses of the claimed authority led an exasperated Congress

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378. GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776, at 355–57 (2008).

379. *See generally* Kiyo Sue Inui, *The Gentlemen's Agreement: How It Has Functioned*, 122 ANNALS AM. ACAD. POL. & SOC. SCI. 188 (1925).

380. *See* Thomas A. Bailey, *The Root-Takahira Agreement of 1908*, 9 PAC. HIST. REV. 19 (1940); *see generally* Greg Russell, *Theodore Roosevelt's Diplomacy and the Quest for Great Power Equilibrium in Asia*, 38 PRESIDENTIAL STUD. Q. 433 (2008) (analyzing Roosevelt's strategic objectives in Asia).

to nullify it.[381] Nixon triggered a strong congressional reaction by using impoundments aggressively, not only to make significantly deeper spending cuts than were usual, but also for the express purpose of thwarting statutory mandates and policies.[382] Congress brought the controversy to an end by enacting the Congressional Budget and Impoundment Control Act of 1974.[383]

Presidential impoundments (which, when not authorized by Congress, resemble other nonenforcement decisions), were generally predicated on one of two constitutional bases. First, under the Commander in Chief authority, presidents going back to Thomas Jefferson had impounded funds that Congress had appropriated for national defense purposes.[384] Alternatively, claiming to act under the Vesting Clause, presidents have impounded appropriated funds whose expenditure they considered wasteful or inefficient.[385] Critics of the latter position made telling points against it. In effect, they argued that the President had no authority to decline to enforce a statute that mandated spending for a designated purpose and that was itself constitutional, at least in the absence of a plausible claim that the expenditure would disable the President from discharging his constitutional responsibilities in another area, such as national defense.[386] Whatever traction the first defense of impoundments might have had, the second had none.

The Obama Administration made no defense of the June 15 nonenforcement decision in terms of a presidential power or responsibility separate from its asserted power of prosecutorial discretion. There was no claim that by continuing to deport DREAMers, the United States would encounter serious diplomatic difficulties for its foreign policy, endanger American citizens or investments abroad, compromise important national security interests, or anything of the kind.

B. Equity in Individual Cases

Breach of the Executive's enforcement duty might also be excused based on equitable considerations in an individual case or a small set of

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381. Peter E. Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 DUKE L.J. 1, 14, 16–17.

382. *See id.* at 14–15 (discussing Nixon's withholding of a substantially larger amount of funds than any previous president in order to weaken or destroy programs he disagreed with).

383. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297; *see* Train v. City of New York, 420 U.S. 35, 41–42 n. 8 (1975) (summarizing the provisions of the Act).

384. In 1803, Jefferson informed Congress that he had decided not to expend some $50,000 that it had appropriated for gunboats, finding the expenditure unnecessary. Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505, 1508 n.7 (1973). Jefferson was careful to say, however, that his action was a delay rather than a refusal to spend; and he expended the funds on gunboats in the following year. *Id.*

385. *See id.* at 1508 ("[F]unds were impounded solely because they were no longer necessary for or appropriate to the achievement of the ends for which they had been made available . . . .").

386. *Id.* at 1513–14.

cases. Again, the *Arizona* Court spoke to the point in the immigration context:

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return.[387]

To be sure, statutory law provides authorization for many equitable exceptions. Section 240A of the INA provides for cancellation of removal at the Attorney General's discretion in certain classes of cases, or under treaty law such as the Refugee Convention[388] and the Convention Against Torture.[389] The Court seems to have had in mind these statutory and treaty grounds for exercising "equity," rather than "equitable" exceptions based on the Executive's sole Article II authority. Certainly the Constitution itself seems to envisage no kind of presidential "equity" power, other than in the Pardon Clause (which concerns crimes, not civil violations).[390]

Under our analysis, equitable exceptions from statutory law that were not themselves based on another statute or on treaty law would be "dispensations," and hence not valid exercises of Article II authority.[391] Without more, therefore, they are breaches of duty. To be sure, one might consider the equitable exceptions to which the Court referred to be tolerable, even allowing that they were breaches of duty. They might be regarded as wrong but venial.[392] However, it is essential to bear in mind—as the Court

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387. Arizona v. United States, 132 S. Ct. 2492, 2499 (2012).

388. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

389. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

390. U.S. CONST. art. II, § 2, cl. 1.

391. *See supra* notes 122–70 and accompanying text (discussing dispensation).

392. In their cumulative effect, however, even venial breaches can be damaging. As Todd Zywicki has argued, following rules uniformly:

> advance[s] the rule of law by distancing rule makers from the merits of individual cases, thereby leading to an abstractness and even-handedness in the operation of rules. . . . At the same time, it protects individual actors from the arbitrariness inherent in such decisions, increasing the predictability of their interaction with rules of the state.

carefully stressed—that the exceptions it described all concerned "an individual case."[393] Allowing an individual removable alien to remain in the United States when there are equitable considerations to be made on his or her behalf will ordinarily have a minimal adverse effect on congressional policy. Indeed, such a decision in an individual case might be defended on the grounds that it furthers congressional policy (perhaps by improving ICE's reputation for fairness in the immigrant community) or that it represents what Congress itself would have decided in that case, if it had been able to give the case its attention. The situation with regard to a class of as many as 1.76 million people is altogether different. This is not a matter of granting equity at all, as that concept has historically been understood, but of making law.[394]

The connection between equity and particularity is a longstanding and even, it seems, a necessary or conceptual one.[395] In our legal culture, the dominant understanding of equity derives from Aristotle.[396] In his consideration of justice in Book Five of the *Nicomachean Ethics*, Aristotle argues that "equity" is neither "absolutely the same" as justice nor yet "generically different" from it.[397] Equity, Aristotle says, is better than one kind of justice, but it is also justice itself.[398] What creates the problem of specifying the true relationship between equity and justice "is that all law is universal but about some things it is not possible to make a universal statement which shall be correct."[399] Law is designed to deal with the general or typical case, and therefore consists for the most part in general statements or rules. But particular cases arise to which the law, in its generality, cannot or should not be applied. Lawmakers, Aristotle says, know that general rules may fail in this way, but they cannot anticipate the future in complete detail.[400] The problem caused by generality need not arise from careless lawmaking, but from the nature of things.

Zywicki, *supra* note 76, at 12.

393. Arizona v. United States, 132 S. Ct. 2492, 2499 (2012).

394. *See* Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2090 (2008) (outlining "moral arguments" for legalizing the status of DREAMers, but suggesting a solution through legislative action).

395. This is not to say that no "law" can deal with an individual case. An act of Congress (posthumously) made the Marquis de Lafayette a U.S. citizen. *See* Act of Aug. 6, 2002 Pub. L. No. 107-209, 116 Stat. 931 (conferring honorary citizenship on Lafayette). But as a general matter, "laws" consist of rules, and hence may be applied to more cases than one.

396. *See* Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 92–95 (1993) (observing that it was Aristotle who made the major contribution to incorporating equity into concepts of justice); Roger A. Shiner, *Aristotle's Theory of Equity*, 27 LOY. L.A. L. REV. 1245, 1251–53 (1994) (suggesting that Aristotle's account of equity provides us a way to understand equity beyond linking it to gaps in the law to acting as a rectification of law's misleading universality).

397. ARISTOTLE, THE NICOMACHEAN ETHICS 98 (Lesley Brown ed., David Ross trans., Oxford Univ. Press 2009) (350 B.C.E.).

398. *Id.*

399. *Id.* at 99.

400. *Id.*

A general law may fail to provide for an unforeseen case either because the conditions for its application have not been met or because, although those conditions have been met, the application of the rule to the particular facts of the case would have an unjust result. Equity steps in "to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known. . . . And this is the nature of the equitable, a correction of law where it is defective owing to its universality."[401] Simply following the general legal rule may be just, but "correcting" the legal rule to suit the particular features of a case may be more just still.

Aristotle is describing a dynamic within the idea of justice that drives lawmakers to make legal rules that classify with ever increasing specificity and precision. Lawmakers can shift from rules that impose strict liability for certain conduct to rules that take account of intent, motive, means, or circumstances.[402] The list of mitigating or aggravating factors can be extended indefinitely. At the outermost limit, rules could apply to all conceivably relevant facets of every particular case. But the limit is unattainable, and the drive for justice cannot end in the complete abandonment of general laws.

Furthermore, decisions made solely on a case-by-case basis and without reference to general laws are also liable to be unjust. They are inordinately prone to bias and arbitrariness—vices that generality in the law aims to suppress. Moreover, a legal system that consisted entirely of discretionary, situational judgments about particular cases would leave ordinary citizens at a loss for how to order their conduct or plan their lives—another evil that the generality of law is designed to prevent. And even if a wholly discretionary system routinely produced "correct" results in individual cases, it would entail prohibitive decision-making costs. Thus, the idea of justice creates a counterdrive away from unlimited discretion in particular cases towards the formation of fixed, general rules. The tension in any developed legal system between the need for generality in its rules and the need to secure justice in particular cases cannot be solved perfectly.

Within the traditional law–equity framework, the June 15 nonenforcement decision has the hallmarks of a statement of law, not those

401. *Id.* The power to "correct" the law is not, however, the power to overturn it. Thus, a court of equity must accept and enforce an unjust law, if the intent of the legislator is plain. As Justice Joseph Story wrote, if a court of equity had the power of "superseding the law . . . it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised." 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 21 (14th ed. 1918).

402. To take one of Aristotle's own examples, someone wearing a finger ring whose hand brushes up against another may be held to be guilty of assault with a "weapon," unless circumstances and intent are taken into account. *See* Shiner, *supra* note 396, at 1252 & n.30 (citing ARISTOTLE, ARS RHETORICA 1374a32-b2 (W.D. Ross ed., 1959)).

of a judgment in equity.[403] It is general, applying to every member of a class of perhaps 1.76 million people on the basis of a limited number of common characteristics. It requires no searching, individualized evaluation of the merits of particular applicants. All who possess the designated characteristics will qualify. It can hardly be seen as "correcting" a rule that Congress made in the light of an unforeseen contingency. Nor can it be said to be implementing what Congress would have done, had it been aware of how the existing rules of immigration law would apply to this class. It is the amendment of existing law—and so statute-like itself—not a correction that perfects the law.

C. Insufficient Resources

The final type of defense commonly available when the duty of enforcement has been breached is that the agency simply lacked sufficient resources—funding, staffing, or leadership—to discharge its enforcement duty in full. In such cases, the agency would be pleading an excuse: it would be admitting to having failed in its duty but arguing that the responsibility is really that of Congress.

Justice Brandeis's explanation of this defense can hardly be improved upon:

> Obviously the President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so. Full execution may be defeated because Congress declines to create offices indispensable for that purpose. Or, because Congress, having created the office, declines to make the indispensable appropriation. Or, because Congress, having both created the office and made the appropriation, prevents, by restrictions which it imposes, the appointment of officials who in quality and character are indispensable to the efficient execution of the law. If, in any such way, adequate means are denied to the President, the fault will lie with Congress. The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted.[404]

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403. To be sure, the Executive has in the past asserted an "equitable" power to dispense with the statutory immigration law on behalf of a large class of persons, rather than individuals or small groups. But equally, Congress has protested against such actions and, on occasion, severely narrowed the Executive's discretion. *See* Cox & Rodriguez, *supra* note 371, at 501–05 (detailing the executive practice of "paroling" refugees into the United States).

404. Myers v. United States, 272 U.S. 52, 291–92 (1926) (Brandeis, J., dissenting). *Compare* Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 613 (1838) (emphasizing that "[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible").

There is no doubt that ICE, like its predecessor INS, has faced acute resource constraints.[405] The agency has long sought to cope with these limitations by establishing enforcement priorities. In the present Administration, ICE has focused its enforcement efforts on removing illegal immigrants who have committed nonimmigration crimes while in the United States.[406] Correspondingly, the agency has dedicated fewer resources to other forms of enforcement, such as workplace enforcement (a tool used more often in the Bush Administration[407]) or the prosecution of noncriminal visa overstayers.[408] Given the budgetary constraints on the agency, few if any would argue that these priorities were unreasonable, let alone unconstitutional.

The questions of the unreasonableness as opposed to the unconstitutionality of a nonenforcement decision, though related, are distinct. A decision to seek the deportation only of visa overstayers would be an unreasonable and inefficient use of ICE's scarce resources, but arguably not an unconstitutional one, even if it meant that illegal immigrants who had committed serious crimes while in the United States remained here. On the other hand, whether or not judicial review of the action is possible,[409] an enforcement decision to seek the removal only of Haitians, as distinct from members of any other national origins category, we believe would be unconstitutional.[410] So would a decision to remove deportable aliens because they had not contributed to the President's reelection campaign.[411]

A categorical refusal to enforce the removal statutes against any deportable alien—effectively, the adoption of an "open borders" policy—would also, we think, be unconstitutional. Even if enforcement resources were constrained, it would be an obvious refusal to perform the constitutional duty of faithful execution of the laws. Yet the logic of the June 15

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405. *See supra* note 30 and accompanying text.

406. JONES-CORREA, *supra* note 24, at 9–10.

407. Julia Preston, *A Crackdown on Employing Illegal Workers*, N.Y. TIMES, May 29, 2011, http://www.nytimes.com/2011/05/30/us/politics/30raid.html?pagewanted=all&_r=0.

408. *System for Tracking Visa Overstays Is Almost Ready*, WASH. TIMES, Mar. 6, 2012, http://www.washingtontimes.com/news/2012/mar/6/system-for-tracking-visa-overstays-is-almost-ready/.

409. *See* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 492, 497 (1999) (Ginsburg, J., concurring in part and concurring in the judgment) (leaving open the possibility of judicial review of a claim of selective deportation based on an alien's exercise of First Amendment rights).

410. *See* Yick Wo v. Hopkins, 118 U.S. 356, 368–70 (1886) (establishing that the selective enforcement of ordinances against only Chinese immigrants violates "the nature and the theory of our institutions of government" which "do not mean to leave room for the play and action of purely personal and arbitrary power").

411. *See* Bridges v. Wixon, 326 U.S. 135, 162 (1945) (Murphy, J. concurring) (asserting that "the First Amendment and other portions of the Bill of Rights make no exception in favor of deportation laws," including freedom of speech). *But see* Harisiades v. Shaughnessy, 342 U.S. 580, 591–92 (1952) (upholding over First Amendment objection the deportation of a noncitizen based on his former affiliation with the Communist Party).

nonenforcement decision points to the conclusion that the President may adopt exactly that policy if he wishes. If the President may constitutionally permit 15% of the nation's illegal immigrant population to remain in the United States without fear of removal, why may he not do the same for 50% of that population, or for all of it? True, as long as some funding was available to ICE for enforcement, the President could not claim that an appropriations shortfall justified the *total* cessation of deportation activities. Still, the President could deliberately allocate ICE's resources in such a way as to achieve essentially that result. But if the President can constitutionally implement an open borders policy on his own initiative and without authorization from Congress, what remains of the immigration law? The rationale supporting the June 15 nonenforcement decision can lead to absurdity. The failure of an agency to perform its ordinary enforcement duties may be so unreasonable that it may be considered unconstitutional, notwithstanding limitations on its resources.

Even though the question of whether resource constraints excuse an agency's nonenforcement decisions is almost always one for Congress, large-scale nonenforcement (such as exists here) nonetheless calls for a reasoned public explanation and defense. One has first to consider whether the excuse is factually true or not. If it is not true, the excuse should likely be rejected. But even if the circumstances were as the party offering the excuse claimed, the excuse may still be rejected as flimsy or insufficient. If I seek to excuse my failure to keep my promise to attend your child's birthday party because I was short of cash and could not pay for the taxi fare, you can rightly reject my excuse if you know that I could easily have withdrawn cash from the bank on my way to the taxi stand, or that I spent all the cash I had on an expensive present for myself. The motivation and intent behind nonperformance may also be relevant to its evaluation. To break a promise deliberately is bad enough; to break it out of a desire to cause hurt or hardship is worse.

The June 15 nonenforcement decision purported to be based on budgetary constraints.[412] The President himself defended the decision by arguing that "in the absence of any action from Congress to fix our broken immigration system, what DHS has taken steps to do is focus immigration enforcement resources in the right places."[413] But there are obvious reasons to question the truth of this assertion.

First, the Obama Administration provided no evidence to substantiate its claim of inadequate resources. It gave no estimates of what the cost savings from its initiative would be. Given that it had already, in 2011, publicly declared that any enforcement action against the DREAMers was "low

412. Miriam Jordan, *Immigration-Policy Details Emerge*, WALL ST. J., Aug. 3, 2012, http://online.wsj.com/article/SB10000872396390443545504577567441019730890.html.

413. Obama, *supra* note 54.

priority,"[414] it did nothing to show that the savings from this additional nonenforcement measure would be significant. It did not explain how the resources freed up by the nonenforcement decision would be used to improve ICE's enforcement efforts in other areas. It did not and probably could not show why the grant of work authorization to the DREAMers would result in cost savings for ICE, rather than in extra costs. Indeed, DHS's own immigration policy advisers and strategists had found that a "deferred action" program for the DREAMers would "likely be controversial, not to mention expensive."[415]

Justice Scalia, for one, did not credit the administration's rationalization for its nonenforcement decision. "The husbanding of scarce enforcement resources," he wrote in *Arizona*, "can hardly be the justification for this [policy], since the considerable administrative cost of conducting as many as 1.4 million background checks, and ruling on the biennial requests for dispensation that the nonenforcement program envisions, will necessarily be *deducted* from immigration enforcement."[416] Justice Scalia is quickly being proven right. As details of the Administration's policy implementation emerge, it appears that ICE expects to hire over 1,400 full-time workers, in addition to contract labor, to handle applications.[417]

Furthermore, cost savings alone cannot possibly explain the fact that the contours of the nonenforcement decision dovetailed so neatly with those of the DREAM Act.[418] That could hardly have been a pure coincidence; rather, it was proof by a kind of *res ipsa loquitur* that the Administration's true purpose was not that of economizing or prioritizing. There is no reason to think that the Administration or ICE considered alternative nonenforcement measures that would not have been so overtly antagonistic to Congress's choice to reject the DREAM Act, or even a nonenforcement measure that would not have applied to DREAMers who were already subject to removal orders.[419]

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414. Robert Pear, *Fewer Youths to be Deported in New Policy*, N.Y. TIMES, Aug. 18, 2011, http://www.nytimes.com/2011/08/19/us/19immig.html?pagewanted=all (discussing the new Obama Administration policy that would suspend deportation proceedings for low-priority cases).

415. Memorandum from Denise A. Vanison, Policy & Strategy, U.S. Citizenship & Immigration Servs., et al., *supra* note 39, at 10. The memo also discussed ways of funding such a program, which it acknowledged seemed to require either "a separate appropriation or independent funding stream." *Id.* at 10–11.

416. Arizona v. United States, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., concurring in part and dissenting in part).

417. Jordan, *supra* note 412.

418. There are certain differences between the DREAM Act and the nonenforcement decision, though not material ones. For example, the DREAM Act would have applied to those of 35 years of age or under, not those of 30 years or under. DREAM Act of 2011, S. 952, 112th Cong. § 2(b)(1)(F); BATALOVA & MITTELSTADT, *supra* note 12, at 1.

419. For example, the nonenforcement measure applies equally to those immigrants already ordered removed and within the 90-day removal period. *See* 8 U.S.C. § 1231(a)(1)(A) (Supp. II 2009) ("[W]hen an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period').").

In short, there are valid reasons to question the truth of the Administration's claim that its June 15 nonenforcement decision was driven by the need to conserve scarce enforcement resources and dedicate them to more urgent priorities. Because the Administration has not indicated how much ICE was spending on the removal of DREAMers as of June 15, it has not shown that nonenforcement against the DREAMers would result in significant savings or achieve significant benefits. Moreover, by creating what amounts to a substantial new program, it has subtracted from the resources available for enforcement. Assuming that the nonenforcement decision will result in cost savings to ICE, the Administration has not shown that those savings will be dedicated to higher priority enforcement activities.[420] So far as we are aware, the Administration has not announced that ICE's (alleged) cost savings from the nonenforcement decision will be applied to (say) the removal of greater numbers of deportable violent offenders from the state and federal prisons in which they are being held.[421]

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420. A simple and schematic illustration may be in order. Suppose that the total population of deportable immigrants is 10,000, of whom 5,000 are DREAMers and 5,000 are criminal aliens. Suppose also that ICE's enforcement budget is $1,000, and that the cost of proceeding against and deporting a single illegal immigrant is $1. If ICE used the whole of its budget without distinguishing between the two kinds of deportable immigrants, it would spend $500 on deporting 500 DREAMers and $500 in deporting 500 criminals. But assume that ICE had reasonably concluded that the deportation of a criminal created 2 units of value, whereas that of a DREAMer created only 1 unit of value. Then it would be rational for ICE to dedicate the whole of its budget to deporting 1,000 criminals, thus creating 2,000 units of value, rather than to deporting 500 of each kind, with a yield of only 1,500 value units. This appears to be how the Administration would have us think about its action.

But the situation is more complicated. First, DREAMers had been a low enforcement priority for about a year before the June 15 nonenforcement decision. So let us assume that instead of spending $500 on their deportation, ICE had been spending only $50. Then the nonenforcement decision would shift $50 to enforcement against the criminal class, creating a net value gain of only 50 ($(2 \times 50) - 50$), not 500 ($2,000 - 1,500$). Second, assume that the cost of background checks and other expenses related to the "deferred action" program amounted to 10 cents per DREAMer, and that all 5,000 DREAMers applied for that relief. The cost of the new program would then be $50—a sum equal to the amount that ICE had been spending on enforcement against them. In that case, there would be no additional funding available for enforcement against the criminal class, and so no gain in value. Finally, suppose that 5 DREAMers had outstanding deportation orders against them, and that it would cost only 10 cents to complete the removal of each of them. Nonenforcement against these DREAMers would then make an additional 50 cents available for enforcement against the criminals. But the value of deporting the 5 DREAMers would be 5, whereas dedicating 50 cents more to enforcement against criminals would yield only 1 unit of value.

421. Although the Administration has declared that the removal of aliens convicted of serious crimes is a high priority, there is obviously a significant enforcement shortfall in that and related areas. A recent report by the Inspector General of DHS found that more than 800,000 individuals who had been ordered deported, removed, and excluded are still in the United States. OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-13-11 (Revised), IMPROVEMENTS NEEDED FOR SAVE TO ACCURATELY DETERMINE IMMIGRATION STATUS OF INDIVIDUALS ORDERED DEPORTED 1 (2012). Further, DHS had erroneously identified about 12% of these cases (including cases of those with criminal records), as having a lawful immigration status. *Id.* Individuals erroneously verified for benefits included some who had committed felonies ranging from citizenship fraud to aggravated assault. *Id.* One person who had been ordered deported in 2000 after multiple criminal convictions including a weapons offense applied in 2009 for a Transportation Security

Nor has the Administration said why, if that is its purpose, ICE did not seek a supplemental appropriation from Congress to cover the cost of removing such convicted offenders (which in the current political climate would presumably be easy to obtain), instead of choosing not to enforce the law in the DREAMers' case.

Even more importantly, the Administration has not explained why, if enforcement priorities and cost savings dictated its nonenforcement decision, it chose to waive enforcement as against the very class of persons that Congress decided should not receive such relief. In other words, it has not dispelled the inference that its breach of duty was improperly motivated, rather than being the most efficient use of available resources.

We cannot *prove* that the Administration's defense of its nonenforcement decision was pretextual. But it appears to be so, and that appearance will linger for as long as the Administration does not provide a more detailed explanation of how it is using ICE's resources. At the very least, respect for the constitutional mandate to enforce the laws implies that the Executive must shoulder the burden of persuading the public and Congress that a major nonenforcement decision such as this are due to spending constraints and considerations of efficiency; and conclusory statements to that effect, without detailed documentation and careful cost–benefit analysis, do not discharge that burden.[422] At this point, the nonenforcement decision remains an unexcused, and perhaps unconstitutional, breach of the Executive's duty to enforce.

Finally, let us consider the argument that even if the June 15 nonenforcement decision did not result in the dedication of ICE's resources to more important priorities, the President nonetheless had the authority to close down enforcement against the DREAMers simply because he considered those enforcement costs to be money wasted. In other words, suppose that although ICE has adequate resources to bring removal proceedings against DREAMers, the President concludes that the costs of such enforcement are simply not worth it, in the sense that those costs exceed whatever value is created by the prosecutions. This scenario is different from the one which we have been considering, in which appropriations that had been dedicated to enforcement against DREAMers are supposed to have been rededicated to higher value enforcement activities. The difference is akin to that between impoundment—in which appropriated funds are simply

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Administration card granting access to secure areas of transportation facilities and was erroneously confirmed to be in lawful status. *Id.* at 6. ICE finally removed this person in 2012. *Id.* So far as we are aware, the Administration has said nothing about dedicating resources allegedly saved from its DREAMers program to improving enforcement in deporting, or disqualifying from benefits, those under removal orders who have criminal records.

422. As noted earlier, the Obama Administration could adopt a policy of this kind as a matter of self-policing and governmental transparency through an Executive Order, or Congress could impose such a policy by statute. *See supra* note 21 and accompanying text.

not spent on a "wasteful" activity—and reprogramming[423]—in which appropriations originally directed to one purpose are spent on another, more desirable one. Does the President have the constitutional authority to shut down enforcement activities that he considers not "worth it" in that sense?

The answer, we think, is no. The Executive is still duty bound to bring those cases for removal. That duty grows directly out of the original meaning of the Take Care Clause. Congress has articulated the activity that it expects to be prosecuted, and has provided sufficient resources for it to be prosecuted. Congress's judgments, both as to the nature of the proscribed activity and as to the provision of the means to prosecute it, trump the Executive's judgment. The essential principle at issue here was confirmed in *TVA v. Hill*,[424] where the Court upheld an injunction against the completion of a nearly finished federal dam because the operation of the dam would endanger a protected species.[425] Plausibly, the survival of the snail darter was simply "not worth" the cost of enjoining the dam, which might have brought substantial benefits to consumers of electricity and on whose construction considerable sums had already been expended.[426] But Congress's judgment that the survival of the snail darter took priority was definitive.[427] If Congress directs that a particular type of civil enforcement action occur and provides the means to do so, the President may not override that judgment by concluding that the expenditure is wasteful.[428]

D. The Illegal Immigration System: De Facto Delegation

The President's refusal to enforce the law raises the question whether the modern administrative state, with the vast and unreviewable discretion it allows to the Executive, is intrinsically inconsistent with the Framers' intention to create a constitutional order that subordinates the Executive to the law in the domestic arena. That question arises with special intensity in the case of immigration law.

Adam Cox and Cristina Rodriguez have argued that the "rise of *de facto* delegation" has created a situation in which the formal allocation of power between Congress and the President with respect to immigration policy has

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423. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-734SP, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 85 (2005) (defining "reprogramming").

424. 437 U.S. 153 (1978).

425. *Id.* at 156, 172.

426. The Court duly noted this point. *Id.* at 187 (acknowledging the argument that "in this case the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter").

427. *Id.* at 194.

428. As the Court said in *Hill*,

> [It is] the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws . . . .

Id.

come to matter less and less.[429] On the one hand, Congress has formally regulated the admission and removal of noncitizens in great detail, especially with regard to the major categories of family and labor migration.[430] In this sense, they say, immigration law resembles tax law or criminal law more closely than other regulatory areas where Congress has explicitly delegated broad standard-setting power to the Executive.[431] On the other hand, Congress has de facto given the Executive vast discretion to decide whether, whom, and when to deport by making a high number of noncitizens deportable.[432] Further, Congress has magnified this delegation by increasingly subjecting even lawful entrants to deportation for post-entry criminal conduct.[433] Finally, by eliminating earlier avenues for relief from deportation that had existed in the past, Congress has increasingly shifted discretion to the charging phase of the removal process.[434]

Given that roughly 11.5 million noncitizens are present in the country illegally, and given also that only a tiny fraction of that illegal population will ever be placed in removal proceedings due to resource constraints, Cox and Rodriguez argue that the scope for "prosecutorial discretion" or deliberate nonremoval will be vastly increased.[435] Counterintuitively but plausibly, as Congress has made the formal immigration law system more stringent, subjected growing numbers of noncitizens to removal, and eliminated statutory forms of relief, it has also made the system more vulnerable to discretionary executive decision making. Cox and Rodriguez speculate:

> Congress has intentionally delegated increasing amounts of immigration authority to executive officials for political reasons. Congress might accrue political benefits from making immigration law on the books ever harsher and bear few of the political costs associated with immigration enforcement efforts that portions of the public might see as excessive . . . .[436]

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429. Cox & Rodriguez, *supra* note 371, at 528–29.

430. *Id.* at 511.

431. *Id.*

432. *Id.* at 512–13.

433. *Id.* at 514.

434. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010) ("[I]mmigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The 'drastic measure' of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes." (citation omitted)); *id.* at 1480 ("In 1996, Congress also eliminated the Attorney General's authority to grant discretionary relief from deportation an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to 1996." (citations omitted)); *id.* at 1481 ("[R]ecent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.").

435. Cox & Rodriguez, *supra* note 371, at 513–14.

436. *Id.* at 529.

Congress, in other words, might be deliberately writing stringent immigration laws in the confidence that they would be radically underenforced. And to ensure underenforcement, Congress would deliberately fail to appropriate the funds necessary for enforcers to perform their assigned tasks in anything like an adequate manner.[437] This incongruous system could serve to placate two opposed political constituencies: those hostile to illegal immigration (because the formal laws became harsher) and those favorable to it (because those laws were radically underenforced).[438]

If this account of our immigration system were correct, then the Obama Administration's use of its implicit discretion would appear in a different light: if the Administration seemed to be disregarding constitutionally based rule-of-law requirements, that was only because Congress had enabled, and indeed tempted, it to do so. Well before the June 15 nonenforcement decision, Cox and Rodriguez had observed that "Obama has the power to overhaul the immigration screening system even in the absence of congressional action."[439]

That insight provides the best defense that we can see for the Administration's nonenforcement decision. The Administration could argue that its decision rests on the overall structure of our current immigration law, including the appropriations that Congress has made available for its enforcement. On that view, Congress has implicitly—though not formally—delegated to it an essentially unfettered power to decide "who should or should not be admitted into the country."[440]

Even by the extremely permissive standards of the nondelegation doctrine,[441] however, this would be an extraordinary delegation. It has no "intelligible standard" whatsoever to guide and limit administrative discretion. It would allow an administration lawfully to subvert the very laws that it was charged with enforcing. And it would permit an administration to decide unilaterally, and without regard to standing immigration law, what the nation's demography was to be.

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437. *See* Motomura, *supra* note 394, at 2049 ("[C]hronic and intentional underenforcement of immigration law has been de facto federal policy for over a century . . . ."); *id.* at 2037 ("[D]iscretion seems to be unusually important in immigration law, because unlawful immigrant activity enjoys acceptance in many circles, and because rates of investigation, detection, apprehension, and prosecution are extremely low.").

438. *See* Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 71 (contrasting the view of constituencies that claim that federal immigration law is overenforced with those claiming it to be underenforced, and concluding that both critiques "are accurate").

439. Cox & Rodriguez, *supra* note 371, at 464.

440. De Canas v. Bica, 424 U.S. 351, 355 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, *as recognized in* Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1974 (2011).

441. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474–75 (2001) (acknowledging the wide outer limits of nondelegation precedents and citing cases to that effect).

What would explain such an incoherent and self-defeating pattern of legislation? There are two separate questions here. First, why would Congress delegate so much discretion to the Executive, while also making detailed policy decisions in some immigration areas itself? Second, when Congress delegates to the Executive in the immigration area, why should it do so *informally* through underfunding, rather than *formally*?

Some political scientists have theorized that Congress's decision when to make policy itself and when to delegate policy making away is equivalent to a firm's make-or-buy decision—in other words, a choice whether to produce a product internally or contract out for its supply.[442] On this view, Congress will tend to make policy itself when doing so maximizes legislators' chances of reelection.[443] So the tax code (like immigration law) contains many detailed provisions that work to the advantage of key constituencies—such as corporations or other well-organized groups seeking special tax breaks.[444] But Congress will also tend to delegate policy making away from itself (or "contract out") when its own decision making is likely to be inefficient, where it is most prone to logrolling, or least likely to have expertise.[445] Thus, Congress will delegate to the Executive policy-making authority over matters like base closing.[446] By such a delegation, Congress can avoid both the difficulties of negotiating a list of bases to be closed and the blame for closing particular bases; for Congress, these gains outweigh the costs of losing control over the base-selection process. Applying this analysis to the immigration area, it is explicable why Congress should make detailed policy in some areas (such as the grant of visas for skilled employees in high-tech industries), but delegate away other matters (such as the deportation of illegal immigrants) to the Executive.

But why would Congress delegate policy-making authority over deportation informally rather than formally? Perhaps the answer is that if it made a formal delegation, Congress would share more of the blame for the nonremoval of particular groups of aliens than if it made an informal delegation. If the President acts only on the basis of an informal delegation, Congress can more successfully evade responsibility for an unpopular exercise of presidential discretion (although it will also not be positioned to claim any credit for a popular one) by claiming it had nothing to do with it.

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442. For discussion and application of the theory of the firm to Congress, see David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 960–67 (1999). *See also* Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 231–38 (1990); Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 765–72 (1984).

443. Epstein & O'Halloran, *supra* note 442, at 962.

444. *See, e.g.*, 26 U.S.C. § 11 (Supp. I 2009) (containing portions of tax code dealing with corporate income tax and its exceptions).

445. Epstein & O'Halloran, *supra* note 442, at 965.

446. *See* Dalton v. Specter, 511 U.S. 462, 464–65 (1994) (describing the congressional delegation of base closing authority to both a special commission and the President).

True, Congress might be tempted to formalize the President's discretionary power because that would expose him even more to the risk of blame in the highly negative area of illegal immigration. But in exposing the President to heightened risk, it could be doing the same to itself.

Thus, the current structure of our immigration law might not be as incoherent as it seems, at least as a matter of meeting electoral incentives. Indeed, it might also serve our first-order national goals of immigration policy, even if not well designed to do so.[447] But a de facto delegation system of immigration law would come with substantial costs. Chief among these costs is the damage that such a system would do to the republican character of our government. As we discussed above, the Framers sought to solve the problem of the Executive by giving it broad but undefined powers to act in emergencies in which the life or security of the nation was at risk, but correspondingly, by subordinating its powers of action in the domestic sphere to the will of Congress as declared in statutory law.[448] The President might behave like a King of England in an international crisis, but in ordinary, domestic matters he was little more than a Governor of New York. That essential balance would be upset if Congress gave the Executive the power to overturn, at will, the statutes that it had enacted. What would the enactment of statutory law *mean* if Congress also consciously enabled and encouraged the Executive *not* to enforce it? The essential purpose of the legislative process created by the Framers—that fundamental policy decisions on matters of vital domestic interest should be made by the nation's elected representatives on the basis of public reason and the reconciliation of different interests—would be defeated. And what would become of public respect for law and government if acts of Congress were perceived as utterly ineffectual, and the Executive were thought to be blatantly disregarding them? In these circumstances, the citizenry's regard for legality and customary law compliance, on which republican government finally depends, would surely wither.[449] From any traditional separation of powers

447. On the relationship between the first-order goals of immigration policy and the second-order institutional design features used to achieve those goals, see Cox & Rodríguez, *supra* note 371, at 542–43. In practice, our current institutional arrangements might function very much like a system in which the Executive was vested with broad *but formalized* discretionary powers to remove unwanted immigrants while admitting desirable ones, and used those powers in furtherance of national immigration goals.

448. *See supra* Part III.

449. Consider a very simple analogy: Suppose the Legislature sets the speed limit at 60 m.p.h., but does not cover enforcement costs fully. The police might quietly decide to enforce a 70-m.p.h. limit, and disregard drivers traveling between 60 and 70 m.p.h. If knowledge of this policy became widespread, it would likely cause many drivers who previously had been law compliant to drive at up to 70 m.p.h. That effect alone would likely damage the public's respect for the law and weaken its habits of compliance. Imagine next that the police commissioner made a formal, public announcement that motorists driving illegally but below 70 m.p.h. would not be stopped and charged. Not only would that announcement likely encourage more noncompliance, but it could do considerably more harm to the public's regard for the law.

perspective, a legal regime that invites the President to openly refuse to enforce the law in hundreds of thousands of cases is badly in need of repair.

V. Conclusion

The common idea that the President has a positive constitutional authority to decide not to enforce the civil law is mistaken. The Take Care Clause, coupled with related constitutional provisions, establishes that the President has a duty to enforce the laws. The Constitution confers no express or implied power or authority not to enforce the laws. On the face of it, the Obama Administration breached its constitutional duty by refusing to enforce the immigration law in as many as 1.7 million cases.

The Administration cannot rely on a claim of presidential prerogative to justify a decision not to enforce the law. American constitutional practice, coupled with the Supreme Court's case law, does indeed suggest that there is a presidential prerogative. But if so, that prerogative is one granted *by the Constitution*; it is not *extra*constitutional. And it is restricted to action for the sake of national security in times of war or sudden crisis. Presidential prerogative does not justify a refusal to enforce the immigration laws in ordinary, noncritical circumstances. Rather, the Constitution tries to solve the problem of reconciling the need for a strong executive with a republican form of government by giving the President broad, undefined powers in the international sphere but circumscribing his power closely in domestic matters.

Just as in common law, a range of defenses can be offered for the Administration's apparent breach of duty here. The main justifications or excuses that can be used to defend a breach of the duty of faithful execution fall into four categories: that the law whose nonenforcement is at issue is unconstitutional; that enforcement in the particular circumstances would interfere materially with the exercise of another constitutional power of the President (such as that over foreign affairs and national security); that equity in individual cases warrants forbearance in enforcement; and most importantly here, that the enforcing agency lacks sufficient resources for complete enforcement and must therefore use its best judgment to allocate the resources it has. Despite its claims to the contrary, the Administration's nonenforcement decision with regard to the DREAMers does not appear to fall within any of these categories, including the last. Thus it stands as an unexcused breach of duty.

The Administration's decision is the almost inevitable outcome of what has been described as a de facto delegation system that Congress has established in the immigration area. It can be argued that the combination of a massive illegal immigrant population, extremely stringent laws regarding deportability, and inadequate resourcing for enforcement gives the President virtually unfettered control to decide who remains in the country and who is removed. If this understanding of our immigration law system is correct,

then that system poses a threat to the traditional conception of the rule of law and its attempt to control arbitrary executive action. It invites a President to create operative, functional "law" covering hundreds of thousands of cases that overtly contravenes statutory law.

The conception of executive power that we have defended is fully consistent with the attribution to the President of broad constitutional powers over foreign affairs, national security, and military policy. The Framers intended to give Congress the dominant role in regulating domestic matters, while giving the Presidency, with its distinctive institutional qualities of energy, secrecy, speed, and unity of purpose, the primary responsibility for foreign affairs. Although immigration straddles domestic and foreign policy, Congress, not the President, has the controlling authority in that area.

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Book Reviews

Time Out of Joint

WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES. By Mary L. Dudziak. New York, New York: Oxford University Press, 2012. 221 pages. $24.95.

Reviewed by Kenneth Anderson*

The eminent legal historian Mary L. Dudziak has written a book on the meaning of time in war. The separation of the words as found in the title, *War* and *Time*, appears to be deliberate.[1] Dudziak's essay proposes to isolate and identify the effects of time as it passes during war—particularly when it is a long and indefinite time—upon a society and ultimately upon a culture. Time in the course of war is, in this telling, both jaws and tail of the dragon. It is both cause and effect, within and upon culture and society.[2]

This plays out in a special way for Americans, however. The American cultural conception of "time" in "war" seeks to confine war to a presumably temporary emergency.[3] Policies that would otherwise be legally, politically, socially, and culturally unacceptable—encroachments upon civil rights and liberties, most prominently, but also encroachments upon property rights, and regulatory changes of many kinds from taxation to price controls—become accepted as legitimate, extraordinary measures "for the duration." An uncertain duration, perhaps, but a duration nonetheless assumed in a culturally deep way to be temporary.[4] The legitimacy of these war measures is accepted not just because they are claimed to be "necessary" in exceptional circumstances. They are also accepted because—independently—American cultural assumptions about the nature of war define them as not merely

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1. *See* MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES 3 (2012) (contrasting wartime as battletime with war "break[ing] time into pieces).

2. *See id.* at 3–4 (characterizing wartime as "moving and changing society" and as resulting from "the way we think about war").

3. *Id.* at 4.

4. *Id.* at 3–5.

necessary exceptions, but as temporally confined.[5] War in the American historical imagination is temporary.[6]

Necessity in war, then, is the hard master pressing exceptional measures upon society.[7] Time, and the assumed temporary nature of war as a state of exception, however, soothes their acceptance and helps establish their legitimacy by contrasting them with "normal" times.[8] Peace is defined as normality; it is defined as "normal" time.[9] And yet the rub: the passage of time in war, when it goes on and on (and particularly when it goes on without discernible end or even a way to define an end) tends to harden effects that were supposed to be temporary, confined to the emergency of war, into permanent changes in society and culture.[10] Time in war—the passage of time in war—is an independent social cause with its own social and cultural effects. We should therefore not be comforted quite so much as Americans are by the culturally reinforced belief that war, or at any rate, war's effects upon the ordinary life of peacetime, is temporary.

In war, Dudziak writes, "regular time" is thought to be "interrupted, and time is out of order."[11] The distinction between time "out of order," established by the social condition of war, and regular time, leads to the category of "wartime," which functions as both a passive historical descriptor and a causal cultural actor.[12] If the book's title initially deliberately separates the two categories, this is in order to see that their subsequent combination in the text signals a distinct social category of its own, one that is established by the fact of war and the social perception of time, and which has independent effects upon society. At the large historical level, Dudziak notes, war slices "human experience into eras, creating a before and an after"—for example, antebellum and postbellum Civil War America, or the "postwar" after World War II.[13] Yet beyond merely being a way of descriptively periodizing history—a series of convenient before and after signposts—wartime also functions as an "abstract historical actor, moving and changing society and creating particular conditions of governance."[14]

War Time is a fine and excellent book, an ambitious exercise in the genres of cultural critique and the history of ideas. The genre of cultural criticism is often characterized by the use of cultural materials that range across literature and the arts, high and pop culture, tropes of culture offered and interpreted to reveal some deeper perception of culture and society.

5. *Id.* at 4.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 4–5.
11. *Id.* at 3.
12. *Id.*
13. *Id.*
14. *Id.*

Dudziak is a distinguished *legal* historian, however, and what she brings specially to this enterprise are both the raw materials of law in time of war and peace and the analytic toolkit of legal academics. The profound contribution of *War Time* to the understanding of society and culture draws upon Dudziak's ability to bridge from the usual materials of cultural criticism and law and legal analysis, melding them into an analytic whole.

The reference to "governance" is fundamental. *War Time* seeks in part to deploy its two terms as abstract analytic categories for interpreting culture and in part to deploy a variety of cultural materials in interpreting those two terms. In that sense it is as much intellectual history as it is cultural criticism. Mostly, however, it seeks to apply those categories to America's experiences following 9/11: the decade of the war on terror.[15] The "governance" to which the book's introduction refers, in other words, is the governance of America *today*, in the time of the war on terror. Dudziak's aim is to illuminate the meaning and effect of wartime in the almost twelve years since 9/11.[16] The attacks by al-Qaeda on 9/11 created wartime for the United States as a social fact, but also as a contested legal categorization.[17] That fact had profound effects on governance.[18] The processes of governance in turn created new effects—triggering, for example, the independent powers of the Commander in Chief and precipitating the authorization of war by Congress and thus the legal ordering of "time out of order"[19]—which is to say, triggering the legal predicates for "wartime."[20]

Commentators across every intellectual discipline have sought since 2001 to illuminate precisely these questions regarding the war on terror and governance, of course. The arguments start with the question of whether it illuminates, obscures, or elides even to refer to the governance of the last eleven years as a "war" at all, let alone a "war on terror."[21] How to characterize the nature of the conflict, the enemy, and America's responses? These unsettled, still-bitter arguments illustrate a point often made by law professors to first-year law students, viz., how a question is framed will largely structure available responses. Were the 9/11 attacks acts of war, of criminality, or both?[22] What fundamental bodies of law apply to what parts

15. *See id.* at 7–9 (explaining that the book focuses on the American conception of wartime due to the central role played by the United States in twenty-first-century conflict in the context of the war on terror).

16. *Id.*

17. *Id.* at 103–05, 112–13.

18. *See id.* at 103–05 (describing the expanded executive powers that came with defining the post-9/11 era as an era of war).

19. *Id.* at 3, 103–05.

20. *See id.* (describing efforts to characterize the attacks of 9/11 as an act of war and the necessary response as one of wartime and war powers).

21. *See id.* at 112–14 (describing different approaches to defining the post-9/11 era in legal terms).

22. *See* John Yoo, *Ten Years Without an Attack*, WALL ST. J., Sept. 7, 2011, http://online.wsj.com/article/SB10001424053111904332804576538443334834166.html ("Looking back over the

of the "war" on terror? Where do these bodies of law apply—and where not? These debates have never stopped since 2001 and will not, since many of those arguing do not agree on first framing principles. The principal policies and laws at issue have varied since 9/11. Detention, interrogation, rendition, and Guantanamo dominated in the early years. Targeted killing and drone warfare increasingly dominate today.[23] But the framing categories remain as essential as ever.

More than ten years after 9/11, however, the core issue has gradually shifted from this framing category or that, or this particular policy or that, to a much more fundamental question. Whatever exactly the framing categories are, or whatever key national security policies in this "wartime" might be (keep Guantanamo open or close it, conduct military commissions or civilian trials, etc.), the deeper issue is this: Is the United States, as a society and government, finding "institutional settlement" for post-9/11 national security and law? Is it finding institutional stability of general principles, national security policies that are stable and accepted as broadly legitimate within American society over time, relatively independent and irrespective of particular, changing, and contingent political actors? Is the United States gradually achieving "institutional settlement" that will be stable across changes of presidential administration and political party, changes of party control of Congress, and changes in the composition of the federal courts, with regard to how the United States acts against transnational terrorism and terrorists, in fulfilling a broad public mandate (in language of the AUMF) to "prevent future acts of international terrorism"[24] against America?

* * *

Institutional settlement is a category dependent upon time—stability of law, policy, and social and political legitimacy *across time*. Moreover, as *War Time* teaches us, the experience of the years since 9/11 reflects that the "time" built into institutional settlement is socially, legally, and politically conditioned.[25] Stability is partly a temporal concept, and institutions likewise. The "time" that establishes settlement has to be able to cross the boundaries of party and faction, and reflect internalized acceptance constituting legitimacy among a wide swath of America. Legitimacy is one

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decade, the first clear lesson is the critical importance of Mr. Bush's decision to consider the struggle with al Qaeda a war."); *see also* DUDZIAK, *supra* note 1, at 113–14 (discussing the debate over whether the "war on terror" was a "war," "emergency," "crisis," or something that fit no existing definition).

23. *See generally* Abraham D. Sofaer, *Targeted Killings from Many Perspectives*, 91 TEXAS L. REV. 925 (2013) (reviewing TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD (Claire Finkelstein et al. eds., 2012) and discussing the legal issues surrounding targeted killings in the war on terror).

24. Authorization for Use of Military Force Against September 11 Terrorists, 50 U.S.C. § 1541 (2006).

25. *See* DUDZIAK, *supra* note 1, at 23 (discussing the importance of wartime and peacetime in international law); *id.* at 17–19 (discussing social, cultural, and economic influences on the definition of time).

of the mechanisms by which governance brings time out of the disorder of wartime and back into longer run conceptions of order—temporally situating it in relation to the legitimacy of the political community over the long run, in peacetime and wartime. After two Bush Administrations, one Obama Administration and the start of another, institutional settlement in national security policy surrounding transnational terrorism carried out by nonstate actors is the fundamental issue. What makes it necessarily—not exclusively by any means, but certainly necessarily—intertwined with time as a social and cultural category is that time is conceptually part of stability and settlement.

Yet much of the analytic framing of the proper response to 9/11 has focused less on time than on *who*, as manifest in categories of legal definition with profound legal consequences: terrorist, enemy combatant, unprivileged belligerent, alien, citizen, and so on.[26] Much of the analytic framing of the proper response to 9/11, too, has focused on *place* and *space*: what is the "legal geography" of war, the geographic reach of the law of war, governance under a legal framing of "war," the question of *where* war and its law governs and where it does not.[27] Law defined by "person" and "place" has in turn largely framed the received understanding of wartime in the war on terror. If, for example, one is picked up as an unprivileged belligerent and terrorist actor and alien in a certain place (for example, outside of United States territory), then the temporal consequences include the possibility of detention until the end of the conflict, whatever and however long that might mean—including forever.

War Time adds something distinctive to the analysis of these categories. Dudziak addresses time as its *own* category, and not merely as a set of temporal consequences of *other* framing governance and legal categories such as person and place (such as how long might a person be detained at Guantanamo).[28] This book teaches us that "time" in war has its own etiology and its own effects.[29] *War Time* seeks to give an account of time's etiology and effects, and specifically its effects upon governance, in the war on

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26. *See id.* at 121–22 (describing how the Supreme Court considered the defendant's enemy combatant status and citizenship in determining due process rights in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) and *Rasul v. Bush*, 542 U.S. 466 (2004)); *id.* at 101 (quoting President Bush's characterization of the war on terror as "a new kind of war" that required a new kind of response based on the identity of the combatants).

27. *See id.* at 123 (explaining that geography was the "[m]ost important" consideration in determining whether the right of habeas corpus applied outside U.S. borders). For discussion of this perhaps obscure term, see Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a "Legal Geography of War," in* FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW (Peter Berkowitz ed., 2011), *available at* http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf.

28. *See* DUDZIAK, *supra* note 1, at 23 (labeling wartime as a "central category" in law and politics).

29. *See id.* at 23–26 (explaining that war time has "force in history, enhancing the power of government" and that this may sometimes restrain civil liberties).

terror.[30] This insight drives the attention the book merits from both legal scholars and readers across the fields of the humanities. *War Time* draws valuable attention to a category that is undertheorized in legal scholarship, and—specifically in the field of national security law and policy—it draws attention to the independent weight of time, as more than merely a collateral effect of other categories such as person and place. If the two rhetorical categories are necessity in war, on the one hand, and time in war, on the other, then nearly all of the arguments over today's national security policies have run to necessity. Dudziak forces us to take account of the other, time and the independent significance of its passage.

The book is organized in a straightforward fashion. First, *War Time* offers a general framing of time and war as cultural categories.[31] Most of this draws upon traditional methods of cultural criticism, though parts of it reach to specifically legal materials. The book then turns to examine wartime as it was understood in two distinct, and distinctly different, wars—World War II and the Cold War.[32] These are compared and contrasted against each other with respect to the cultural perception of their boundaries, beginnings and endings, and the fixedness and permeability of those temporal markers.

Finally, Dudziak turns to 9/11 and its aftermath, applying insights drawn about time and war from these earlier wars to the war on terror.[33] The burden of her observations across all these wars is one of law and policy: she is always looking, in her choice of cultural tropes and objects of cultural analysis, toward their implications for the war on terror.[34] She aims to show, at bottom, that by comparison to past "wars"—both "real" wars, such as WWII, and the conceptually looser and somewhat metaphorical Cold War—the temporal framing of the war on terror is a legal and policy mistake.[35] It justifies legal and policy measures across time that are driven in part by a conceptual framing based on war, justifying "emergency" temporary

30. *Id.* at 3–4, 7.

31. *Id.* at 17, 21–26.

32. *Id.* at 47–48, 61–62 (discussing World War II); *id.* at 68–69, 91–92 (discussing the Cold War).

33. *See id.* at 101–02 (comparing President Bush's response to 9/11 to the responses in World War II and the Cold War); *id.* at 115–16 (describing attempts to define "wartime" in the context of World War II and the Cold War); *id.* at 123 (comparing the legality of wartime detention post-9/11 to that during World War II).

34. *See id.* at 120–22 (describing the Supreme Court's attempt at framing the post-9/11 world within the traditional paradigm offered by earlier wars); *id.* at 126–27 (noting that the post-9/11 Supreme Court took a deferential approach to national security questions much like it did during the Cold War).

35. *See id.* at 6–7 (asserting that the "narrative cohesion" of the understanding of wartime that was used in World War II and the Cold War does not apply to the war on terror in framing current law and politics issues).

measures[36] for a "conflict," however, that lacks temporal specificity even in principle.[37]

Thus, the book argues by its conclusion, the war on terror, as law and policy, assumes without adequate justification notions of temporary measures that are not in fact so, and more than a decade onward after 9/11, quite evidently not so.[38] These temporary measures are what they have been in war after war in American history: restrictions on civil rights and liberties. They result in considerable part, *War Time* urges, from American cultural assumptions about war.[39] And, in turn, these cultural assumptions about war make (and depend upon) further cultural assumptions about time, and the meaning of time in war. But these assumptions are assumed largely without political or legal debate, no matter how much argument there is about specific emergency measures, simply because they are baked into our cultural concepts. As substratum assumptions shared by both American right and left in political and legal battles over national security policy, Dudziak argues by the book's final chapters, they tacitly structure important terms of the argument, and lead to wrong, or at least unnecessary, policies and laws. To a considerable extent, they are less policies or laws than artifacts of our cultural constructs. Americans "disagreed deeply about this war," Dudziak says in her conclusion, but "coalesced around the idea that the times were not normal times."[40] If that is so, then the task of cultural criticism is to strip away the veil of "necessity" covering these measures that are, so to speak, soothed into acceptance by an underlying assumption that, it being wartime, these are "temporary" measures. This is the independent importance of time as a social and cultural category. A cultural framing of wartimes as "discrete and temporary occasions, destined to give way to a state of normality, undermines democratic vigilance."[41]

This means, however, that *War Time* has a prescriptive character by its end, one that reaches to policy and law in America today. It seeks to draw out of its readings and decodings of cultural and historical materials an argument that is, in its largest reach, an argument from false consciousness. The essential prescription of *War Time* is a call to see whether, if false consciousness is stripped away—once "we understand that political actors help to generate a shared political time"—then are we freed to "see that we are not driven by our times, but instead shape them."[42] And the book's prescriptive call is to tell us that we need not "suspend our principles"—

36. *See id.* at 4 (explaining that exceptional wartime policies are justified by the assumption embedded in American legal and political thought that war is temporary).

37. *See id.* at 135 (explaining that the war on terror establishes a wartime with no boundaries and may be a perpetual war).

38. *Id.* at 135–36.

39. *Id.* at 4.

40. *Id.* at 135.

41. *Id.* at 136.

42. *Id.*

meaning our principles of civil rights and liberties, particularly—and that the stance ought to be resistance to incursions upon them predicated on the necessities of wartime.[43]

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This prescription involves large claims, both methodological and normative, and it is an equally large question whether they are justified. Have we actually "suspended our principles" or are they simply more capacious than Dudziak believes? Is national security governance today, nearly a dozen years post-9/11, actually driven by some logic of pure, even perhaps Schmittian, necessity?[44] Or have today's national security responses long since moved beyond "necessitarian" logic, and are they simply part of a normal and ordinary movement back and forth within the eternal tradeoff between liberty and security, *both* of which are highly regarded values of American democracy?

And, finally, *how* would one answer those skeptical questions? Is the method of *War Time*—its admittedly intriguing mix of cultural critique and the history of ideas in culture and society—able to answer these deeply policy and political questions? The traditional skeptical response to a traditional argument from false consciousness, after all, is to ask on what criteria we should conclude that one's—or, at the society-wide level of something broadly accepted and taken as legitimate, *everyone's*—consciousness is "false."[45] How are we supposed to know?

The methods of cultural criticism—the methods, for that matter, of criticism as a genre generally—depend upon assessments, readings, and interpretations of varied cultural materials from which one extracts insights into a larger phenomenon.[46] At the end of this Review, we will look at them from the outside, so to speak, of cultural criticism, and ask whether and to what extent their use is appropriate to the ultimately prescriptive policy agenda of *War Time*. We start in a different way, however—by accepting the methods of cultural critique used in the book and asking to what extent they seem persuasive on their own terms.

This is not, of course, something for which certainty can be offered. There is no QED, because whether one accepts either the relevance, or degree of relevance, of some cultural trope or practice as being able to illuminate a larger cultural or social order is inherently subjective. It depends heavily on inviting the audience to read both critically and sympathetically, with a certain amount of reasoning but a large amount of invitation to "see" that this phenomenon and the interpolation of it is revelatory in some fashion.

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43. *Id.*

44. *See id.* at 115–17 (discussing German political theorist Carl Schmitt).

45. *See, e.g.*, Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1140 (1993) (criticizing antipornography arguments based on false consciousness on the grounds of making presumptions about what is in women's best interests).

46. ARTHUR ASA BERGER, CULTURAL CRITICISM: A PRIMER OF KEY CONCEPTS 2–3 (1995).

It is the elaboration of insight rather than derivation, and depends upon apperception far more than deduction. This is not necessarily a familiar or congenial method for many in the legal academy who might encounter this book, as historian Samuel Moyn observed in his own *Lawfare* review of *War Time*.[47] The book, he correctly notes, devotes many pages to the "task of connecting students of the law and students of the humanities, who rarely share one another's assumptions. Humanists will regard much of Dudziak's text as an anecdotally rich and sprightly written reestablishment of the threshold claim that culture and society affect temporal categories and experience."[48]

Intellectually important parts of the legal academy today, however, aspire in large part to social science as Ur-discipline and the methodological starting point for legal scholarship, not to the humanities (and perhaps least of all to the areas of the humanities that produce cultural criticism). The method might therefore be somewhat alien, perhaps off-putting, to some legal academics. Let's set that external concern aside for now, and take the method on its own terms. How persuasive is Dudziak in her basic claims that WWII is the essence of a discretely bounded war in American imagination, with Pearl Harbor on the one end and VJ Day on the other (but not actually so, if one looks to its history); that the Cold War perturbed but did not ultimately supplant the American sense of war as discretely bounded, but instead seemingly took advantage of that bounded sense to establish temporally unbounded national security structures; and that the war on terror, whatever label is currently put on it, fundamentally misframes "it" as a matter of "temporary" time and temporality?[49]

Dudziak's account of time and WWII acknowledges that Pearl Harbor looks to be a very concrete beginning and Japan's final surrender in 1945 a very concrete end.[50] It is embedded that way in American historical imagination, and, she says, it is the modern experience that establishes the American sense of war as a state of exception, with measures of emergency justified in part by a belief that they will be temporary because war is essentially temporary. She says:

> The effort to contain World War II within the Pearl Harbor-to-surrender frame reinforces traditional ideas about wartime. This matters because wartime is the occasion for the use of the federal government's war powers. The assumption that wars are finite

47. Samuel Moyn, *War Time: An Idea, Its History, Its Consequences*, LAWFARE (May 24, 2012, 11:10 AM), http://www.lawfareblog.com/2012/05/war-time-an-idea-its-history-its-consequences/. Full disclosure: I serve as the Book Review Editor for *Lawfare* and commissioned Moyn's review.

48. *Id.*

49. DUDZIAK, *supra* note 1, at 35–36, 68–72.

50. *Id.* at 35–36.

> legitimizes the exercise of war powers by making it seem that their use is temporary.[51]

One might think that the book's comparison to the Cold War is made in order to suggest that this deeply reinforced cultural assumption by Americans over generations exposes a mismatch between the finite temporal expectations inherited from WWII and the facts of a Cold War of deeply uncertain duration. In part, Dudziak means just that, temporal mismatch—though she also devotes many pages to showing that WWII was far less bounded than the American imagination suggests.[52] Her evidence for this latter proposition is interesting because it raises questions about the methodology at issue here. She walks through a considerable body of material showing that, in fact, the boundaries between war and "not war" are porous, and that Roosevelt had gone most of that distance before Pearl Harbor—so much so that many senior advisors were privately relieved that the Japanese attack took the burden off of uniting the country around a much more diffuse and gradual involvement in the conflict.[53] As a matter of concrete history, this is quite correct and not disputed.

But particularly for evidence of the porousness of WWII at its close, she draws on materials that draw upon both cultural critique and law. She examines in detail the capital murder trial of John Lee, an inmate in the United States Army Disciplinary Barracks in 1949, accused of killing another inmate;[54] the key legal question was whether the court-martial was lawful under a (pre-Uniform Code of Military Justice) statute providing that no person could be tried for "murder or rape committed" within the territorial United States "in time of peace."[55] Was it "wartime or peacetime"?[56] Dudziak's discussion is fascinating as regards this case and all its precedents stretching back to the U.S. Army's pursuit of Pancho Villa in Mexico.[57] The resolution involves the Supreme Court saying that there can be "war" for some purposes and "peace" for others; John Lee was released on those grounds.[58] One effect is to reinforce Dudziak's observation that even in WWII, the boundary between war and peace was more porous than simply the act of surrender and the formal cessation of hostilities.[59]

But even operating from within a method of cultural critique, I am not so persuaded that these legal cases offer much in the way of evidence about

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51. *Id.* at 36.
52. *Id.* at 36–52.
53. *Id.* at 48–49.
54. *Id.* at 33–40.
55. *Id.* at 33.
56. *Id.*
57. *Id.* at 36–40.
58. *See id.* at 39 (contending that Justice Douglas used "common sense" to distinguish Lee's capital case, held to occur during peacetime, from contemporaneous rent-control regulations, held to be during wartime).
59. *Id.* at 40.

how the boundaries of war and peace were perceived. Dudziak's more fundamental point—that the perception of a sharply bounded WWII influenced the assumptions framing the Cold War—seems to me more correct. The cases and their legal rules concerning the end of conflict have the air not of deep principles, but merely of the far more routine task of courts giving answers to questions where the answers might just as easily have gone the other way, without very much effect into the future or much root in the past, in large part because it is understood that the decisions are necessarily arbitrary to some degree. This shows something of the subjectivity of materials and conclusions in this kind of cultural interpretation and how reasonable minds, even situating themselves within Dudziak's method, could quite easily disagree as to interpretation and significance.

The same skepticism could be brought to bear, even within the methods of cultural criticism and intellectual history, against another set of cultural artifacts about time and war in the book—the issuance of U.S. military campaign service medals. The text (and full appendix) makes surprisingly large use of these—when, where, and for what wars and campaigns issued—as a way of evidencing what was considered wartime and what not.[60] It is used to stress both the porousness of the beginnings and endings of conflicts, as well as the observation that if one looks to campaign medals and decorations, the United States has been engaged across its history in vastly more years of conflict somewhere, sometime than the public culture recalls.[61] This latter point is well-taken, although in that case the notion of concomitant domestic "emergency," meriting special measures, is weakened and appears to be dissociated from conflict as such.

Even so, I doubt I am alone among readers in thinking that the evidence gleaned from campaign medals is less than fully persuasive as to the existence and meaning of wartime. Somewhat like the court cases noted above, and perhaps even more so, the circumstances driving the issuance of medals and decorations seem far too contingent on other events—politics, bureaucracy, etc.—to make it into a compelling source of evidence about even the purely cultural significance of wartime. It seems to me puzzling rather than persuasive. Still, other readers might find it both compelling as well as a marvelously indirect method of revealing the cultural subject.

* * *

If reasonable minds can disagree as to the significance of certain of these materials—the legal cases or campaign medals, for example—there is at least one matter on which the internal methodology of the book seems to me distinctly mistaken. The nature of the method involves looking at frequently specific and very concrete cultural or social practices, in order to

60. *Id.* at 28–31, 74–76, 137–56.

61. *Id.* at 28–31.

interpolate some higher level meaning for society or the culture more broadly. The text, however, has a tendency to treat matters applicable to *battle* as being applicable to *war* and to use them without discrimination in establishing the concept of "wartime."

So, for example, the introduction talks about the common psychological phenomenon of battle as suspending time itself in the psychological perception of an individual soldier.[62] Dudziak says that "one meaning of 'wartime' is the idea that battle suspends time itself."[63] That is likely true of battle, as a matter of the psychology and phenomenology of many of its direct individual participants—but in that case this notion of "wartime," by reference to battle, would not seem to have very much to do with "war" itself. War is more, and bigger, than that. "Battletime," as we might more correctly call it, is not "wartime," and is not obviously revelatory as to the nature or perception of war, whereas the notion of wartime that drives the book overall is one that is very much attached to war—war and its cultural assumptions at the level of the nation and society as a whole.

Whether the condition of war has the effect of suspending time in some metaphorical way that could be evidenced and debated is a much more interesting question—and indeed the book does exactly this using a variety of materials. War might be thought of "suspending" social and cultural "time," for example, in the sense of people's ordinary lives being put "on hold" by war. Patterns of career, education, marriage and family, and so on, are placed on hold until wartime is over and people return to their civilian lives, careers, occupations, and so on. But that is a very different sense of suspending time than the distinctive psychological phenomenon of time standing still in the heat of battle.

Moreover, at the large national level, a war that mobilizes all of society, as WWII did, was not only, or even mostly, about suspending ordinary life so much as it was about upturning and remixing it thoroughly. Farm boys moved for the first time beyond their villages, where they saw big cities and faraway countries. They were introduced to technologies and ways of thinking and people quite unlike them. Women entered the factories and wage work; the many changes this wrought over the long run for American society have been well-studied. These and so many more were "suspensions" of time in war as measured by life before—but by war's end, in so many of these things and for many people as well, there was no going home again and no going back. These were permanent changes in the culture, not suspensions of it—and many in ways that were good for the country over the long term, bringing about unprecedented geographic and social movement and mobility. And the permanent nature of many of these

62. *Id.* at 3.
63. *Id.*

changes was recognized in WWII; peacetime was going to be peaceable, yes, but it was not going to be picking up merely where things left off.

The bigger lesson out of this is that although the methodology of cultural critique often involves examining some small thing by which to interpolate bigger things, there has to be a commonality between them, and battle and war lack that. One might wonder something like the same in the discussion of the famous early Cold War/Korean War case of *Youngstown Sheet & Tube Co. v. Sawyer*.[64] The case is treated in the text for something it undeniably is—the proposition that there are "limits to presidential power, even during war," and the Supreme Court's rejection of the implication of the Truman Administration's argument that there is no limit to the president's "inherent power in an emergency."[65]

But there is another way of seeing the case that seems perhaps more pertinent to an analysis of the structure of time and exception. Precisely because the model of an "emergency" was the monumental emergency of WWII only a few years before, neither the emerging Cold War, nor even the Korean War, seemed to the *Youngstown* Court or, for that matter, to the American public, to constitute an "emergency." Not, at least, set against the standard of Pearl Harbor. The United States was fighting a war, but it was not remotely like WWII, had not required a congressional declaration even as a legal predicate (being a mere United Nations police action),[66] and no matter how bloody, protracted, or ugly it finally became (though the Korean War was obviously a very nasty war), it was war without an "emergency."

In that case, however, *Youngstown* itself is less a case about war powers than about recognizing (or not) an emergency. If Truman really thought the steel was so important, then he could have gotten it through ordinary, non-emergency-powers means. He wrapped his claimed emergency powers in the constitutional rubric of war,[67] and the Court's rejection of it[68] was not so much a limitation upon powers in war as disbelief that this "war" was an emergency which would trigger those powers. In that case, then, Justice Jackson's famous concurrence—that the "scope of presidential power varied depending on whether the president acted in accordance with or against congressional grants of power"[69]—should be taken at least partly as a proxy

64. 343 U.S. 579 (1952); DUDZIAK, *supra* note 1, at 88–89.

65. *Id.*

66. *See id.* at 86 (noting that the United Nations passed a resolution calling for U.S. troops in South Korea to forestall a North Korean and Soviet invasion, which grew into the three-year war).

67. *Youngstown*, 343 U.S. at 582 (explaining that Truman claimed he was "acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States"); *see also* DUDZIAK, *supra* note 1, at 89 (describing the Government's argument that the President has inherent power in an emergency).

68. *See Youngstown*, 343 U.S. at 589 (holding Truman's seizure order unconstitutional).

69. DUDZIAK, *supra* note 1, at 89; *see also Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring) (laying out a three-part framework for presidential powers based in part on Congress's approval of the President's actions).

for understanding when there was a "true" emergency, or at least as a signal for greater deference by the courts. I would have thought that the most interesting reading of *Youngstown* in the context of "wartime" would have been to use it to argue that despite what was happening in Korea, and despite the rhetoric of the 1950s Cold War, it was not really regarded as a "war" in the cultural sense by a nation that had just gone through WWII, and therefore did not merit treatment as an exception.

I do not hold out that this is the correct reading of *Youngstown* or that this is the analytic point on which to claim the case's historical importance. I mean only to suggest, in the context of *War Time*'s overall argument, that the distinction between war and emergency is central. Dudziak indirectly acknowledges this, to be sure, in her observation of how many conflicts the United States has actually been engaged in throughout its history[70]—most of them not part of the American historical imagination, and few of them treated as "emergency" to the extent they even entered public attention.[71] But though raised elsewhere in the book, it seems to me an important question to address as part of the book's prescriptive conclusion related to today's war on terror. Why? The relevance is not only in the general proposition (and at least partly contra the argument of this book) that wartime does not equal emergency. It is *also* to say that this plausibly describes (as Dudziak acknowledges, but also criticizes, by the book's ending chapters)[72] the current situation of the "conflict" once known as the "war on terror." It raises a question as to whether an analysis of war and time in assessing whether we have the right tradeoffs between liberty and security in today's war on terror is as important as an analysis of time and "emergency."

* * *

The book's analysis of the cultural understanding of time in the Cold War argues mostly that the perception of the Cold War as a "war" and therefore as sharply and discretely bounded in the American historical imagination, had the effect of abetting a massive overreaction against civil rights and liberties—McCarthyism and all its manifestations.[73] If the underlying assumption, once again, is that of temporally bounded war, then alterations of peacetime understandings can be legitimized as temporary exceptions. Except, Dudziak says, moving from the experience of WWII to the Cold War, the "war" goes on and on.[74] What started as "temporary"

70. *See* DUDZIAK, *supra* note 1, at 28–32 (highlighting small-scale United States military engagements during the twentieth century in China, Haiti, Cuba, Nicaragua, the Philippines, Lebanon, Grenada, and Panama).

71. *Id.* at 32.

72. *See id.* at 112–13 (acknowledging the distinction between war and emergency). *But see id.* at 136 (criticizing our nation's tendency to divide time into wartime and nonwartime).

73. *Id.* at 76–85.

74. *Id.* at 70–71.

becomes enshrined as permanent—part of a national security state that has come to be built atop the edifice of the New Deal state.[75]

This last point makes a perceptive observation about the nature of the national security state in the Cold War. Many legal scholars, Dudziak says, studying the impact of war and war making in the Cold War, tend to focus on how

> this era compares with other war eras, not on the development of the national security state. They measure the domestic consequences, comparing disputes over rights and presidential power during the Korean War and/or the Cold War with other wartimes. But traditional American wartimes don't offer the right kind of comparison. The Cold War is not an impact on American democracy that began with an opening battle and ended with an armistice. Instead it was a period of state-building akin to the New Deal era. During both periods, the United States embraced a new logic of governance.[76]

This is right and important. It *was* a period of "state-building," both domestically and in America's relationships abroad. It was about the introduction of new state structures of governance. And Dudziak is shrewd to observe that the structures created had little or no relationship to a concept of a temporal end to the Cold War—even as many of the measures invoked to justify their creation relied tacitly on just such assumptions about the temporally bounded nature of American war.[77]

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That point granted, however, the chapter on the Cold War[78] seems very one-sided in its view of the emergency measures accepted as long-term constraints on what had previously been the peacetime norms. It is essentially a description of overreaction, and one reason seems to be that it focuses almost exclusively on the early Cold War and, curiously, focuses less than one might have thought important on when the Cold War should be understood to have ended. The Cold War chapter does not really grant to policy makers, lawmakers, and courts of the 1950s through early 1960s very much awareness of the need to try and figure out a way to balance liberty and national security in a long-run struggle—or even, for that matter, an awareness of the differences between WWII and its temporally bounded nature as distinct from the Cold War's much looser, much more porous, and metaphorical nature as war.

It might be I misunderstand the textual move here. It might be that this is precisely the place in the argument where the book's earlier *counter*-reading of WWII comes into play. The chapter on WWII, that is, offers many reasons to believe that American historical imagination internalized a

75. *Id.* at 68–70.
76. *Id.* at 91 (footnote omitted).
77. *Id.*
78. *Id.* ch. 3.

sense of war typified by WWII's sharply marked beginning and ending.[79] Most of *War Time*'s book-long arguments depend upon it, because it says that this was internalized into American cultural consciousness—down to today. But the chapter also turns and offers a counter-reading of WWII, drawn from actual historical facts as well as cultural materials, in which the boundaries of both beginning and ending are understood as porous, cutting against it being understood as having a sharply temporally bounded nature. In that counter-reading of WWII as porous, the Cold War might, like WWII, be porous as to beginnings and endings—analogous to WWII instead of standing in contrast to it. The cultural implication is that the architects of the Cold War, American elites at least, saw the Cold War as being, at least as regards its temporal conception, similar to WWII rather than different. Each, in other words, is indistinct in beginning and end, and yet each presents an obvious emergency for all that. I am unclear, however, as to whether this is an additional argument in the text in this chapter. If something like this is the book's claim, however, it does not seem as if both of those readings could be right.

In any case, it does not seem to me correct to think even of the early Cold War and Americans—particularly American elites assembling the political pieces of the Cold War—as so one-sided and un-self-aware as all that. On the contrary, it seems to me that there was a broad understanding in American society and culture that the Cold War did not have the same specificity as WWII. Part of the difficulty here is that the book focuses on the early Cold War: the 1950s. But the Cold War went on decades longer than that—and if one takes it as a whole, it is hard to see that this is an accurate depiction of its tradeoffs, even in the governance of the national security state. Indeed, I would have said that America across the decades of the Cold War did remarkably well, not badly, at trading off its domestic regime of liberty against security. That is not visible if one sticks with the 1950s.

Moreover, even if confined to the period between, say, 1945 to the early 1960s, there is reason to doubt that the picture is anywhere near as unaware of the tradeoffs being made as the book appears to suggest. On the contrary, a different selection of cultural materials for examination would have shown a deep awareness of the tradeoffs that were being made. Senator McCarthy was not the only influence.[80] Thinking just off the top of my head, I discern

79. *Id.* at 61–62.

80. After all, the risks of permanent threat to liberty was on the minds of the Founders—most famously, in *Federalist No. 8*, in which Alexander Hamilton, reflecting upon external security threats and standing armies such as those of Europe, warned:

> Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and

a keen awareness on the part of thinkers and writers in those years of the ways in which a long war, with no discernible end in sight and no clear sense of what "victory" might look like, might impact long-run culture for the worse. The most interesting and important figures in that regard are those such as George Orwell or Albert Camus—men and women of the anti-Stalinist, anti-Communist Left who wrestled with exactly such tradeoffs and anxieties. *1984*, after all, is a Stalinist nightmare, but it is set in Britain, not the Soviet Union.[81] Orwell intended a warning about what our Western society might become, not a fable about someone else's society.[82] There are other examples from the period. Science fiction writer Robert Heinlein kicked off an entire genre of sci-fi horror fables about how *our* society becomes *their* society with his early-1950s minor classic *The Puppet Masters*.[83] The "institutional settlement" that defined the American Cold War from beginning to end—and which distinguished it so deeply from Western Europe—depended profoundly on the staunchly anti-Communist convictions of America's labor union leadership, and yet their concerns about the organizing rights and liberties of labor, including powers to strike, assemble, unionize, and so on, were never off the table in the transition from the New Deal state to the national security state.

For that matter, if permitted a personal point, one of the earliest "adult" books I read as a child in the mid-1960s was a science-fiction novel, *They Shall Have Stars*, by James Blish.[84] The premise of the novel is that the sheer effect of time on a Cold War that, in the story, goes on well into the twenty-first century, means that gradually "our" side comes to resemble "their" side, with merely surface differences in form.[85] In this, Blish offered a fictional, mid-Cold War meditation on Spengler's *Decline of the West*;[86] his tone was somber, elegiac, and anxious. By the novel's year 2013, the United States is democratically governed in name only, and is run instead, behind the surface democracy, by the hereditary head of the FBI.[87] Deliverance comes through scientific research sponsored by a brave senator, producing a faster-than-light drive that allows whole populations of Earth to depart for

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political rights. To be more safe, they at length become willing to run the risk of being less free.

THE FEDERALIST NO. 8, at 61–62 (Alexander Hamilton) (Clinton Rossiter ed., rev. ed. 2003).

81. GEORGE ORWELL, 1984, at 3 (Penguin 1990) (1949).

82. *See* MICHAEL SHELDEN, ORWELL: THE AUTHORIZED BIOGRAPHY 433–35 (1991) (indicating that Orwell thought of *1984* as a warning against totalitarianism in general, regardless of time or place).

83. ROBERT A. HEINLEIN, THE PUPPET MASTERS (1951).

84. JAMES BLISH, THEY SHALL HAVE STARS (1957), *reprinted in* CITIES IN FLIGHT 1 (1970).

85. *Id.* at 21 (describing the U.S. and U.S.S.R. as "becoming more and more alike in their treatment of 'security'").

86. Albert I. Berger, *Science-Fiction Critiques of the American Space Program, 1945–1958*, 5 SCIENCE-FICTION STUD. 99, 106 (1978).

87. Blish, *supra* note 84, at 5, 12.

the stars—significantly, escape from *both* "our" society and "theirs."[88] The novel contains soliloquies on the ways in which the passage of time itself, under the peculiar national security pressures of secrecy, brings about convergence between the societies of the West and the Soviets—or, more precisely, moral collapse of the Western democracies into Soviet-style systems, under the implacable demands of the national security state.

* * *

I digress, but not entirely. The point is, deep self-awareness of the effects of permanent emergency measures in the Cold War were present from the beginning, and informed cultural understanding, at least at the elite levels, was present all the way through. The best reading of the cultural materials reveals deep self-awareness both that the Cold War required serious political and legal tradeoffs and that "time" itself might have a dangerously transforming effect on a culture of liberty in a permanent state of what constituted, if not an emergency, then at least an extended state of exception. The book partly makes note of this awareness. Eisenhower's famous "military-industrial complex" speech, Dudziak observes, sets out the major concerns about the evolution of democracy into something different.[89] I am unclear as to *War Time*'s argument here, however. It suggests at some points a framing of the Cold War temporally[90]—but on the mistaken assumption that it can recapitulate the bounded temporal framing of WWII. I would say, on the contrary, that Cold War thinkers were well aware of the differences and why the Cold War was temporally not WWII.

But Dudziak's argument, and its acknowledgment of such materials as Eisenhower's farewell speech, could be read to say something quite different. Although there are cultural materials of diverse kinds showing that intellectuals, and literary and academic figures were well aware of the problem of decline into permanently illiberal shifts in culture, society, politics, and law in the many ways Orwell or Blish describe (and even if this cultural awareness extended to politicians and even President Eisenhower), the actual facts of policy, politics, and law show serious overreaction predicated on the existence of a temporary emergency—an emergency that would, it was believed as a cultural premise, resolve itself soon enough back into "normality." Certainly these were *not*, Dudziak might say, calibrated and consciously made tradeoffs between security and liberties, undertaken in a way that would show society's self-awareness not of a bounded, temporary emergency, but instead gradual, un-self-conscious state-building of the permanent national security state. The permanent national security state was not created, on this telling; over time, it coalesced.

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88. *Id.* at 11.

89. DUDZIAK, *supra* note 1, at 91–92.

90. *See id.* at 77–80 (noting that the height of anticommunism sentiment and the Cold War were not precisely contemporaneous).

Again, I don't think that is so, not for the Cold War as a whole. Dudziak's national state-building observation is persuasive, but I would add to it genuine self-awareness of the effects of time. That is part of the reason that it was conceived by many of the participants *as* state-building; what Dudziak here calls "state-building,"[91] we might also call "institutional settlement" for which no end is, but also no end need be, in sight. The implications of this for today's war on terror, I should add, probably do not need to be stated. Likewise the reasons why Dudziak would find the essence of this "state-building-institutional settlement" a profound political problem,[92] whereas I find it the basis for comfort: we did not build it thinking it would end, and we knew we were making state-building, institutional settlement tradeoffs and decisions.

To the extent *War Time*'s view of the Cold War as tacitly premised on a temporary condition of wartime is actually true of the 1950s, however, the historical forces driving this are essentially national security arguments from *necessity*, not *time*. That is true of McCarthy's urgent appeals to necessity as a basis for his infamous hearings; it comes close to the famous dictum (which *War Time* mentions in the introduction) that in times of war, law is silent; necessity knows no law other than itself.[93] Eisenhower's framing of the dilemma is genuinely a mixed argument from necessity as well from time: we are "compelled," he says, to create a "permanent" armaments industry of vast proportions, necessary to respond to the security threat; but also "new" in the American experience.[94]

But *War Time* is a book in the first place about time and war, not necessity and war. More precisely, it is a book arguing that oftentimes things that are asserted to be about necessity and war are actually things tacitly taken on an assumption about time and war, and specifically an assumption about the temporary nature of wartime. The arguments writers such as Blish and Orwell make are arguments from the sheer passage of time, the effects of permanent emergency measures on the cultural perception of "normal." They seem to me frankly closer to the kinds of cultural materials that *War Time* ought to want to consider. Moreover, "time" in this sense is more about culture and society and less about actual policy and politics, and so literature and the traditional materials of the humanities have much greater traction in giving insight.

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If that is so, however, then sympathetic as I am to the method of cultural criticism and its materials, there are limits to what one can get from them. It is interpretation, not proof; insight, not deduction; apperception, not

91. *Id.* at 91.

92. *See id.* at 93 (citing the national security state as "the most important threat to the survival of what remained of the New Deal in the twenty-first century").

93. *Id.* at 3.

94. *Id.* at 91.

derivation. The selection of anecdotal materials from what is essentially an unlimited cultural pool involves subjective judgments, and likewise the interpretation of what one does select. In some things relevant to this topic one might be able to do quantitative studies of concrete things—the percentage of military-age males who during the Cold War served in the military, for example, or the size of Cold War military budgets as a percentage of GDP. Many things could be counted—and certainly have been, to great profit in our historical understanding—but matters crucial to understanding something as qualitative a phenomenon as "wartime" will not be susceptible of explanation by counting things. This means interpretation has to remain at a level of "plausibility" at most, and also at a level of metadescription that seeks to do no more than capture often elusive, merely glancing, always contestable flashes of "insight" into the culture. It is no less important or useful for that, however; I honor the method and much of *War Time*'s use of it in pursuit of the history of an idea.

When *War Time* turns to the war on terror today,[95] however, it loses sight of the limits of cultural critique. It seeks to turn plausible but contestable cultural and social insights into action-guiding prescriptions for policy, politics, and law.[96] One understands the impulse. After all, why engage in all this subtle cultural decoding only to conclude that in today's world, it has no actionable implications? The problem, however, is that culture does not answer policy questions; it is the substratum in which possible policies are contained. Cultural criticism, however important, does not drive all the way down to specify very much.

Whereas, by the time *War Time* reaches its prescriptive conclusions, it wants very much to tell us to resist the view that the apparent necessities of war are in fact necessities. That's no longer an argument about time evidenced by readings of culture; it's an argument from a policy, and political, view of what is "necessary" and what is not. Dudziak is very concerned for us to see that what look to be inevitable features of our strategic security situation in relation to transnational terrorism are, on the contrary, merely "argument[s], rather than . . . inevitable feature[s] of our world."[97] This is the argument from false consciousness again—bringing to bear the revelation that apparent immutability and necessity driving our policies are actually constructions of cultural temporality.[98] We mistakenly hold a legitimizing and comforting, but also false, assumption that this antiterror war and its measures are merely temporary, and so we embrace bad arguments from

95. *Id.* ch. 4.

96. *See id.* at 103–06 (connecting Bush-era national security policy with the Administration's characterization of the post-9/11 decade as "wartime"); *id.* at 131–32 (criticizing Congress for remaining in this "wartime" mindset during the recent debt-ceiling debacle).

97. *Id.* at 136.

98. *See id.* ("To take seriously war's presence as an ongoing feature of American democracy, a starting point is to cease viewing the nation's history as divided into time zones, and to look instead for war's enduring mark on American politics and American law.").

necessity.[99] The materials of cultural criticism and the history of this idea of time in war frees us to see that, faced with these apparently irresistible claims of necessity, we can indeed resist and need not "suspend our principles."[100]

This kind of prescription seems to me, however, exactly what the kinds of cultural materials that give *War Time* its genuine analytic interest *cannot* do. It can tell us that the passage of time and permanent emergency in a condition of wartime risks permanently altering our society, politics, and culture. It might even be able to tell us that in the past, there has been a tendency to overreach. But this is an argument about the effects of time, and the actual condition of making tradeoffs between liberty and security is not a matter of an argument about time but necessity. The materials required to tell us about that tradeoff are very different from those presented in this book about temporality. They are exactly what one would expect, in fact: considerations of politics, policy, and law, in their concrete manifestations and tradeoffs.

This is one important part of the criticism that has been made of *War Time*—criticism in an "external" sense, from outside of the method of cultural critique that the book employs. It is, for example, an important part of the criticism that Eric Posner levels against the book in a combative review in *The New Republic*:[101]

> Dudziak argues that the decision to classify a security threat as a war is a political judgment. It is not driven by—or solely driven by—exogenous events. Since people think that all "wars" are temporally bounded; people willingly suspend their principles and cede their liberties, because they believe that the war will come to an end. Political leaders instinctively understand this cultural feature of wartime, and take advantage of it. . . .
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> . . . .
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> . . . [But it] is not clear why a person would willingly yield civil liberties (or some of them) on the understanding that the war will end, but would not do so on the understanding that the war might continue indefinitely. The only reason to accept limitations on civil liberties is to ensure an acceptable level of security, and the validity of that reason does not depend on when one expects the threat to end. . . . Temporality as such plays no obvious role in this analysis.[102]

There is something right about this, but also something that fails to give the method sufficient due. The right part is the shrug of the rational

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99. *Id.* at 136.

100. *Id.*

101. Eric A. Posner, *The Longest Battle*, NEW REPUBLIC (Feb. 6, 2012, 12:00 AM), http://www.tnr.com/book/review/mary-dudziak-war-time#. I borrow Samuel Moyn's description of Posner's review as "combative." *See* Moyn, *supra* note 47 (reviewing Dudziak's book and responding to Posner's critique of it).

102. Posner, *supra* note 101.

shoulders to say, look, the tradeoff between security and liberty is one that exists on account of the threat, how one assesses it, the magnitude and likelihood of the risks it poses. If it is true today, it might be true tomorrow, or next year or ten years after; or it might not. A rational person, or democratic polity, will simply have to assess the risks. An exogenous threat has to be evaluated exogenously. So, as Posner says, temporality, whether a long time or an indefinite time, or for that matter a short time, plays "no obvious role in this analysis."[103]

Yet while temporality may not play an obvious, or even leading, role in the consideration of exogenous threats in the tradeoffs between security and liberty, it is still possible to see it playing less obvious or central roles. Even within the structure of a rationalist evaluation of the threats stretching out with less and less certainty with the passage of years, I would have thought that there would be enough slippage about an uncertain future for which certain decisions likely have to be taken today, and which have unavoidably long-run implications, that temporality as such *can* play at least an indirect role. The path dependency of security policy, embedded as it is within complex national institutions, budgets, bureaucracies, laws, and regulations, apart from anything else, ought to be enough to warrant a consideration of the impact of the passage of time on what security tradeoffs made today might mean a long time from now.

Consider an uncertain security future, years from now, when there might still be risks of both our current kind but perhaps other kinds, arguably calling for new tradeoffs. Yet path-dependent, largely institutional decisions must be made today that cannot be easily or costlessly altered five years from now, or ten years from now, even if we might agree that the tradeoffs at that point in time are not optimal. There is nothing irrational in asking this as a question about time as such and the pressures it brings to bear. One can redescribe this, if one likes, not as "time," but instead as simply the long-run accumulation of all those institutional, resource, and other pressures over time—but it does not seem strange to describe that as the passage of time itself, or to treat time itself as a proxy or marker for all those pressures, given that their commonality is what happens to them over time. This does not really seem so different from the picture of institutional investment, the "stickiness" of investments and opportunity costs, the difficulties of easily switching institutional gears, and the long-run effects of transaction costs that run back to Coase and his analysis of institutions in *The Nature of the Firm*.[104] That, combined with a healthy dose of public choice theory,[105]

103. *Id.*

104. R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937), *reprinted in* R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 33 (1988).

105. *See* MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 1–6 (2009) (defining public choice theory and explaining the structure of a public choice theory analysis).

would explain the role of time—even if as nothing more than a proxy, for how various interest groups become both invested actors and vested beneficiaries in the national security state, creating a stable but quite possibly suboptimal equilibrium in terms of long-run tradeoffs.

It is true that one might—seeing time in this way, as a proxy or marker—pick a different set of cultural materials to explore than those *War Time* picks. But that will always be a possibility; although some of the materials Dudziak uses do not seem to me revelatory, others do. Where the concern is about the "exogenous" threat that appears to have no bounded nature and no easily discernible end, I would have looked, as indicated, far more to the literature and artistic expression of the Cold War, for example. This is to say that *War Time*'s cultural materials about the quite possibly corrosive effects of time, under conditions of national security emergency, going on for years and decades, *does* have a place in the consideration of policy. It can be seen as a *rational* intervention in a *rational* debate in which time is proxy and marker for accumulated pressures across an uncertain future—path dependency and all that.

The most important role that materials drawn from culture and society about time and war have is not, however, as a rational, if indirect, intervention in the debate over tradeoffs. Coldly rational intervention is not why the novelists, playwrights, poets, historians, moralists, and *moralistes* have so long given voice to the concern about the role of time in war as reshaping society in permanent and perhaps deforming ways. It's not even obviously why Hamilton in the *Federalist No. 8* or Eisenhower in his Farewell Address expressed their concerns about security not merely in terms of necessity, but in terms of time directly. The concern has always been, rather, to express all this not as rational argument, but to ensure that a democratic public and its leadership and elites have before it an awareness of the effects of permanent war and permanent emergency as *affect*. And, as affect, a very peculiar one: *anxiety*. The literature of the Cold War that I have mentioned is replete with the cultural affect of anxiety—anxiety for who we are and what we might, under the pressure of exogenous necessity, wind up becoming. This is, to be sure, not precisely the cultural material that Dudziak brings to bear—but I wish she had, because a rich cultural and social commonality between the Cold War and today's war on terror is an abiding anxiety over the reshaping effects of necessity and emergency over time upon a society and a culture.

* * *

Why should a rational actor care about anxiety? Does anxiety yield anything here other than anxiety—affect that at most collaterally accompanies rational calculation or, worse, tends to worsen rational judgments about tradeoffs? Because, of course, it is true that anxiety over the passage of time leading to a "state" (in multiple senses) of war and permanent emergency cannot banish exogenous threats, or the demands of necessity; real threats cannot be wished away. For that matter, perhaps all

that a pervasive sense of anxiety adds to this is a perverse form of self-satisfaction, the narcissism of doing the rational thing, but feeling bad about it. On multiple grounds, then, it might seem clear that anxiety adds nothing and might even detract from rational judgments about difficult tradeoffs.

But this is not how the greatest humanists, writers, and historians have seen as the role of this anxiety. It is hard to read Thucydides on the Peloponnesian War, for example, without sensing a profound anxiety about the corrosive effects of so long a war on the very nature of Athenian governance; it is a moral undercurrent to the whole text and one which he evidently wishes to communicate.[106] Gibbon on Rome likewise communicates a subtext, expressed not so much as anxiety as regret, a moral lesson about collateral effects over time of the exogenous and constant pressures of the barbarian tribes upon Roman governance.[107] With writers of fiction, one can find the same. Brecht's most famous play, *Mother Courage and Her Children*, for example, is set in the Thirty Years' War, and its viciously satirical conceit is that the characters in the play are entirely invested, materially and in every other way, in the war never ending; the inversion of the play is to express deep anxiety that the war *might* end, to the dismay of all.[108] For that matter, this anxiety is even a backdrop in the children's fantasy book, *Ender's Game*.[109]

One could go on and on with examples, I suppose, and whether they are evidence of anything depends in the first place on whether one grants anything to the method. Perhaps the proper rational reaction is merely to say, well, anxiety over all that and five bucks will get you coffee at Starbucks. But I do not think one can dismiss the anxiety expressed by so many writers over so long a time just like that. The great French poet and World War II Resistance commander René Char described the war in his poetic notebook of the war years as "this time of damned algebra."[110] Not merely an algebra of calculation, a calculus of costs and benefits, but instead both a necessary rational calculus—and a necessary source of anxiety.

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106. THUCYDIDES, THE PELOPONNESIAN WAR (P.J. Rhodes ed., Martin Hammond trans., Oxford Univ. Press 2009). For a useful discussion by a modern classicist, see generally VICTOR DAVIS HANSON, A WAR LIKE NO OTHER (2005).

107. EDWARD GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE (David Womersley ed., Penguin Books abr. ed. 2000) (1776).

108. *See* BERTOLT BRECHT, *Mother Courage and Her Children: A Chronicle of the Thirty Years' War*, *in* 5 BERTOLT BRECHT: COLLECTED PLAYS (Ralph Manheim & John Willet eds., Ralph Manheim trans., Vintage 1972). On the history of the Thirty Years' War, see GEOFFREY PARKER, THE THIRTY YEARS' WAR (2d ed. 1997).

109. *See* ORSON SCOTT CARD, ENDER'S GAME 255 (1994).

110. The original French is "ce temps d'algèbre damnée." RENÉ CHAR, FEUILLETS D'HYPNOS 14 (Folio Plus Classique 2007) (1946). Char, we should add, was not merely another literary "resister," one of the Parisian writers who occasionally wrote something that disturbed the censors and then counted themselves heroes of the Resistance after the war, but instead someone who spent years fighting the German army and the Gestapo in the forests of Provence. *See* Carrie Jaurès Noland, *The Performance of Solitude: Baudelaire, Rimbaud, and the Resistance Poetry of René Char*, 70 FRENCH REV. 562, 565 (1997) (explaining that Char joined the resistance in 1940).

Char, too, had concerns about time and war and wartime, and identified the important moral role of anxiety and affect in tempering apparently rational judgments about uncertainty and risk into the future. He fought, but he never thought unimportant to the conception of the struggle, a certain existential anxiety about what prolonged conflict would do, as well as prolonged occupation, to undermine, perhaps fatally, *une certaine idée de la France.*[111] It is impossible for me to see, frankly, that these kinds of materials should not have their place, if not in the direct formation of policy and tradeoffs, then as part of the diffuse and indirect influences upon the formation of policy that arise from an understanding of time and culture in war and emergency. But *War Time* makes itself vulnerable to the criticism that Posner launches, precisely because it goes beyond this indirect and diffuse anxiety to believe that these cultural materials and their interpretation can directly inform policy. The arguments of *War Time* cannot drive down so far to policy: in this, the book seriously overreaches.

* * *

I close by noting that this Review has framed the tradeoff as between the *liberties* of a nation at peace and the pressures of *necessity* arising from exterior threats, which might serve to justify policies and governance that have little if any basis in the constitutional order of the American republic: the President will do what he must. Michael Walzer remarked in *Just and Unjust Wars* that an aspect of the nature of necessity and the moral crime of aggression is that external aggression—war—forces people and a society to do things that they would rather not do, and we can add, this includes the risk of becoming people they would rather not become.[112] Moreover, Walzer implies, short of vanquishing the foe quickly and easily, there is not necessarily anything they can do about it.[113] Even the justice of a side's cause cannot make resistance to aggression any less necessary or costly; neither can it make the risk of the transformative pressures of time upon a free society go away. The possible conditions of response to the aggression of 9/11 are, over time, more malleable than might have been thought on 9/12, but they are set even today by conditions of the world, not by a unilateral imagining that the world is as one would like and not as it is. The tradeoffs for our principles, which include both liberty and security, are not necessarily changed on account of being aware of the transformative pressures of time and permanent emergency.

It is not clear to me that *War Time* recognizes this bitter truth. If it did, I do not think it would reach prescriptions about principles that depend upon necessities of force, threat, and security in the world, and not about time.

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111. CHARLES DE GAULLE, MÉMOIRES DE GUERRE 1 (1959).

112. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 53 (1977) ("Aggression is morally as well as physically coercive . . . .").

113. *See id.* at 51 (contending that in most cases, fighting, not giving up one's life, is the preferred response to aggression).

What, in that case, do the materials and method of culture, cultural criticism, and intellectual history have to offer? Anxiety, principally—to the end that those who think they are making merely a set of rational tradeoffs between liberty and security be caused to think harder and longer about the full costs and benefits of their policies. Perhaps this causes an alteration in policy, perhaps not; perhaps efforts to find ways to ameliorate effects of policies that one undertakes with regrets, but perhaps not.

Although both the argument of the book and this Review have largely assumed, so to speak, the nature of necessity, it bears noting that we are not in that condition today, at least not insofar as it implies an "emergency," and not insofar as the leaders of American government today are concerned. On the contrary, whatever one thinks might have been the state of emergency in which American government acted in the days following 9/11, it has been a very, very long time since the justification or public legitimization of the government's policies have been on the basis of some necessity alone. Officials of government have stressed for many years—not just through the Obama Administration, but back to the Bush Administration—that the tradeoffs that have been made are indeed ones that are contemplated by the constitutional order and not just in a state of emergency or exception.[114] The tradeoffs made today are cabined and blessed by the rule of law; there is nothing ad hoc or nakedly "necessitarian" about them, and there is not even special reason to think that the authors of, say, the *Federalist Papers* would be surprised. That belief might or might not be warranted, of course. Dudziak would certainly not accept it, and of course, it is merely what any public official would say, though my conversations with senior government national security lawyers over several years have convinced me that they believe it deeply. Yet this might be mere self-deception. It might be true, as the conclusion to *War Time* argues, that under the comfort of legal justification and a cultural construction of the nature of wartime we have, in fact, merely suspended our principles and impeded "public engagement and responsibility."[115]

This serves to point out that what, as a society, we believe to be true as to the nature of the threat and the law-governed nature of our response—including the possibility that it is not actually captured under the rule of law—is at the heart a debate over institutional settlement for national security policies. My experience of officials across two very different administrations

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114. One can get a sense of the insistence on the rule of law, rather than some rule of emergency necessity, in the series of speeches delivered by senior officials and particularly general counsels of leading national security agencies during the Obama Administration. *See* Kenneth Anderson, *The Canonical National Security Law Speeches of Obama Administration Senior Officials and General Counsels*, LAWFARE (Aug. 28, 2012, 3:37 P.M.), http://www.lawfareblog.com/2012/08/readings-the-canonical-national-security-law-speeches-of-obama-administration-senior-officials-and-general-counsels/ (offering a periodically updated list of speeches by senior officials of the Obama Administration on national security law).

115. DUDZIAK, *supra* note 1, at 136.

tells me that they both worry about precisely these policies and their effects upon a free society over time, and that they also believe that the principles of the American constitutional order are sufficiently capacious to allow them to make these tradeoffs within the strictures of the rule of law. Even if one accepts, as I do, that they are fundamentally right about this, it still seems to me that anxiety about these tradeoffs is a virtue—and, for what my experience of these officials is worth, they think so, too. That is so even if, as a public official, one believes one has the constitutional discretion to make these tradeoffs, without invoking any concept of exception or emergency.

Inducing this kind of anxiety has been one of the glories of the humanities when it comes to writing about war and time from Thucydides forward. We *ought* to worry about the effects of endless war upon our culture and understand that time itself is a source of worry; this is Dudziak's contribution through this book. Does this seem like small wages for the effort of this intellectual framing? Anxiety over time seems to me the essential value of *War Time*—there, however, but not further into policy. Still, no one should underestimate the importance of ensuring that those who, upon grounds of rationality, make profound tradeoffs between the liberties of a society and its security, also feel anxiety as to what those tradeoffs today might mean over time.

Postscript of Inauguration Day, January 21, 2013

Since this Review was first written, Barack Obama has won a second term in office. In the transition between the first and second term, senior officials—some leaving government, others remaining or shifting to new positions—have begun to address directly the meaning and conditions for the end of the conflict with al Qaeda—as a matter of law and policy, conditions for it, and consequences thereof. The most important public example is a speech delivered on November 30, 2012, at Oxford University by the outgoing DOD General Counsel, Jeh C. Johnson:

> But, now that efforts by the U.S. military against al Qaeda are in their 12th year, we must also ask ourselves: how will this conflict end? It is an unconventional conflict, against an unconventional enemy, and will not end in conventional terms.
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> Conventional conflicts in history tend to have had conventional endings.
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> We cannot and should not expect al Qaeda and its associated forces to all surrender, all lay down their weapons in an open field, or to sign a peace treaty with us. They are terrorist organizations. Nor can we

> capture or kill every last terrorist who claims an affiliation with al Qaeda.
>
> I am aware of studies that suggest that many "terrorist" organizations eventually denounce terrorism and violence, and seek to address their grievances through some form of reconciliation or participation in a political process.
>
> Al Qaeda is *not* in that category.
>
> Al Qaeda's radical and absurd goals have included global domination through a violent Islamic caliphate, terrorizing the United States and other western nations from retreating from the world stage, and the destruction of Israel. There is no compromise or political bargain that can be struck with those who pursue such aims.
>
> In the current conflict with al Qaeda, I can offer no prediction about *when* this conflict will end, or whether we are, as Winston Churchill described it, near the "beginning of the end."
>
> I do believe that on the present course, there will come a tipping point—a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.
>
> At that point, we must be able to say to ourselves that our efforts should no longer be considered an "armed conflict" against al Qaeda and its associated forces; rather, a counterterrorism effort against *individuals* who are the scattered remnants of al Qaeda, or are parts of groups unaffiliated with al Qaeda, for which the law enforcement and intelligence resources of our government are principally responsible, in cooperation with the international community—with our military assets available in reserve to address continuing and imminent terrorist threats.[116]

This is a statement that lays down conditions of military necessity—defeat is a necessary condition; there is no compromise or political bargain to be struck by negotiation; and defeat will be shown, among other things, by the point at which al Qaeda has been effectively destroyed, its and its affiliates' leaders have been killed or captured, and the group cannot attempt a strategic attack against the United States. These are conditions that define the "necessity" of a nation's security and safety—and they do not, by themselves, express a temporal dimension. Nonetheless, beyond those elements arising from the nature of necessity, other parts of Johnson's speech

116. Jeh Charles Johnson, Gen. Counsel, U.S. Dep't of Defense, The Conflict Against Al Qaeda and Its Affiliates: How Will It End? (Nov. 30, 2012) (footnotes omitted), *available at* http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/.

reveal an acute, even agonized, awareness of time, its passage across twelve years of war.

> "War" must be regarded as a finite, extraordinary and unnatural state of affairs. War permits one man—if he is a "privileged belligerent," consistent with the laws of war—to kill another. War violates the natural order of things, in which children bury their parents; in war parents bury their children. In its 12th year, we must not accept the current conflict, and all that it entails, as the "new normal." Peace must be regarded as the norm toward which the human race continually strives.
>
> . . . [A]nalyzing war in terms of a continuum of armed conflict—where military force is used at various points without a distinct break between war and peace—is counterproductive. Such an approach . . . results in an erosion of "any demarcation between war and peace," the very effect of which is to create uncertainty about how to define war itself.[117]

This passage from Johnson's speech captures precisely and eloquently a crucial moral sensibility that the nature of necessity alone cannot. Without in any sense denying the stringent conditions that necessity requires for there to be an end to the conflict, and without offering any prediction when or even if those conditions will be met, Johnson articulates the collateral cultural and moral cost of war that risks permanency—the corrosive, illiberal, anti-democratic effects of permanent emergency and permanent war. Johnson's speech echoes directly *Federalist No. 8*; it echoes the cultural and political literature of the Cold War; it is above all an expression of anxiety by American political leaders who recognize their responsibilities to address *both* the necessities of national security and the troubling effects of permanent conflict on a democratic society and peacetime culture.

In that regard, it is important to recognize that Dudziak has been both astute and prescient to observe that the sensibility of time in war matters, and the more so the longer things go on. Persuaded or not as one might be with regard to cultural evidence she offers, or for the policy demands she makes upon the nature of necessity, those who think that the cultural fact of time passing in war is irrelevant and that only the harsh evaluation of security and risk matters misapprehend how some of this nation's most senior leaders regard the collateral harms of permanent wartime. The harms are as much moral and cultural as anything, and Johnson offers recognition of this in a speech that appears to have been cleared in the interagency process as reflecting the view of the Administration as a whole.

This is not to ignore that this same speech lays down markers of American security that practically ensure that even when something called peacetime comes, it will also be accompanied by—Johnson is explicit about

117. *Id.*

this—continued precise, contained uses of force aimed to ensure that terrorist groups do not regroup, regather their strength, find safe haven in the weakly governed places of the world, or gain political control over whole zones and populations. Peacetime in the sense that Johnson means it will certainly involve some amount of targeted killing, drone warfare, military and intelligence assistance to governments battling insurgent groups with transnational terrorist aims, covert action and discrete uses of force by special operators and paramilitary forces, and perhaps support to proxy forces in one place or another. Perhaps it is merely a cynical appropriation to declare that peacetime has returned and then continue war unabated. Quite possibly Dudziak, on the strength of her analysis, would say that this is not actually peacetime, but just an appropriation of words. And, ironically, the realist of necessitarian logic, and Dudziak's otherwise combative foil, Eric Posner, just might agree.

For what it's worth, however, I think Johnson is right in understanding genuine peacetime as nonetheless bearing elements of conflict, and right to reject the claim that this is just the "new normal," the cynical continuance of war under a new name. But what he and Dudziak share, any other disagreements aside, is an appreciation that time has its own effects in war, and that even if they cannot take pride of place over the exigencies of safety and security, it is essential that we recognize and seek as best we can to ameliorate those effects, starting with their recognition as cultural, moral, diffuse, and long term. The American way of war is at once sense and sensibility.

In the Interests of Avoiding Further Federal "Quackery"

CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS. By Stephen M. Bainbridge. New York, New York: Oxford University Press, 2012. 283 pages. $65.00.

Reviewed by Holly J. Gregory* & Rebecca C. Grapsas**

Introduction

Professor Stephen M. Bainbridge's *Corporate Governance After the Financial Crisis*[1] presents a cogent discussion of the congressional and regulatory reaction to two significant economic crises within the past decade and the unprecedented federal expansion into the traditional state bulwark of corporate law that resulted. Much has been written about corporate governance and the federal reaction to these crises in the aftermath of the Sarbanes-Oxley Act of 2002[2] (the Sarbanes-Oxley Act or Sarbanes-Oxley) and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[3] (the Dodd-Frank Act or Dodd-Frank). For those trying to understand the state of corporate governance regulation today and the key debates and tensions that are at work, Bainbridge's book is a must read, along with Lynn Stout's *The Shareholder Value Myth*,[4] and—to balance things out with a broader perspective about how crises drive governance regulation and change—Ira Millstein's and Paul MacAvoy's book, *The Recurring Crisis in Corporate Governance*.[5] Indeed, when the next crisis comes along, but before the federal legislators and regulators pick up their pens, these should all be required reading to help avoid further federal imposition of "quack

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1. STEPHEN M. BAINBRIDGE, CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS (2012).

2. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

3. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 2, 5, 7, 12, 15, 18, 22, 26, 28, 31, 42, and 44 U.S.C.).

4. LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS AND THE PUBLIC (2012); *see also* Jonathan Macey, *Sublime Myths: An Essay in Honor of the Shareholder Value Myth and the Tooth Fairy*, 91 TEXAS L. REV. 911 (2013) (reviewing STOUT, *supra*).

5. PAUL W. MACAVOY & IRA M. MILLSTEIN, THE RECURRENT CRISIS IN CORPORATE GOVERNANCE (2003).

corporate governance" as Bainbridge—borrowing from Professor Roberta Romano[6]—colorfully terms the recent federal efforts.[7]

I. Sarbanes-Oxley and Dodd-Frank as Federal "Quackery"

Lest there be any doubt about Bainbridge's views on the breadth of federal quackery, he states at the outset:

> Are Dodd-Frank's governance provisions quackery, as were Sarbanes-Oxley's? In short, yes. Without exception, the proposals lack strong empirical or theoretical justification. To the contrary, there are theoretical and empirical reasons to believe that each will be at best bootless and most will be affirmatively bad public policy. Finally, each of Dodd-Frank's governance provisions erodes the system of competitive federalism that is the unique genius of American corporate law by displacing state regulation with federal law. Dodd-Frank is thus shaping up to be round two of federal quack corporate governance regulation.[8]

The Sarbanes-Oxley Act was adopted in reaction to the Enron and WorldCom accounting frauds and concerns about the potential for management malfeasance in public companies.[9] The Dodd-Frank Act was enacted just eight years later in reaction to the failure of various financial institutions and regulators to adequately assess risks in the housing market and related market for mortgage securities.[10] In both instances, Congress apparently believed corporate governance failures played a role and that new regulations were needed, but the focus of the legislated corporate governance fixes were dramatically different: The corporate governance provisions in Sarbanes-Oxley were designed in large measure to position boards to hold the CEO and CFO and other members of senior management more accountable.[11] Sarbanes-Oxley focused on enhancing the independence of board audit committees and on enhancing the board's oversight of internal controls.[12] Underlying the federal legislation (as well as amendments to listing rules at about the same time) was the decided view that strong, independent boards were key to avoiding similar problems in the future.[13] While Sarbanes-Oxley worked a fundamental expansion of federal corporate governance regulation, at least the underlying philosophy was generally in line with notions of director primacy under state law. In contrast, the

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6. Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1521 (2005).

7. BAINBRIDGE, *supra* note 1, at 8.

8. *Id.* at 15.

9. *Id.* at 5–8.

10. *Id.* at 1.

11. *Id.* at 59–60.

12. *Id.*

13. *Id.* at 77–78.

corporate governance provisions of Dodd-Frank veer sharply away from director primacy. Rather than look to strong independent boards as the solution, Dodd-Frank provides shareholders with enhanced powers (through regulations promulgated by the Securities and Exchange Commission (the SEC)) to hold boards accountable[14]—and this is a clear departure from the director primacy that is embodied in state corporate law, with implications for our economy at large.[15]

II. Director Primacy Under State Law and Its Erosion by Federal Law and Regulation

By giving the board clear authority for the business and affairs of the corporation within a framework of fiduciary duties owed to shareholders, state corporate law creates an efficient decision-making structure for entrepreneurial activities that require capital from a variety of sources.[16] Shareholders, as the providers of capital, can share in the benefits of corporate activity while limiting their liability to their investment. The board determines what actions are in the best interests of the corporation through its authority to manage and direct the affairs of the corporation. This includes determining corporate strategies and considering how short-term interests in effecting immediate return to shareholders (for example, through dividends or share repurchases) are best balanced with investments in technology, R&D, and brand development necessary for sustainable, long-term success. It also includes determining which executives are best able to develop and implement successful strategies and appropriate benchmarks and compensation incentives.[17] To perform this role, boards must have flexibility and discretion—and this discretion is what is at stake as director primacy erodes under federal law and regulation.

As noted by Bainbridge, Stout, and others—and quoting from the report of the American Bar Association Task Force on the Delineation of Governance Roles and Responsibilities (the ABA Task Force Report)—"Discussions about the roles of shareholders and boards may be hampered by the use of terms that are charged with meaning from other, non-corporate contexts, and hence are evocative yet not wholly accurate."[18] Specifically, discussions of corporate governance are often imbued with references to "[s]hareholder democracy," shareholders as "[c]orporate owners," and

14. *Id.* at 14.

15. *Id.* at 1–2.

16. AM. BAR ASS'N., REPORT OF THE TASK FORCE OF THE ABA SECTION OF BUSINESS LAW CORPORATE GOVERNANCE COMMITTEE ON DELINEATION OF GOVERNANCE ROLES & RESPONSIBILITIES 4 (2009) [hereinafter ABA, TASK FORCE REPORT], *available at* http://apps.americanbar.org/buslaw/committees/CL260000pub/materials/20090801/delineation-final.pdf.

17. *Id.* at 8.

18. *Id.* at 5.

directors as "agents" of shareholders.[19] This unfortunate but pervasive lexicon has muddied the understanding of shareholder and director relations and roles, and may sway public, media, and legislative viewpoints. Bainbridge asserts that political forces rather than empirical or theoretical justifications underlie Dodd-Frank's corporate governance reform provisions,[20] which makes the federal incursion and its shift toward shareholder primacy all the more troubling. One would hope at minimum that legislators and regulators would ground their actions in an understanding of the delicate balance that is inherent in the current system and what it is designed to achieve.

III. Corporate Governance as Cause and Solution

Bainbridge asks the key questions: were corporate governance failures at the root of the economic crises that led to Dodd-Frank and were Dodd-Frank's corporate governance reforms necessary to respond to the crisis?[21]

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19. The Task Force Report summarizes the deficiencies in these references:

> *Shareholder democracy*: Although the corporation's governing body—the board of directors—is elected by the shareholders, the board's governance powers are determined by law and therefore neither delegated by, nor derived from, the shareholders. Upon election to the board, each director becomes a fiduciary to the corporation and must act in the best interests of the corporation and the entire body of shareholders, no matter who nominated or what groups the director is affiliated with. Therefore, analogies to democratic forms of government are imprecise.
>
> *Corporate owners*: The corporate form bifurcates the provision of equity capital and the control of the business and affairs of the corporation. This specialization of functions is famously referred to as the 'separation of ownership and control,' and shareholders are often referred to as the 'owners' of the corporation. However, the corporation is a legal person in its own right rather than a mere asset. Once the separation of equity rights and control occurs in the formation of the corporate entity, the analogy of shareholders to 'owners' of the corporate 'asset' is imperfect at best. The asset that shareholders own is the stock that represents their investment interest. (Shareholders may more accurately be called 'shareowners' or 'stockowners.') Whether individually or collectively, stock represents limited contractual and decision rights in the corporation that fall short of the full bundle of powers and responsibilities typically associated with ownership. Shareholders do not have the right to come to corporate headquarters and remove a proportionate share of the machinery or dictate how widgets will be manufactured. They do have the right to elect directors and determine certain fundamental matters . . . .
>
> *Principals and agents*: Contrary to the often-used analogy, directors are not 'agents' in a principal-agent relationship with shareholders, since shareholders cannot dictate board actions and directors are obligated to make their own judgments based on the best interests of the corporation and bear the full liability for those judgments. Moreover, directors lack the ability to bind shareholders to contracts, and the corporate assets managed by directors are not subject to claims from a shareholder's creditors. Thus, the basic indicia of the principal-agent relationship are missing in the shareholder-director relationship.

Id. (citations omitted).

20. BAINBRIDGE, *supra* note 1, at 15.

21. *Id.*

His answers, not surprisingly, are "no" and "no."[22] "[S]ystemic flaws in the corporate governance of Main Street corporations were not a causal factor in the housing bubble, the bursting of that bubble, or the subsequent credit crunch."[23] Moreover, any connection between the key corporate governance reforms of the Dodd-Frank Act and the economic crisis are tenuous in the extreme. He asserts that a powerful interest group of activist institutional investors hijacked the legislative process to achieve long-standing goals unrelated to the causes of the financial crisis.[24]

Most of the corporate governance reforms in Dodd-Frank relate to executive compensation.[25] One of the concerns was that executive compensation may have driven unduly risky behavior at financial services firms and thereby played a role in the economic crisis.[26] However, the compensation reforms in Dodd-Frank are primarily aimed at *all* public companies including those outside of the financial services industry,[27] and the compensation reforms that are applicable to public companies generally have little, if any, relation to risk. They are on their face far more related to the increase of shareholder influence as well as populist concerns about the level of executive pay. For example:

- Section 951 mandates that public companies provide shareholders with a periodic "advisory" vote on the compensation paid to the CEO, the CFO, and the three other top paid executive officers ("say on pay"), and also requires an advisory vote on golden parachutes.[28]
- Section 953 mandates that the SEC impose additional disclosure requirements with respect to executive compensation, including disclosure of the relationship between executive compensation and the company's financial performance and disclosure of the median of the annual total compensation of all employees except the CEO, the CEO's annual total compensation, and the ratio of the two amounts.[29]
- Section 954 mandates that the SEC direct the exchanges to require listed companies to adopt and disclose compensation "clawback" policies that would require executives to return

22. *Id.*

23. *Id.* at 10.

24. *Id.* at 15.

25. *Id.* at 122–37 (describing Dodd-Frank's executive compensation reforms).

26. *See id.* at 119–20 (considering whether executive compensation practices encouraged excessive risk).

27. *Id.* at 111–12.

28. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 951, 124 Stat. 1376, 1899–900 (2010).

29. *Id.* § 953.

"excess" incentive compensation paid to an executive in light of certain financial restatements.[30]

- Section 971 expressly authorizes the SEC to adopt rules and procedures relating to the inclusion of shareholder board nominees in a company's proxy solicitation materials ("proxy access").[31]
- Section 972 requires companies to disclose in the proxy statement the reasons for combining or separating the positions of chair and CEO.[32]

Bainbridge concludes that say on pay in particular is an example of quack corporate governance, supported by

> a powerful group of policy entrepreneurs pursuing an agenda unrelated to the financial crisis. . . . Like other quack corporate governance statutes, say on pay federalizes matters previously left to state corporate law. It does so without strong empirical support. It is inconsistent with the board-centric model that has been the foundation of the U.S. corporate governance system's success.[33]

IV. Federal Versus State Regulation of Corporate Governance

What can we learn from the impact of these changes regarding the relative merits of the federal government and the states as sources of corporate governance regulation? State corporate law has for more than a century determined the rules by which corporations are both formed and governed.[34] The primary federal intervention in the area has been through SEC disclosure regulations for public companies.[35] Sarbanes-Oxley and Dodd-Frank expand disclosure but also provide specific mandates with respect to behavior through federal securities regulation by the SEC and listing rules.[36]

Bainbridge acknowledges the long-running debate over whether state competition in the area of corporate law creates a "race to the top" or a "race to the bottom."[37] He concludes that "[w]herever one comes out on that debate, the case studies of federal corporate governance regulation confirm that the new form of vertical competition between the states and Washington

30. *Id.* § 954.

31. *Id.* § 971.

32. *Id.* § 972.

33. BAINBRIDGE, *supra* note 1, at 136–37.

34. *See id.* at 21 (explaining that even though "the federal government and the stock exchanges play important" roles in corporate law, essentially "corporations are creatures of state law" (footnotes omitted)).

35. *Id.* at 28.

36. *Id.* at 29.

37. *Id.* at 261.

is no improvement."[38] He cites evidence that he finds to be "quite conclusive" that due in part to the regulatory burden imposed by Sarbanes-Oxley, "U.S. capital markets became less competitive vis-à-vis other markets" with respect to share of the global IPO market.[39] (Note that the Jumpstart Our Business Startups Act[40] was signed into law in April 2012, with the aim of facilitating private capital formation, among other things.)[41]

Bainbridge expresses concern about the expansion of federal power with respect to corporate governance and favors less federal intrusion generally. He believes there are three reasons why federal intervention in corporate governance tends to be ill conceived:

- "[L]aws tend to be enacted in a climate of political pressure that does not facilitate careful analysis of costs and benefits."[42] This point is illustrated by the July 2011 decision of the United States Court of Appeals for the District of Columbia Circuit to vacate the SEC's rule mandating proxy access, on the basis that the SEC "failed adequately to consider the rule's effect upon efficiency, competition, and capital formation."[43]
- "[L]aws tend to be driven by populist anti-corporate emotions."[44]
- "[Content of the laws] is often derived from prepackaged proposals advocated by policy entrepreneurs skeptical of corporations and markets."[45] In particular, he expresses concern about lobbying by special interest institutional and activist investors and "policy entrepreneurs pursuing an agenda unrelated to the financial crisis"[46]—this is perhaps a veiled reference to proxy advisors such as Institutional Shareholder Services (ISS).[47] He does not, however, discuss the significant lobbying efforts of the Business Roundtable and the U.S. Chamber of Commerce.[48]

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38. *Id.*

39. *Id.* at 261–62.

40. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

41. *See id.* (memorializing Congress's intent to "increase American job creation and economic growth by improving access to public capital markets for emerging growth companies").

42. BAINBRIDGE, *supra* note 1, at 268–69.

43. Bus. Roundtable v. SEC, 647 F.3d 1144, 1146 (D.C. Cir. 2011).

44. BAINBRIDGE, *supra* note 1, at 269.

45. *Id.*

46. *Id.* at 137, 156, 270.

47. *Id.* at 256; *see also About ISS*, ISS, http://www.issgovernance.com/about (describing ISS's proxy-voting operations and mechanics information services).

48. *See* Lee Fang, *Lobbying Group for Big Business Boasts of 100 Meetings a Year with Congress—How Much Access Do You Have?*, REPUBLIC REP. (Apr. 12, 2012), http://www.republicreport.org/2012/business-round-table/ (discussing the significant lobby efforts of the Business Roundtable and the U.S. Chamber of Commerce).

He also cites concern about the "ratchet effect"—that the rules put in place for crises do not shrink back to precrisis levels once the crises end and therefore the size and scope of government and its regulation tend to only move in one ever-increasing direction.[49]

Imposition of governance "one size fits all" practices through federal fiat compounds the problem because it lessens the experimentation that comes with private ordering. It reduces "opportunities for experimentation with alternat[e] solutions to the many difficult regulatory problems that arise in corporate law."[50] Bainbridge quotes Justice Brandeis: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of country."[51] The ABA Task Force Report also noted concerns about potential unintended consequences from reform efforts in its recommendation:

> [S]pecial care [should be] taken to ensure that short-term shareholders are not unduly enabled to take actions that could undermine the long-term interests of the corporation and other shareholders. Consideration should also be given to whether a proposed reform is likely to change decision rights to a degree that the accountability mechanisms associated with such decisions would also need adjustment.[52]

The ABA Task Force Report emphasized the need for policy makers and regulators to "understand the rationale for the current ordering of roles and responsibilities in the corporation and assess the impact of proposed reforms on such ordering. Reform discussions should include an assessment of how the distinct interests of long-term and short-term shareholders will likely be affected . . . ."[53]

V. The Move Towards a More Shareholder-Centric Model and Implications for the Real World

As discussed above, the Dodd-Frank Act provides shareholders with greater influence than accorded to them under state law. This is at odds with Bainbridge's preference for fewer legal rules and greater reliance on fiduciary principles applicable under state law (i.e., the duties of care and loyalty and the business judgment rule). Bainbridge describes the change caused by federal intrusion in the role of the board to a primarily monitoring function and expresses skepticism about its value.[54] He makes a cogent case

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49. BAINBRIDGE, *supra* note 1, at 269.

50. *Id.*

51. *Id.* (quoting Newstate Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)) (internal quotation marks omitted).

52. ABA, TASK FORCE REPORT, *supra* note 16, at 25–26.

53. *Id.* at 25.

54. BAINBRIDGE, *supra* note 1, at 51–65.

that the new regulation has not been effective and notes that good governance, which requires judgment, is not guaranteed—indeed, board decision making may become more bureaucratic and less judgment-focused as hamstrung directors find it difficult to apply fiduciary judgment and discretion.[55]

This shift in power to shareholders continues the trend towards greater shareholder influence generally over the past several years, driven largely by "the growth of institutional investors and the concentration of share ownership in their portfolios,"[56] as well as "the removal of regulatory and technological barriers to communication and coordination between shareholders."[57] In addition, the coordinating impact of proxy advisors raises real-world concerns about the impact of the shift towards a shareholder-centric model. For example, ISS recently adopted changes to its U.S. proxy voting policies, effective 2014, that will result in a negative vote recommendation against individual directors, committee members, or the entire board, if the board "failed to act" on a shareholder proposal that received the support of a majority of votes cast in the previous year.[58] "Responding to the shareholder proposal will generally mean either full implementation of the proposal or, if the matter requires a vote by shareholders, a management proposal on the next annual ballot to implement the proposal," according to ISS.[59] "Responses that involve less than full implementation will be considered on a case-by-case basis, taking into account" various factors listed in ISS's policy.[60] This policy change will add significant pressure on boards to act in line with shareholder viewpoints on matters that state law clearly has reserved for directors, subject to their fiduciary responsibilities.

Conclusion

We all share enormous interests in the success of the U.S. corporation—and the governance of that institution has proved remarkably successful and

55. *Id.* at 63.

56. ABA, TASK FORCE REPORT, *supra* note 16, at 16.

57. *Id.* at 15.

58. ISS, U.S. CORPORATE GOVERNANCE POLICY, 2013 UPDATES 5–6 (2012), *available at* http://www.issgovernance.com/files/2013USPolicyUpdates.pdf.; *see also* ISS, 2013 U.S. PROXY VOTING SUMMARY GUIDELINES 12–13 (2012), *available at* http://www.issgovernance.com/files/ISS2013USSummaryGuidelines.pdf.

59. *Id.* at 5 n.2.

60. *Id.* These factors include "[t]he subject matter of the proposal," "[t]he level of support and opposition provided to the resolution at past meetings," "[d]isclosed outreach efforts by the board to shareholders in the wake of the vote," "[a]ctions taken by the board in response to its engagement with shareholders," and "[t]he continuation of the underlying issue as a voting item on the ballot (as either shareholder or management proposals)." *Id.*; *see also* ISS, 2013 U.S. PROXY VOTING POLICIES AND PROCEDURES, FREQUENTLY ASKED QUESTIONS (EXCLUDING COMPENSATION-RELATED QUESTIONS) 11–14 (2012), *available at* http://www.issgovernance.com/files/2013ISSFAQPoliciesandProcedures.pdf.

resilient as regulated primarily by state corporate law. While Bainbridge states the case in the extreme, federal legislators would be well-advised to adopt the mantra of "do no harm." Legislators and regulators would also do well to study how state law apportions governance roles among shareholders, boards of directors and managers, and how that apportionment relates centrally to the success of the corporate form. As advocated in the ABA Task Force Report, clear understanding of the traditional roles played by shareholders and boards under corporate law—and the reasons for those roles—is necessary to understand the potential impact of any reform measure under consideration.[61] More specifically, "Returning to solid economic growth over the long term will depend in part on the ability of policy makers to respond to concerns over corporate governance as a factor in the present crisis while avoiding reforms that are insensitive to positive aspects of the present legal ordering of decision rights and responsibilities within the corporation."[62] Perhaps there should be imposed on Congress a requirement for cost-benefit analysis of the type the SEC must undergo as part of the rule-making process. "Reform proposals should be assessed in light of their likely impact on the capital raising and capital deployment ability of the corporate form in aid of sustainable growth and wealth creation. . . . The goal of any reform effort should be to ensure that the corporation is positioned to continue its successful role in our economy, ultimately for the benefit of society at large."[63]

61. ABA, TASKFORCE REPORT, *supra* note 16, at 1.
62. *Id.*
63. *Id.* at 3.

Shleifer's Failure

THE FAILURE OF JUDGES AND THE RISE OF REGULATORS. By Andrei Shleifer. Cambridge, Massachusetts: MIT Press, 2012. 352 pages. $40.00.

Reviewed by Jonathan Klick*

I. Introduction

Andrei Shleifer is undoubtedly among the world's most important economists. By standard citation measures, no one else is anywhere close. For example, his nearly 19,000 citations in the RePEc rankings[1] as of October 2012 place him ahead of Nobel Prize[2] winners such as James Heckman (12,212),[3] Joseph Stiglitz (11,431),[4] and Robert Lucas (9,314).[5] His work on corporate finance, behavioral finance, and transition economics earned him the American Economic Association's prestigious John Bates Clark medal in 1999.[6] Perhaps not even international scandal will keep Shleifer from taking his place among the Nobelists.[7]

Shleifer's influence in legal scholarship is almost as large. With more than 1,000 Westlaw citations,[8] Shleifer would compare favorably to most law and economics specialists in top U.S. law schools.[9] Given all of this, the publication of Shleifer's book *The Failure of Judges and the Rise of Regulators*[10] as part of the MIT Press's Walras-Pareto Lecture series is sure to be of interest to a wide range of legal scholars, students, and policy makers—and especially to those who do not have access to JSTOR[11] and a

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1. *Top 5% Authors, as of October 2012*, IDEAS, http://ideas.repec.org/top/top.person.nbcites.html.

2. Formally the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel, *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel*, NOBELPRIZE.ORG, http://www.nobelprize.org/nobel_prizes/economics, but only pedants note this, such as bloggers who disagree with a given Nobelist's positions.

3. *Top 5% Authors, as of October 2012*, *supra* note 1.

4. *Id.*

5. *Id.*

6. *John Bates Clark Medal*, AM. ECON. ASS'N, http://www.aeaweb.org/honors_awards/clark_medal.php.

7. For a thorough and exhaustive review of Shleifer's troubles, see David McClintick, *How Harvard Lost Russia*, INST. INV., Jan. 2006, at 62.

8. Based on a search for "Andrei /2 Shleifer" in Westlaw's Journals & Law Reviews (JLR) database performed on September 25, 2012.

9. I blame my own paltry 295 on youth and a bias against guys with beards.

10. ANDREI SHLEIFER, THE FAILURE OF JUDGES AND THE RISE OF REGULATORS (2012).

11. JSTOR, http://www.jstor.org.

printer,[12] since all but the introductory chapter previously appeared in academic journals.

In the introductory chapter, Shleifer lays out a connection among these papers that might not have been apparent to people who read them when they first appeared. Although many readers, viewing his papers individually, would have guessed that Shleifer is pessimistic about the ability of courts to resolve disputes in an efficient manner, his optimistic view of regulation as a substitute mechanism is less clear than the claims he makes in this book, such as his statement, "In this book, I argue that the superiority of courts is far from clear cut. And when courts fail, regulation emerges as the more efficient approach."[13]

The sources of court failure, according to Shleifer, are many. As a consequence of judicial discretion, Shleifer suggests that litigation is "expensive and unpredictable, leading [parties] to bear unnecessary risks."[14] This conclusion holds, according to the author, even in the best of circumstances, but Shleifer goes on to list problems endemic to courts such as "weak incentives" due to the job security judges enjoy and the low probability that good performance will be rewarded,[15] the knowledge deficit that arises given the general educations and limited training judges receive in substantive areas,[16] judicial bias,[17] and the asymmetry of resources that often exists between the parties in court.[18]

While I would be the last one to argue that judges have good incentives,[19] it is not all that clear why regulators are preferable along these dimensions. At the end of the introduction, Shleifer appears to hedge somewhat in his language when he presents all this as some kind of possibility theorem,[20] stating, "With all the faults of regulation recognized by

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12. *Printers, Scanners, Inkjet, All in One Printers*, WALMART, http://www.walmart.com/cp/Printers-Ink/37807.

13. SHLEIFER, *supra* note 10, at 6.

14. The explicit context of this statement is one of contract enforcement as between workers and employers, though the implication is more general so as to include most forms of litigation. *Id.*

15. *Id.*

16. *Id.* at 12.

17. *Id.* at 12–14.

18. *Id.* at 14.

19. See our piece, Eric Helland & Jonathan Klick, *The Effect of Judicial Expedience on Attorney Fees in Class Actions*, 36 J. LEGAL STUD. 171 (2007), where we prove that judges are lazy.

20. In our ambition to be mathematicians, we economists have a long history of developing possibility (or impossibility) theorems, such as Arrow's famous Impossibility Theorem regarding collective choices, Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328 (1950), Sen's Liberal Paradox, Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970), and Eric Talley's theorem on the Possibility of an Economist with Good Hair. *But see* Photograph, Professor Eric Helland, Claremont McKenna Department of Economics (and Professor Jonathan Klick) (Sept. 15–16, 2011), http://www.flickr.com/photos/pennlaw/6171946801, for empirical evidence by Helland and Klick regarding the probability of an economist having good hair.

a generation of scholars, it can emerge as the more efficient form of social control. Regulators rise when judges fail."[21] Presumably, Shleifer believes the chapters that follow lay out the case for the superiority of regulators relative to judges. These chapters fall short of this ambition. Instead, the chapters largely focus on problems with courts and some of the correlates of increases in the level of regulation.

Shleifer does little to make the direct case for this argument regarding substitution between litigation and regulation in dispute resolution. The systematic empirical work on this issue in the U.S. context does not support the substitution hypothesis. For example, in work using data on state insurance regulation and class actions involving the same kinds of conduct that fall under the regulations, Eric Helland and I found no evidence of substitution between regulation and litigation on the margin.[22] Perhaps the situation is different in other substantive areas or cross-nationally, but such evidence is not present in the literature.

Intuitively, all of the weaknesses of courts identified by Shleifer seem to be present in regulation as well. Regulators are civil servants with relatively poor incentives, except in the cases where they hope to benefit from the so-called revolving door between the regulators and those they regulate. It is doubtful many would view these as good incentives. The prospect of performance-based termination is also largely absent in many regulatory systems. As for judicial bias exceeding that of regulators, there is no systematic evidence of this. In fact, one could argue that the narrow role of regulators may systematically attract individuals with an ideological bias as the ability to indulge that bias provides psychic income,[23] whereas generalist judges might not expect as many opportunities to indulge their normative preferences given the wide variety of cases they are likely to see and their relatively limited ability to choose what types of cases they will hear. As for asymmetry of resources leading to undue persuasion or outright corruption of judges, presumably such forces are at work for regulators as well, because many regulatory issues involve concentrated benefits and diffuse costs on the

21. SHLEIFER, *supra* note 10, at 21.

22. *See generally* Eric Helland & Jonathan Klick, *The Tradeoff Between Regulation and Litigation: Evidence from Insurance Class Actions*, 1 J. TORT L. 2 (2007) (finding that, at least in the insurance industry, litigation and regulation go hand in hand); Eric Helland & Jonathan Klick, *Why Aren't Regulation and Litigation Substitutes? An Examination of the Capture Hypothesis*, *in* REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION ch. 11 (Cary Coglianese ed., 2012) (highlighting the inconsistent outcomes of regulatory action and private litigation in the American insurance industry); Eric Helland & Jonathan Klick, *Regulation and Litigation: Complements or Substitutes*, *in* AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW (Frank Buckley ed., forthcoming 2013) (manuscript at 19–21), *available at* http://buckleysmix.com/wp-content/uploads/2010/10/Klick-final-edit.pdf (concluding that data and surveys revealed no evidence that supports the substitution hypothesis regarding the relationship between regulation and litigation).

23. This is an implication of the model laid out in Jonah Gelbach, Jonathan Klick & Lesley Wexler, *Passive Discrimination: When Does It Make Sense to Pay Too Little?*, 76 U. CHI. L. REV. 797 (2009).

various sides of a proposal, as articulated by Mancur Olson,[24] or because a given side finds it easier to "capture" a regulator due to its repeat player position, as suggested by George Stigler.[25]

I suppose the most intuitive benefit of regulators relative to judges is the expertise regulators are assumed to have given their specialization. But even on this issue, the evidence does not favor Shleifer, mostly because there is no systematic evidence regarding the expertise of regulators. In fact, recent work by Wright and Diveley suggests that generalist judges outperform expert regulators in antitrust disputes.[26] Given the complicated nature of modern antitrust issues, this would have seemed to be a best-case scenario for Shleifer's position. Maybe things are different in other countries or in areas of law that have not been studied empirically, but Shleifer offers no evidence of his own or citations to the work of others.

To be fair, Shleifer may have been stuck, having spent the tens of dollars MIT Press gave him as an advance, and yet finding himself with no idea for a coherent book. As a way out, perhaps he figured he could string together a series of articles he had published on legal-ish topics in fancy economics journals. In that spirit, this Review will largely treat the individual book chapters separately. Since I know little to no theory, I will discuss all of the theory chapters in a relatively brief way in Part II that can be summarized as follows: yep, it's theory, all right. A more extended discussion of the empirical chapters follows in Part III.

II. Shleifer's Written a Lot of Good Theory, Just Not Here

The best economic theory allows us to make our intuitions about the way the world works more precise and to then test those intuitions, leading us to either have greater confidence in them relative to other plausible intuitions, or to revise them accordingly. Theory also provides a framework for us to identify the tradeoffs we face when making individual or policy decisions. The work through which Shleifer made his reputation fits this ideal nicely. His work on noise trading, for instance, provides the formalization of ideas stated imprecisely by Keynes;[27] it also provides a

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24. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (contending that rational self-interest, rather than encouraging group members to act in such a way as to benefit the entire group, will in fact lead individual members to seek personal gain at the expense of the group).

25. *See generally* George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (positing that regulators will not cease bowing to industry interests until the system provides a political support for regulators other than the regulated industry itself).

26. Joshua D. Wright & Angela M. Diveley, Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission 19–20 (Jan. 23, 2012) (unpublished manuscript), *available at* http://ssrn.com/abstract=1990034.

27. *See generally* J. Bradford De Long, Andrei Shleifer, Lawrence Summers & Robert Waldmann, *The Size and Incidence of the Losses from Noise Trading*, 44 J. FIN. 681 (1989) (finding that stock prices can be greatly depressed by irrational noise trading).

better fit for some empirical regularities that are hard to square with standard finance theory.[28] Importantly, it also highlights the real problems that arise because of noise trading that are absent in the standard model.

The theory chapters in this book, though originally published in top-quality journals, do not fit this description of good theory. Much of the work is either fairly trivial or fails to allow for anything resembling rigorous econometric testing, leaving the reader with the sense that Shleifer was just dressing up his opinions in mathematics as a way to get them into the scientific literature.

The first such chapter deals with judicial fact discretion.[29] The model finds that if judges have a preference for finding damages different than true damages, they will do so if there is a low personal cost involved.[30] That cost is assumed to be lower when judges have more fact discretion.[31] A subsequent model suggests that if judges are motivated by a fear of reversal on appeal, judges will use fact discretion to fit the current case safely into a settled precedent, again leading to a divergence from a finding that matches true harm.[32] Since setting damages equal to true harm leads to efficient precaution levels, giving judges more discretion with respect to the facts leads to inefficient outcomes.[33] In a statement that will surprise literally no one, Shleifer concludes, "For both models, we have shown that the outcome of a trial is determined at least in part by who the judge is."[34]

Given that the main conclusion of the model is pretty close to "water flows downhill," we need to ask whether there are any subtleties in the model that do provide either interesting testable implications or important policy recommendations. As for testable hypotheses, Shleifer offers some broad claims like "[f]act discretion leads to judicial behavior that is unpredictable from the facts of the case, but predictable from the knowledge of judicial preferences."[35] I suppose this is like a testable hypothesis, except that it requires data that do not generally exist (since predictability implies settlement, and settlements are hardly ever observed), and a metric—knowledge of judicial preferences—that is likely to be correlated with lots of other factors that may lead to predictability. (E.g., a more senior judge's preferences may be better known; a more senior judge may also be less likely to make a legal mistake. If it is harder to predict the outcome of a given case

28. *See generally* J. Bradford De Long, Andrei Shleifer, Lawrence H. Summers & Robert J. Waldmann, *Noise Trader Risk in Financial Markets*, 98 J. POL. ECON. 703 (1990) (setting forth a model for the effects of irrational noise trading on the stock market).

29. SHLEIFER, *supra* note 10, ch. 2; *see also* Nicola Gennaioli & Andrei Shleifer, *Judicial Fact Discretion*, 37 J. LEGAL STUD. 1 (2008).

30. SHLEIFER, *supra* note 10, at 29.

31. *Id.* at 29–30.

32. *Id.* at 38–39.

33. *Id.* at 48.

34. *Id.*

35. *Id.*

for a more junior judge, is it because the judge's preferences are not known, or because there are more random errors?)

As for policy implications, the answer would be something along the lines of "don't give judges discretion over facts when the true level of harm is known." If it is not known, all bets are off. Related to the broad theme of the book, Shleifer's model implies that under "extreme" fact discretion, "dispute resolution in court may become socially inefficient. In those instances, adjudication can be replaced by ex ante regulation based on bright-line rules. By relying on few cheap-to-verify facts, these rules are less vulnerable to fact discretion."[36] This last claim—that *ex ante* bright-line regulation is less vulnerable to fact discretion—is simply asserted, but there are plenty of examples where regulators exercise discretion of facts. My favorite example in the literature is Makowsky and Stratmann's finding that traffic cops are more likely to fine out-of-town drivers, and are more likely to do so when budgets are tight (see, water does flow downhill), despite the fact that speed limits are among the brightest of lines.[37]

The next chapter examines evolution in common law.[38] In this model, using the assumptions that judges hold preferences over party types, there is a cost to diverging from legal precedent, and the common law evolves when judges distinguish a current case from existing precedent.[39] Shleifer finds that a wider distribution of judicial preferences will lead to more disagreement with precedent, and that such disagreement leads to more precise legal rules as seemingly similar cases are distinguished on the basis of increasingly specific informational elements.[40] The chapter purports to generate a number of testable predictions,[41] but on inspection, the predictions do not lend themselves to empirical testing. For example, Shleifer states, "But proposition 3 delivers another novel empirical prediction, namely that legal rules are more complex (include more empirical dimensions) when judicial views are more dispersed."[42] Short of an exogenous shock to the dispersion of judicial views (what would that even mean?), it would be impossible to rule out the possibility that inherently more complicated phenomena lead to both more complicated legal rules and a wider dispersion of preferences. The latter is completely plausible, since a more complicated legal area will naturally involve more tradeoffs over which people can have very different views. As for implications, is the common law good or bad? Should the cost of distinguishing be increased, or should judges be allowed

36. *Id.* at 49.

37. Michael D. Makowsky & Thomas Stratmann, *Political Economy at Any Speed: What Determines Traffic Citations?*, 99 AM. ECON. REV. 509, 526 (2009).

38. SHLEIFER, *supra* note 10, ch. 3; *see also* Nicola Gennaioli & Andrei Shleifer, *The Evolution of Common Law*, 115 J. POL. ECON. 43 (2007).

39. SHLEIFER, *supra* note 10, at 55.

40. *Id.* at 55–56.

41. *Id.* at 56.

42. *Id.* at 68.

to simply ignore precedent? It all depends on the unquantifiable parameter values in the model. Somehow this does not seem more helpful than Hayek's hand-wavy attempts to analogize the common law to a market where local knowledge can be leveraged and there is flexibility to adapt to new developments. Nor is it in reality any more precise than Cardozo's optimistic claim that bad decisions tend to balance out over time.

"The Rise of the Regulatory State"[43] is the next theory chapter in the book. Simply put, the theory shows that if the bad guys can subvert the courts more cheaply than they can subvert the regulators, it is more efficient to rely on regulation, and vice versa.[44] Shleifer indicates that progressive regulation at the turn of the last century is consistent with this story, since industrial interests got rich during this period and so could dominate the courts.[45] Why they could not dominate the regulators as much is not clear, but it must be true—otherwise, the story wouldn't fit the theory. The following chapter, "Coase Versus the Coasians,"[46] has much the same flavor when it suggests that one should rely on judges to enforce contractual agreements and other background rules when, on net, they're relatively better at doing so than regulators are and vice versa. Because regulators are more easily incentivized, Shleifer asserts that this balance will often favor regulators.[47] The last of the theory chapters, "Legal Origins,"[48] is perhaps the best known of Shleifer's work to a legal audience, including the subsequent empirical literature it spawned.[49] The central idea that common law and civil law systems developed as reactions to different legal realities between England and France[50] is both important and interesting, as is the further implication that these historically dependent decisions can end up having important and predictable consequences even after those conditions have since passed.[51] Unfortunately, this work is bundled up in a wave of bad

43. *Id.* ch. 6; *see also* Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON. LIT. 401 (2003).

44. SHLEIFER, *supra* note 10, at 147.

45. *Id.* at 143.

46. *Id.* ch. 7; *see also* Edward Glaeser, Simon Johnson & Andrei Shleifer, *Coase Versus the Coasians*, 116 Q.J. ECON. 853 (2001).

47. SHLEIFER, *supra* note 10, at 178.

48. *Id.* ch. 8; *see also* Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, 117 Q.J. ECON. 1193 (2002).

49. For examples of such literature, see Carsten Hefeker & Michael Neugart, *Labor Market Regulation and the Legal System*, 30 INT'L REV. L. & ECON. 218 (2010), Mark J. Roe, *Legal Origins, Politics, and Modern Stock Markets*, 120 HARV. L. REV. 460 (2006), and Mathias M. Siems, *Shareholder Protection Around the World (Leximetric II)*, 33 DEL. J. CORP. L. 111 (2008).

50. Briefly, because England was relatively peaceful internally, it could rely on decentralized dispute resolution, whereas internal conflict in France made this unworkable as local nobles would have subverted a decentralized dispute-resolution process. France thus required enforcement from the central government, but this centralized control had to rely on a more rigid system of bright-line rules due to the information costs involved in a nonlocalized system. SHLEIFER, *supra* note 10, at 210–11.

51. *Id.* at 209–10.

empirical analyses attempting to relate current legal rules and metrics of financial and macroeconomic development to a country's legal origins.[52] In a nutshell, the empirical literature on this topic suffers from simultaneity[53] problems of epic proportions. Legal institutions, political institutions, and cultural institutions are all bound up in unknowable ways leaving us with no possible hope of untangling causality.[54] Shleifer and company's claims that the underlying empirical work is robust and the suggestion that such stability improves confidence in causality are flat out false.[55] But other than that, Legal Origins is probably the high point of the book.

In sum, although Shleifer is a creative, insightful, and technically proficient theorist, this book provides no evidence of that.

III. As an Empiricist, Shleifer's a Good Theorist

As suggested above, Shleifer's theoretical undertakings in this area do not focus on developing feasible empirical predictions. Instead, most of his claims of providing empirical predictions suggest no workable econometric test. The remaining chapters do, however, examine data. Unfortunately, they do so in a way that suggests Shleifer has ignored all developments in empirical microeconomics over the past two decades.[56]

Modern empirical work in economics focuses on solving the omitted variable bias problem. Because various variables are often correlated with each other, examining the effect of x on y is problematic unless one controls for all other variables that happen to be correlated with x and y. Intuitively, failure to do so means that some of the effect of z on y will be captured in an estimate of x's effect on y. The estimated correlation will include the "true" effect of x on y, but it will be biased because of the unaccounted-for effect of z. A naive response would be to simply control for all of the other variables that matter, but this is often technically difficult if, for example, the data on z have not been collected or involve some measurement error. Sometimes which z variable should be included is unknown. Even the best economic or legal theories do not completely lay out all of the determinants of y and how

52. For a review (and an example) of this bad literature, see Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

53. Simultaneity problems occur when two variables simultaneously cause each other. John Antonakis et al., *On Making Causal Claims: A Review and Recommendations*, 21 LEADERSHIP Q. 1086, 1094–95 (2010).

54. On this issue, see Jonathan Klick, *The Perils of Empirical Work on Institutions*, 166 J. INST. & THEORETICAL ECON. 166, 166 (2010).

55. *See generally* Eric Helland & Jonathan Klick, *Legal Origins and Empirical Credibility*, *in* DOES LAW MATTER? ON LAW AND ECONOMIC GROWTH 99 (Michael Faure & Jan Smits eds., 2011) (showing that the results are actually not robust at all and arguing that, even if they were, it would provide no confidence that the relationships are causal).

56. For a nice discussion of the improvements that have been made in the field, see Joshua D. Angrist & Jörn-Steffen Pischke, *The Credibility Revolution in Empirical Economics: How Better Research Design Is Taking the Con out of Econometrics*, 24 J. ECON. PERSP. 3 (2010).

they are related to x. Other times, while z is known, it is impossible to code it in a principled way.

This omitted variable problem is ubiquitous when dealing with observational data.[57] The sources of this omitted variable problem in legal analyses are varied. When examining the outcomes of cases as a function of time or jurisdiction or substantive area, one form of the omitted variable bias that arises is a selection effect whereby cases may settle differentially across time or jurisdiction or substantive area. Since those settled cases do not have observed judicial outcomes, there can be no confidence in inferences based on observed cases. Similarly, when trying to examine the effect of a legal rule on behavioral outcomes, if the legal rule is adopted by some jurisdictions because of unobserved characteristics or changes in background trends that affect both the likelihood a jurisdiction adopts a rule and the underlying behavior, there can be no confidence in estimated correlations.

Modern empirical microeconomic work focuses on what are referred to as natural or quasi-experiments, where the researcher attempts to exploit seemingly random variation that affects the policy of interest. Work in the area of criminal law and policy provides some of the best illustrations of this approach. For example, along with Tabarrok, I have some work[58] showing that when the level of police protection rose in Washington, D.C., during periods of concern about terrorism, crime fell dramatically, and when the police protection went back to normal levels, crime reverted to its baseline.[59] Usually the study of police and crime levels is hampered by the fact that places that have (or expect to have) high crime levels are also the ones that hire more police, but it is not possible to adequately control for these expectations when calculating the correlation between police and crime. Because the terror concerns we relied on were unrelated to issues having to do with crime, we could have some confidence that our estimated effect of police on crime did not suffer from an omitted variable bias.[60]

Another good example is provided by Helland and Tabarrok where they examine the effect of three-strikes laws on criminal activity.[61] Again, in the standard case, it is not possible to simply look at crime levels between places that do and do not have such laws since chances are that the places adopting three-strikes laws are doing so because of their beliefs about the trajectory of

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57. Experimental analyses avoid the problem by relying on explicit randomization of the x variable of interest (the so-called treatment). If there is randomization, even if a z variable that matters for y is not accounted for, there is no bias in the estimated correlation between x and y since there is no correlation between z and x.

58. Jonathan Klick & Alexander Tabarrok, *Using Terror Alert Levels to Estimate the Effect of Police on Crime*, 48 J.L. & ECON. 267 (2005).

59. *Id.* at 271.

60. We verified that other changes, such as a reduction in the number of tourists, were likely not occurring simultaneously. *Id.* at 271–72.

61. Eric Helland & Alexander Tabarrok, *Does Three Strikes Deter? A Nonparametric Estimation*, 42 J. HUM. RESOURCES 309 (2007).

crime or because public opinion is becoming more receptive to all sorts of anticrime measures, not all of which can be quantified. Helland and Tabarrok solve this problem by examining individuals arrested for the same crimes before the three-strikes laws were even considered. For seemingly random reasons, one of them pleads to a crime that falls outside of the three-strikes law as adopted later, while the other one agrees to a plea involving a crime that is eventually covered by the three-strikes law.[62] This shows that the individual who is randomly hit with a strikable offense (after the fact) appears to be deterred from engaging in criminal activity relative to his otherwise similar counterpart.[63] Because of studies like this, our knowledge of the causal effects of criminal law and policy has grown enormously in the past decade or so.

For all the advances made through these empirical tools, however, they fundamentally can only identify marginal effects. That is, my work with Tabarrok tells us zero about why the baseline level of crime in Washington is higher than that in New York City. The Helland and Tabarrok work is not useful for determining why any given individual commits a crime to begin with. The tools we use only help us to understand what changes occur when a policy is implemented (or, more generally, when a particular x variable changes) relative to some unexplained preexisting baseline.

Shleifer's empirical work does not fit this model. Rather than focusing on well-identified marginal effects, Shleifer purports to explain baselines, largely ignoring the hopelessness involved in any such attempt. Three empirical chapters in this book rely purely on comparing outcome measures across jurisdictions that have different legal institutions, drawing conclusions based on those correlations. So, for example, in the chapter entitled "Courts,"[64] which attempts to analyze the relationship between legal formalism and the ability of parties to quickly settle disputes and finds that greater formalism is associated with delay with no apparent offsetting accuracy benefit,[65] Shleifer concludes "our results suggest a practical strategy of judicial reform, at least with respect to simple disputes, namely the reduction of procedural formalism."[66] At no point does the analysis rule out the possibility that, for example, the formalistic French are not simply different than the less formal Americans in other ways that are likely to impact delay. This kind of cross-sectional comparison has no chance of sorting out these issues, and conclusions based on this analysis are close to worthless in terms of having confidence in causality.

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62. *Id.* at 312–13.

63. *See id.* at 312–14, 326–27 (showing deterrence rates drawn from the study's data).

64. SHLEIFER, *supra* note 10, ch. 5; *see also* Simeon Djankov et al., *Courts*, Q.J. ECON. 453 (2003) (chapter published as article).

65. *Id.* at 106, 141.

66. *Id.* at 142.

The chapter "The Extent of the Market and the Supply of Regulation"[67] is similar in this respect. Shleifer presents evidence that jurisdictions with larger populations adopt more regulations, and concludes that this evidence supports the view that there are fixed costs in implementing regulations, and therefore that large scale is necessary to justify undertaking those costs.[68] While the evidence is consistent with that hypothesis, it is also consistent with a hypothesis that people like regulations and so there is more movement into places that are expected to increase their regulation. It is also consistent with the hypothesis that policy makers believe more people require more regulation since individualized litigation will be more difficult with a large population. There are probably a dozen more plausible stories that are also consistent with the findings.

In "The Regulation of Entry,"[69] Shleifer presents evidence suggesting that larger barriers to setting up a new business are "associated with greater corruption and a larger unofficial economy, but not with better quality of private or public goods."[70] Again, not having actually observed a plausibly random change to the regulation of entry in a sample of countries, Shleifer is left making inferences about baselines, and that kind of analysis is about as reliable as if Shleifer had simply written an article called *I Think Barriers to Entry Are Bad* with text saying, "See the title."

The remaining empirical chapter, "The Evolution of a Legal Rule,"[71] is effectively a case-counting exercise meant to see if states converge to the presumably efficient economic loss rule.[72] Finding a nontrivial number of instances where courts diverge from the rule and no steady trend toward it, Shleifer concludes that "the hypothesis that, in commercial fields, the common law is predictable and efficient, or at least is moving there, is not supported by our study."[73] Putting aside the question as to whether the economic loss rule is efficient or whether by "efficiency" we mean making tradeoffs across many dimensions at the lowest cost, as an empirical matter, it is very difficult to draw strong conclusions from a reading of appellate cases due to sample selection problems and other kinds of omitted variable biases.

The funny thing is, in many ways, I agree with Shleifer's conclusions, but the empirics add nothing to my confidence in them. Much like the theory chapters, the methodological machinery does little to move the ball forward.

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67. *Id.* ch. 9; *see also* Casey Mulligan & Andrei Shleifer, *The Extent of the Market and the Supply of Regulation*, 120 Q.J. ECON. 1445 (2005).

68. SHLEIFER, *supra* note 10, at 262.

69. *Id.* ch. 2; *see also* Simeon Djankov et al., *The Regulation of Entry*, 117 Q.J. ECON. 1 (2002).

70. SHLEIFER, *supra* note 10, at 298.

71. *Id.* ch. 10; *see also* Anthony Niblett et al., *The Evolution of a Legal Rule*, 39 J. LEGAL STUD. 325 (2010).

72. SHLEIFER, *supra* note 10, at 78–79.

73. *Id.* at 104.

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Sublime Myths: An Essay in Honor of the Shareholder Value Myth and the Tooth Fairy

THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC. By Lynn Stout. San Francisco, California: Berrett-Koehler Publishers, 2012. 134 pages. $16.95.

Reviewed by Jonathan Macey*

Introduction

In *The Shareholder Value Myth*,[1] law professor Lynn Stout pitches her tent firmly in the camp of the nascent and prematurely moribund Occupy Wall Street movement. And if contradictions abounded among Occupy Wall Street folks, they similarly flourish in this slim text. This book simultaneously argues that the idea of shareholder primacy is—in addition to being a myth—(a) "the dumbest idea in the world";[2] (b) "an ideology, not a legal requirement or a practical necessity";[3] and (c) bad law.[4] My responses to these observations are: (a) shareholder primacy is not an idea at all; (b) shareholder primacy is an ideology, but like certain other ideologies, such as the ones about the Constitution being sacred or the one about God not being dead, it is quite useful in a wide variety of situations and contexts; and (c) shareholder primacy is not bad law because it is not law at all—at least not in the cartoonish version often presented—and nobody thinks that it is. There is of course a difference between ideology and law, and the fact that shareholder primacy is an ideology does not mean that it is irrelevant to law; and it does not even necessarily mean that there is anything wrong with it. Christianity, Judaism, capitalism, and vegetarianism are ideologies rather than laws. But a lot of people find them convincing and even inspirational all the same.

Sadly, in my view, many people, and academics disproportionately, hate ideology of any sort and consider the very idea of ideology to be abhorrently

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1. LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012).

2. *Id.* at 5–6 (quoting Francesco Guerrera, *Welch Condemns Share Price Focus*, FIN. TIMES, Mar. 12, 2009, http://www.ft.com/intl/cms/s/0/294ff1f2-0f27-11de-ba10-0000779fd2ac.html#axzz2JJPvr8f5).

3. *Id.* at 3.

4. *See id.* at 25 (contending that the idea of a legal duty to maximize shareholder profits is a myth).

anti-intellectual. As this book illustrates, among a certain sort of academic, to describe something as an ideology is to condemn it. Ideology is different from reason, but ideology has its place even in the life of educated, highly reflective people. Professor Stout, however, trivializes the notion of ideology and considers the very use of the appellation "ideological" to be derogatory.

In this Review I challenge the basic assumption that the idea of shareholder primacy is bad simply because it is, at least in part, ideological in nature. Shareholder primacy, for all of its ideological baggage, is also efficient and sensible.

I also defend the idea that shareholder primacy serves valuable salutary functions in corporate governance. I also make what, at least to me, is the rather obvious point that if the myth of shareholder primacy were to be eradicated completely from the intellectual landscape, some other ideology would of necessity emerge to fill the void. And on reading this book, I cannot avoid the conclusion that whatever new ideology might emerge will be far more pernicious and destructive than the extant, thoroughly benign myth of shareholder primacy.

This Book Review is divided into three parts, each of which contains what I consider to be a serious challenge to the ideas propounded in *The Shareholder Value Myth*. First, the book is an attempt to dislodge shareholders once and for all from their mythical, privileged role as the primary, and to some degree exclusive, beneficiaries of the efforts of corporate directors and senior managers. Unfortunately, Professor Stout does not provide any clues as to where, if at all, shareholders would be moved in her preferred ranking. Surely, shareholders should have some place in the corporation. After all, shareholders' money is required to capitalize the corporation. If Professor Stout and her fellow travelers succeed in dislodging shareholders from their current, albeit mythical, position of primacy, where would these scholars place them within the panoply of corporate constituencies such as managers, creditors, employees, suppliers, customers, and local communities? I consider this problem in Part I of this Review.

My second objection deals with Professor Stout's own ideology. She rejects the ideology of shareholder-wealth maximization. It is interesting to consider what, if any, ideology she herself proposes to embrace in its stead, which is the subject of Part II of this Review.

In Part III, I complain that *The Shareholder Value Myth* is but a sheep in wolf's clothing. Shareholder primacy is not so much a myth as it is an aspiration. For this reason, the aspiration that corporations' officers and directors should maximize shareholder value simply cannot be the problem that Professor Stout asserts it to be. In other words, the wolf disguise is the idea that maximizing value for shareholders actually causes any meaningful problems; in reality, shareholder value is not a concern to anybody because managers don't have to maximize shareholder value. Managers are virtually

free to ignore shareholder value in what they do (though not in what they say). Professor Stout at one point actually acknowledges this point.[5] In other words, if Professor Stout is right in claiming that shareholder primacy is a myth, then she must be wrong in her claim that it is a serious threat or problem. Myths do not pose real threats.

I. Ignore Them and They'll Go Away: If Shareholders Aren't Primary, Are They at Least Secondary? Tertiary? Mortuary?

While Professor Stout is quite clear about what she opposes, it is not at all clear what she supports. What Professor Stout opposes, vehemently, is shareholder primacy.[6] Shareholder primacy is the notion that executives and senior managers must and should run their companies with the narrow, single-minded purpose of maximizing shareholder value at the expense of all other values.[7] I do not think that anybody, and particularly scholars such as Jeffrey Gordon, Henry Hansmann, and Reinier Kraakman, all of whom Professor Stout accuses of embracing this caricature of the shareholder primacy paradigm,[8] would recognize their work in Professor Stout's critique. But while Professor Stout is crystal clear in her desire to remove shareholders as top dogs in the corporate governance pecking order, she is frustratingly silent on where she would put them.

Perhaps Professor Stout favors merely orchestrating a minor shuffle in the hierarchy of corporate relationships and would be content simply moving shareholders from first to second place. Alternatively, sometimes it seems that Professor Stout might favor a more radical realignment, with shareholder wealth maximization being jettisoned altogether as a justification (or, if you prefer, as a pretext) for corporate action.[9]

Perhaps Professor Stout does not think that the question of where to rank the interests of shareholders, in a post-shareholder-primacy age, is interesting or important. Perhaps she never bothered to consider the issue, but it is important to address this question if we are to persuade investors to part with their money. Before a rational investor can be persuaded to trade some of her wealth for the privilege of becoming an equity claimant in a public company, she will be interested in knowing where she will stand in the queue when it's time to do things like develop corporate strategy, accept a merger proposal from another company, or distribute free cash flows to the

5. *See id.* at 32 (noting that "maximizing shareholder value" is a "managerial choice" rather than an obligation).

6. *See id.* at 6–8, 10–11 (outlining Professor Stout's criticism of shareholder primacy).

7. *See* Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy* 3 (Univ. of Toronto Legal Studies Series Research Paper No. 15-05, 2005) (explaining the concept of shareholder primacy).

8. STOUT, *supra* note 1, at 21–22.

9. *See id.* at 31–32 (characterizing maximization of shareholder wealth as optional and as simply one "possible corporate objective").

various and sundry groups who are interested in having such cash flows diverted away from investors and towards themselves. Would Professor Stout settle for moving shareholders out of first place and putting them in second place? What about third? Perhaps Professor Stout is joining the throng of scholars who believe that investors are irrational, and based on this belief, she takes the view that they will continue to invest no matter what. It would be interesting to know where Professor Stout stands on all of this.

We don't know where maximizing shareholder value ranks on Professor Stout's list of groups (workers, suppliers, local communities) and interests (the environment, philanthropy) that corporations should try to benefit. Of equal concern, we also are never told what *methodology* decision makers should employ when formulating corporate strategy.[10] In the absence of rules or standards or methods, the questions of how managers and directors decide whose interests the corporation should serve and how to go about serving such interests are of paramount importance.

And here we come to the fun part of the book. Professor Stout is no parvenu in the field of corporate law: she knows who runs corporations, and, stunningly, she has no interest in changing this facet of corporate governance. In more or less plain view on page 32, Professor Stout acknowledges that management runs the corporation:

> As far as the law is concerned, maximizing shareholder value is not a requirement; it is just one possible corporate objective out of many. Directors and executives can run corporations to maximize shareholder value, but unless the corporate charter provides otherwise, they are free to pursue any other lawful purpose as well. Maximizing shareholder value is not a managerial obligation, it is a managerial choice.[11]

This is the key passage in the book, and page 32 is the key page in the book. Professor Stout's message, slightly obscured, but discernible nonetheless, is that managers do and should run the corporation with plenary authority and with no reference to the shareholders' interests. The two key words in this book are "managerial choice."[12] The title of the book should have been not just *The Shareholder Value Myth*—it should have been *The Shareholder Value Myth and the Managerial Value Reality*.

Most people think that the role of corporate governance is to protect shareholders from managers (i.e., to control agency costs).[13] Professor Stout, on the other hand, appears to embrace the view that the role of corporate

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10. *Id.* at 10.

11. *Id.* at 32.

12. *Id.* at 4, 32.

13. *See, e.g.*, Larry E. Ribstein, *The Mandatory Nature of the ALI Code*, 61 GEO. WASH. L. REV. 984, 988 (1993) (detailing the view of many academics that corporate governance should be proscribed by law because of the need to protect shareholders from managers).

governance is to protect management from shareholders.[14] And bear in mind, as Professor Stout also makes clear on the crucial page 32, her theory is simultaneously positive (a description of the way things are) and normative (a description of the way things ought to be).[15]

I certainly understand that corporate activists and gadflies sometimes argue that corporations should not serve "only" the interests of shareholders, but should also serve broader societal interests. On the other hand, it is difficult to comprehend the notion that all power should be vested in the hands of corporate managers without articulating precisely what constraints should be placed on managers. After reading page 32, one wonders what sorts of constraints the author believes should be imposed on managers. Astonishingly, the author offers not even a hint. Managerial choice is, as far as this book is concerned, not only unconstrained as a matter of fact—it is unconstrained as a matter of policy. For example, suppose a manager decides simply to steal a few million dollars from a company. In the real world, where shareholder primacy is still the articulated and occasionally even the operational public policy objective of corporate law, such stealing of course is illegal because these assets are held for the benefit of the shareholders. In Professor Stout's strange alternative universe, it would appear that such stealing would be OK as long as the nonshareholder constituencies of the corporation (workers, the government, the environment, the local community) were not harmed. Perhaps Professor Stout would even applaud having managers abscond with a few (hundred) million in corporate assets if those assets were distributed as gifts to worthy local charities.

One can only wonder and imagine what legitimate policy interests might be served by acknowledging that we live in a legal environment of unconstrained managerial choice. Professor Stout's book posits that we really do live in a world of unconstrained managerial choice now.[16] While as I explain in the following section, I think that Professor Stout is clearly mistaken in this assertion, hers is not a crazy position to take. The really crazy part is the part in which Professor Stout argues that we should even stop *pretending* that top corporate managers operate in a world that is even loosely or fictionally constrained by the "myth" that managers are supposed to maximize value for shareholders.

Wow. Even those who feel uncomfortable with the shareholder value-maximization model would worry about shifting to an unconstrained-managerial-power model. But Professor Stout is apparently so untroubled by the implications of this that she does not even pause to consider how

14. *See* STOUT, *supra* note 1, at 46 (arguing that the traditional theory of corporate governance that focuses on making "boards more accountable to shareholders and more focused on increasing shareholder wealth . . . is inconsistent with both corporate law and with the real economic structure of public corporations").

15. *Id.* at 32.

16. *See id.* ("Maximizing shareholder value is not a managerial obligation, it is a managerial choice.").

different the world would look under her proposed regime. The silent assumption is that society somehow will be better off if we free not only the professoriate, but also the corporate managerial class and even judges and legislators, from the myth of shareholder primacy.[17]

The first problem with this point of view is that we live in the age of the imperial CEO.[18] Within many parts of this particular substratum of society, the myth of shareholder primacy appears to have been eradicated root and branch eons ago. Precious few (if any?) managers have succumbed to the myth of shareholder primacy.[19] Rather, the shareholder-primacy illusion is a disease that appears disproportionately to afflict academics, theoreticians, and thankfully, the corporate bar and the Delaware judiciary.

A second, more fundamental problem with Professor Stout's point of view is that it rather alarmingly presumes that the corporate managerial class simply is not only different, but actually qualitatively better and certainly more moral than the rest of us. In general, top corporate managers of large public companies are different from you and me in the Fitzgeraldian sense: they are rich and the rich are different. Certain corporate managers, particularly in the megabanks that dominate the U.S. economy,[20] seem to me to be rather careless, like Tom and Daisy in *The Great Gatsby*: "They were careless people, Tom and Daisy—they smashed up things and creatures and then retreated back into their money or their vast carelessness or whatever it was that kept them together, and let other people clean up the mess they had made . . . ."[21]

Professor Stout's bottom line is right there on the cover. Her book's title purportedly explains "how putting shareholders first harms investors, corporations, and the public." On reading the book, however, one also discovers that Professor Stout is of the view that putting managers first—or at least freeing managers of the constraints of the shareholder value-maximization myth—somehow would help investors, corporations, and the

17. *See id.* at 46 (proclaiming that the "shareholder primacy ideology is inconsistent with both corporate law and with the real economic structure of public corporations" and with "empirical evidence").

18. Scott Green, *Unfinished Business: Abolish the Imperial CEO!*, J. CORP. ACCT. & FIN., Sept./Oct. 2004, at 19, 19–22.

19. Justin Fox & Jay W. Lorsch, *What Good Are Shareholders?*, HARV. BUS. REV., July–Aug. 2012, at 48, 50.

20. *See generally* Jonathan R. Macey & James P. Holdcroft, *An Ersatz-Antitrust Approach to Financial Reputation*, 120 YALE L.J. 1368 (2011) (describing the dominance of the very largest U.S. financial institutions).

21. F. SCOTT FITZGERALD, THE GREAT GATSBY 179 (Scribner trade paperback ed. 2004). This appears to be a pretty good description of what happened in the U.S. in various financial crises. The people who do the cleaning up are, of course, the politicians, and U.S. taxpayers are the ones footing the bills. Examples include the Enron, WorldCom, and Tyco era, which was followed by the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), and the financial crisis that began in 2007, which was followed by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

public. This seems to me to be one of those flagrantly erroneous assertions that is refuted merely in the telling.

It is interesting to ponder how far Professor Stout would go in her allegiance to unconstrained managerial primacy. Clearly the oft-articulated notion that managers' fiduciary duties of care and loyalty are owed exclusively to shareholders must be abandoned. Presumably another vestigial remnant of the shareholder-primacy myth that should be jettisoned is what Professor Stout apparently regards as the silly tradition that shareholders, and only shareholders, are eligible to vote to elect corporate directors. For example, only shareholders get to cast advisory votes on executive compensation arrangements, and of course only shareholders get to elect corporate directors.[22]

II. OK, So Shareholder Primacy Is Dead, and We Need a New Myth to Replace It?

My second complaint about the analysis in this book also falls into the category of worrying about what might emerge to replace the shareholder primacy paradigm that Professor Stout seeks to eradicate. Shareholder primacy is, as Professor Stout rightly points out, a "dogma,"[23] "a belief system that was rarely questioned,"[24] and a mere "ideology."[25] But the book does not seem to take itself seriously enough to address the question of the role served by mere dogma and ideology. The assertion that shareholder primacy certainly has an ideological component, just as other notions, such as "democracy" and "freedom of religion" and even "capitalism" do. But like some of these other ideologies, it is an ideology with a basis in reason and in fact. As such, before we jettison our possibly dogmatic belief in shareholder primacy, we first should consider whether or not we should replace it with another, perhaps sounder, ideology. Alternatively, of course, it is conceivable (though barely) that Professor Stout is simply an anarchist and that she favors the complete eradication of every sort of structured belief system. But this does not seem to me an attainable goal. As long as there are business organizations of any kind, the people who run them likely will have some notion or theory about what they are supposed to be doing (like maximizing profits or saving the whales) and why they are doing it (because that is the basis on which they were hired). If we get rid of shareholder primacy as the response to the question "what should the people who run businesses do?," it would appear that we have to replace it with something else. Professor Stout's only answer is that businesses should do whatever their managers want them to do. This hardly seems like a slogan likely to

22. *Shareholder Approval of Executive Compensation and Golden Parachute Compensation*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/rules/final/2011/33-9178-secg.htm.

23. STOUT, *supra* note 1, at 21.

24. *Id.*

25. *Id.* at 3.

attract many principled supporters, much less to inspire people to pitch their tents in public parks in wintertime.

It would be interesting to know what "myth" or creed or legal objective Professor Stout thinks might replace the shareholder primacy myth. Like the Occupy Wall Street Movement itself, this book is loud and clear on what it is against, but is deadly silent on what it is for. There are a lot of myths that millions of people, often the most innocent and vulnerable in society, persist in embracing. Santa Claus and the Tooth Fairy are two examples that seem to cling on generation after generation in the West. Perhaps Professor Stout does not understand that there are myths that are malignant, but that there are also myths that are entirely benign. Some myths, like the one about cognitive differences among racial groups, are virulently malignant. Others, like the myth of shareholder primacy, seem quite benign. In fact, Professor Stout has no analysis or description of the harm, if any, that is done by the shareholder value myth.

In her book, Professor Stout successfully makes the point that top corporate managers do not really have to maximize shareholder value.[26] I agree. In fact, I make this very point every year to my students when I teach the introductory survey course on corporate law. My students have no difficulty grasping this point, particularly because it is a core implication of the business judgment rule,[27] not to mention a central component of the cases permitting corporations to donate money to charities that have little or no connection to the interests of the corporation.[28] But if I am right that some myths are more harmful than others (and surely I am), then it is not sufficient for Professor Stout merely to assert that the notion of shareholder value maximization is a myth. She also must establish somehow that it is a harmful myth. This she utterly fails to do. A lot of important legal doctrines, like the corporate opportunity doctrine,[29] the duty of loyalty,[30] and the duty

26. STOUT, *supra* note 1, at 32.

27. The business judgment rule is "a legal principle that makes officers, directors, managers, and other agents of a corporation immune from liability to the corporation for loss incurred in corporate transactions that are within their authority and power to make when sufficient evidence demonstrates that the transactions were made in good faith." *Business Judgment Rule*, *in* WEST'S ENCYCLOPEDIA OF AMERICAN LAW at 190–92 (2d ed. 2005).

28. *See, e.g.*, Shlensky v. Wrigley, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (affirming dismissal because the business judgment rule allows the director of a professional baseball team to make decisions based on "the effect on the surrounding neighborhood").

29. The corporate opportunity doctrine states that

> if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself.

Guth v. Loft, Inc., 5 A.2d 503, 511 (Del. 1939).

30. "As a matter of agency law, an employee owes a duty of loyalty to her employer. A breach of this duty occurs when an employee (a) competes directly with her employer, (b) misappropriates

of care[31] are anchored in the shareholder value-maximization model/myth. It would be bad simply to jettison these doctrines because, notwithstanding that they may be grounded in the myth of shareholder primacy, these doctrines reduce managerial pilfering and negligence and make corporations more valuable than they would be if they did not exist. Moreover, Professor Stout offers no replacements for the shareholder value-maximization paradigm that she seeks to depose. Some pretty bad behaviors, including gross negligence, fraud, and theft, are considered illegal because they conflict with the shareholder value-maximization model/myth. Would such behavior still be outlawed in Ms. Stout's Brave New World?

If we bury once and for all the shareholder value myth, both in theory as well as in practice, and replace it with nothing other than the recognition that corporations are controlled in plenary fashion by their top corporate managers, then such managers really will be free to have their wanton way with the corporate assets under their control. This does not sound like a particularly attractive alternative to our current status as dwellers in a legal landscape clouded by a heavy fog of shareholder wealth-maximization ideology.

The notion of shareholder wealth maximization is not explained very well in *The Shareholder Value Myth*. It is overly simplistic simply to assume that maximizing value for shareholders means maximizing returns.[32] Rather, maximizing the value of a corporation's shares means maximizing the *expected value* of such shares. Expected value in this context refers to future value of shares adjusted for risk. Absent any consideration of risk, a corporate manager might pursue an investment that has a 10% chance of returning $500 million and a 90% chance of bankrupting the company and wiping out all shareholder value. The expected value of this investment, however, is only $50 million, and investors would prefer an investment with a 10% chance of gaining $65 million and a 90% chance of merely breaking even because the latter investment has an expected value of $51.6 million.[33] Because shareholder wealth maximization involves taking the risks as well as the rewards from corporate activity into account, the notion is not quite as wacky as sometimes is suggested.

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her employer's profits, property, or business opportunities, or (c) breaches her employer's confidences." Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 515–17 (4th Cir. 1999).

31. As *Caremark* states:

> Director liability for a breach of the duty to exercise appropriate attention may, in theory, arise in two distinct contexts. First, such liability may be said to follow *from a board decision* that results in a loss because that decision was ill advised or 'negligent'. Second, liability to the corporation for a loss may be said to arise from an *unconsidered failure of the board to act* in circumstances in which due attention would, arguably, have prevented the loss.

In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).

32. STOUT, *supra* note 1, at 2–3.

33. (.10 × $500 million + .90 × $0) = $50 million; (.1 × $65 million + .9 × $50 million) = $51.5 million.

It is true, of course, that sometimes the best alternative for a company is to take big risks. With big risks come big losses, but big gains usually cannot be achieved without taking big risks. As long as the risks are fully disclosed to the other participants in the corporate enterprise, and as long as such risks are managed (and, where possible, hedged) competently, risk taking is not a problem. In fact it generally is believed that risk taking should actively be encouraged because such risk taking leads to innovation, economic growth, and important improvements in society. Risk taking clearly has a place in a world in which we cling, even if only in our hopes and aspirations, to the myth of shareholder value.

In contrast, risk taking appears to play no role whatsoever in Professor Stout's world without myth. If we diminish, much less eliminate, shareholders from our list of constituencies that corporate managers are supposed to serve, we are left only with the interests of fixed claimants, i.e., those claimants like workers, creditors, and local communities who enter into specific contractual relationships with corporations. For solvent companies, meeting the obligations owed to these constituencies does not require marginal risk taking. Marginal risk taking benefits only shareholders. Thus, Professor Stout's eliminating the myth of shareholder value also would eliminate the reality of risk taking, which is the critical component of entrepreneurship. This does not appear to be a recipe for anything other than economic catastrophe in light of the fact that economies that innovate survive and flourish, while those that do not innovate wither and die.

III. It Is Impossible to Kill a Theory That Is Already Dead

My final objection to *The Shareholder Value Myth* is that the entire exercise is but a failed attempt to present a sheep in wolf's clothing. The wolf disguise is a metaphor for the allegedly frightening idea that maximizing value for shareholders actually causes any meaningful problems for anybody. Shareholder value is not a concern to anybody because managers don't have to take extreme or socially destructive actions in the name of maximizing shareholder value. And nobody—literally nobody—thinks that managers can or should break the law for the sake of maximizing shareholder value. Managers are virtually free to ignore shareholder value in what they do (though perhaps not in what they say). But they are not free to steal from the company with impunity under a shareholder wealth-maximization model. But who would be damaged by a little stealing (particularly if it were done in "Robin Hood" fashion under Professor Stout's approach to corporate governance)? Nobody would be harmed if the corporation could pay all of its creditors and other fixed claimants in full, because the only people left are shareholders, and the whole point of Professor Stout's book is that we do not and ought not pay a shred of attention to that grasping cohort of greedy speculators.

So, yes, there are lots and lots of problems in corporate America, but, as Professor Stout herself clearly acknowledges at various points in her book, these problems are not driven by the fact that shareholder value is being pursued too rigorously.[34] Maximizing shareholder value is largely an aspirational concept, and corporate managers, corporate lawyers, corporate governance activists, and their interlocutors are acutely aware of this fact. On this point Professor Stout is correct. Where she is clearly in error is in her notion that this is a point that every other lawyer in America somehow has failed to notice.

For example, Professor Stout is right to say that, as a practical matter, the business judgment rule eviscerates large swathes of the notion of shareholder value maximization.[35] The business judgment rule, which protects most business decisions from judicial second-guessing, means that top executives and directors are free to do virtually anything they want with and to shareholders' money and never have to say they are sorry to shareholders, courts, workers, or anybody else.[36]

Professor Stout begins her attack on the shareholder value-maximization theory by recounting the tragedy of the April 20, 2010 catastrophe in the Gulf of Mexico that began with the massive explosion on BP's *Deepwater Horizon* oil rig and subsequent oil spill. Professor Stout observes that:

> The *Deepwater Horizon* disaster was tragedy on an epic scale, not only for the rig and the eleven people who died on it, but also for the corporation BP. By June of 2010, BP had suspended paying its regular dividends, and BP common stock (trading around $60 before the spill) had plunged to less than $30 per share. The result was a decline in BP's total stock market value amounting to nearly $100 billion. BP's shareholders were not the only ones to suffer. The value of BP bonds tanked as BP's credit rating was cut from a prestigious AA to the near-junk status BBB.[37]

Having just explained how damaging the *Deepwater Horizon* disaster was for shareholders, Professor Stout then unhesitatingly asserts that "the *Deepwater Horizon* disaster is only one example of a larger problem that afflicts many public corporations today. That problem might be called shareholder value thinking."[38] I am at a complete loss to understand how an event that cost shareholders over half of the value of their investment in a company can be blamed on a doctrine that says that managers are supposed to maximize value for shareholders. Blaming a catastrophe that destroyed massive amounts of shareholders' wealth on a theory that posits that

34. STOUT, *supra* note 1, at 3, 4, 8, 32.
35. *Id.* at 43.
36. *Business Judgment Rule*, *supra* note 27.
37. STOUT, *supra* note 1, at 1.
38. *Id.* at 2.

companies should maximize shareholders' wealth is not the sort of association or causal link that is consistent with logic or reason.

Professor Stout goes on to refer to a report by the National Commission on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling, which, according to Stout, concluded that the catastrophe "could be traced to multiple decisions by BP employees and contractors to ignore standard safety procedures in the attempt to cut costs."[39] In fact, the National Commission itself had a different account of where the blame for the catastrophe should go. The Commission blamed "years of industry and government complacency and lack of attention to safety," not the single-minded pursuit by management of environmentally tainted lucre for shareholders:

> Our investigation shows that a series of specific and preventable human and engineering failures were the immediate causes of the disaster. . . . [T]his disaster was almost the inevitable result of years of industry and government complacency and lack of attention to safety. This was indisputably the case with BP, Transocean, and Halliburton, as well as the government agency charged with regulating offshore drilling—the former Minerals Management Service. As drilling pushes into ever deeper and riskier waters where more of America's oil lies, only systemic reforms of both government and industry will prevent a similar, future disaster.[40]

But even if one were to fantasize that some misguided notion of shareholder value maximization on the part of BP management somehow was to blame for the *Deepwater Horizon* disaster in the Gulf of Mexico, it does not stand to reason that shareholder value maximization in general is at fault. In fact, the opposite is true. If BP was trying to maximize value for shareholders, it failed miserably. It failed to such an extent that shareholders in BP and in the other public companies involved in the disaster can sue BP for its failure to adequately protect shareholders' wealth and to fully disclose the risks associated with its drilling practices. And they have done so in droves.[41]

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39. *Id.*

40. Press Release, Nat'l Comm'n on the BP Deepwater Horizon Oil Spill & Offshore Drilling, Oil Spill Commission Landmark Report on Gulf Disaster Proposes Urgent Reform of Industry and Government Practices to Overhaul U.S. Offshore Drilling Safety (Jan. 11, 2011), http://www.oilspillcommission.gov/sites/default/files/documents/OilSpillCommissionLandmarkReportonGulfDisasteProposesUrgentReformofIndustryandGovernmentPracticestoOverhaulU.S.OffshoreDrillingSafety.pdf.

41. *Deepwater Horizon Oilspill Shareholder Lawsuits*, PARKER WAICHMAN LLP, http://www.yourlawyer.com/topics/overview/BP-Deepwater-Horizon-Oil-Spill-Shareholder-Lawsuits (describing shareholder derivative lawsuits against BP and other companies); Kevin LaCroix, *BP Deepwater Horizon Securities Suit, Though Narrowed, Survives Dismissal Motion*, THE D&O DIARY (Feb. 14, 2012), http://www.dandodiary.com/tags/deepwater-horizon (describing securities fraud suit against BP based on BP shareholders' "allegations that they had been misled regarding BP safety efforts and processes").

In other words, it appears that old-fashioned bureaucratic ineptitude at both the government and the corporate levels are to blame for the *Deepwater Horizon* disaster. Shareholder wealth maximization is no more to blame for this catastrophe than the Framers of the Constitution are culpable for the Monica Lewinsky scandal, or Watergate, or the various invasions of Iraq. Failure to perform in a manner that is consistent with a perfectly valid norm (e.g., the separation of powers, the right to privacy, shareholder wealth maximization) is not the fault of the norm; it is the fault of the person who fails to perform.

This point seems even more powerful where the norm that has been violated is, as Professor Stout asserts, merely a myth. After all, if Professor Stout is correct that the notion of shareholder value maximization is nothing more than an urban myth, then Professor Stout must be wrong to assert that shareholder value maximization is causing a problem for anybody. Myths don't cause problems because they are imaginary. Yet Professor Stout argues simultaneously that shareholder value maximization is a myth and a major problem in corporate governance and law. In other words, by claiming that shareholder value is a myth and then decrying the harm that it does, Professor Stout is quite literally tilting at windmills.

Conclusion

Yes, I concede that for the reasons articulated by Professor Stout, the notion of shareholder value maximization is in many contexts more aspirational or real. In this sense it has characteristics in common with myths. Of course, the *raison d'être* for Professor Stout's spirited attack on shareholder value maximization is the stubborn persistence of the shareholder value myth in the imaginations of scholars and practitioners of corporate law. Unfortunately, the reason why Professor Stout wants to destroy the myth of shareholder value maximization is not revealed in this book, at least not in any persuasive way. As noted above, her attempt to link the myth to corporate catastrophes, like the environmental disaster caused by BP's Gulf Coast oil rig in 2010, are not convincing or even credible. Professor Stout herself does not even attempt to draw a link between the catastrophe and the theory of shareholder value maximization that she is attacking. Perhaps, like many academics, Professor Stout simply finds myths to be annoying and anti-intellectual. Perhaps it makes no sense to someone fervently trying to lead a "life of the mind" to indulge in myth, superstition, fantasy or any other way of viewing the world that is not firmly grounded in observable, demonstrable fact. I respectfully disagree. Many brilliant minds have spent long and productive careers exploring the nature, purposes, and effects of myths and legends. While it is true that ancient myths appear to be held in much higher regard than myths of more modern vintage, there is no a priori rule why this should be so.

As far as myths go, the myth of shareholder value maximization is perhaps my favorite among many appealing rivals. The Tooth Fairy is right up there in the running, though I think that there is significantly more support for and merit in the shareholder value myth than the Tooth Fairy myth. For a year or two though, my eight-year-old's embrace of the "Jewish Santa" myth probably will continue to dominate my own private hierarchy of myths.

Targeted Killings from Many Perspectives

TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD. Edited by Claire Finkelstein, Jens David Ohlin & Andrew Altman. Oxford, United Kingdom: Oxford University Press, 2012. 496 pages. $190.00.

Reviewed by Abraham D. Sofaer*

This collection of eighteen essays presents views on "targeted killing" from several scholars of law, philosophy, and ethics, along with those of some military lawyer/practitioners. Apart from minor editing deficiencies, it is a beautiful book: large, with print size that is easy on the eyes, and with sufficient space between lines of text to make the complex material at least visually digestible. It has useful tables of cases, instruments, legislation, and abbreviations, as well as an index. The essays are divided into an introduction (by Andrew Altman, Professor of Philosophy at Georgia State University) and five substantive categories to help the reader see the subject from specific perspectives, with inevitable overlap.

The premise of the book is that the attacks of al Qaeda on September 11, 2001 changed the view of the United States and other states on how to protect their civilians from attacks by persons who are not members of a regular military force.[1] Targeted killing has long been used in conventional warfare and in the course of self-defense.[2] In either context, killing members of an enemy's armed forces is permitted since every member of a conventional force engaged in armed conflict or in self-defense has the right to target and kill the other state's military forces for the purpose of defeating those forces or mounting an effective defense.[3]

Targeted killing (or other forms of attack) are not allowed under the law of war, however, against noncombatants,[4] and according to the International Committee of the Red Cross (ICRC), anyone who is not a combatant (generally anyone not in a uniform, wearing insignia, or armed) is presumed

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1. Andrew Altman, *Introduction*, *in* TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 1, 5 (Claire Finkelstein et al. eds., 2012).

2. *See* Mark Maxwell, *Rebutting the Civilian Presumption: Playing Whack-a-Mole Without a Mallet?*, *in* TARGETED KILLINGS, *supra* note 1, at 31, 34–36 (summarizing the history of targeted killings by the United States during and after the Cold War).

3. *Id.* at 31–32.

4. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (establishing provisions for humane treatment of noncombatants).

to be a civilian and not subject to attack.[5] This presumption is rebutted only during the time an individual is involved in "direct" hostilities, in which case such individuals may be attacked as an unprotected "belligerent."[6]

After the 9/11 attacks, the ICRC issued guidance in 2003, adopted in 2009, establishing for purposes of both international and noninternational armed conflicts the category of "organized armed group."[7] While this guidance creates a category of persons separate from civilians, seemingly analogous to a military force, individuals become members of such "armed groups" only if their "continuous function [is] to take a direct part in hostilities."[8] The first essays focus on who should be considered "non-combatants" in armed conflicts.

I. Targeting "Noncombatants"

Colonel Mark "Max" Maxwell argues in an essay entitled "Rebutting the Civilian Presumption: Playing Whack-a-Mole Without a Mallet?"[9] that the ICRC's recognition of a limited right to respond to attacks by "armed groups" of nonstate actors fails to give sufficient significance to a person's membership in a combat-related function in an organized armed group.[10] He would define noncombatant to exclude members of organized armed groups who perform combat-related functions.[11] These "unlawful combatants" would be subject to attack on the basis of their status just as if they were soldiers, subject to applicable proportionality requirements.[12]

Professor Jens David Ohlin reaches essentially the same conclusion in his essay "Targeting Co-Belligerents"[13] through a process he characterizes as "linkage."[14] He insists that the only terrorists that pose a real danger and that the United States should be authorized to attack are those associated with (i.e., linked to) an armed group.[15] He believes the ICRC's guidance on when members of an "armed group" may be targeted should be understood (or construed) to permit attacks on any individual who deliberately joins a group dedicated to jihad and who in addition carries out orders from the command structure of the group, including engaging in military operations, though not

5. NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 75–76 (2009).

6. *Id.* at 72–76.

7. *Id.* at 31–35.

8. *Id.* at 27.

9. *Maxwell*, *supra* note 2, at 31.

10. *Id.* at 50–54.

11. *Id.* at 56.

12. *Id.* at 46–49.

13. Jens David Ohlin, *Targeting Co-Belligerents*, *in* TARGETED KILLINGS, *supra* note 1, at 60.

14. *Id.* at 62–65.

15. *Id.* at 63.

necessarily at any discrete moment in time or on a continuous basis.[16] He recognizes that the criminal law model would require far less proof of "linkage" through the application of such concepts as conspiracy or complicity.[17] He advocates, instead, a modified military model as the doctrinal basis for rebutting the civilian presumption, seeing that model as most consistent with the preservation of civil liberties, given the absence on the battlefield of any opportunity to disprove "linkage" based on much looser standards.[18]

The next two essays address the same question of what evidence should be required to justify targeted attacks, but make no effort specifically to address which set of legal rules should apply. Professor of Philosophy Daniel Statman, who participated in drafting rules for the Israeli Defense Forces, addresses the issue "Can Just War Theory Justify Targeted Killing?"[19] by examining "three possible models": "individualist," "collectivist," and "contractualist."[20] He concludes that targeted killing is a legitimate means of warfare under all three of the models.[21] From the "individualist" perspective the method is justified for the same reason killing is justified in self-defense, so long as the individual targeted is morally responsible for posing an unjust threat to innocent lives.[22] Collectivist responsibility for attacks and the right to defend result from the practical necessity of conflicts between collectives, including organizations tightly enough organized to be seen to have adopted the common policy of conducting unjust attacks.[23] Contractualist regulation of conflict occurs when agreements among states govern conduct, and targeted killing should be allowed (indeed preferred to outright war) in such situations so long as the method is used against those behaving as combatants or those who materially support combat operations (including political leaders), regardless of efforts to obscure their status.[24] He suspects, based on the positive response to NATO's targeted attacks on Libyan forces, that many who oppose this method *in bello* are in actuality opposed to the underlying conflicts in which the method is used, not to the morality of the method itself.[25]

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16. *Id.* at 83–87.

17. *See id.* at 77 (observing that the "criterion of complicity is notoriously broad and meant to capture a wider scope of participation that plays some causal role in the criminal endeavor even if the causal role is somewhat attenuated") *see also id.* at 88 (noting that "in some jurisdictions [the case law on conspiracies] imposes stringent requirements on individuals seeking to leave a criminal organization").

18. *Id.* at 87–88.

19. Staman, *supra* note 2, at 90.

20. *Id.* at 95.

21. *Id.* at 110.

22. *Id.* at 95.

23. *Id.* at 96–97.

24. *Id.* at 97.

25. *Id.* at 111.

Professor Jeremy Waldron of NYU and Oxford also focuses on the morality of targeted killing, but he concludes the method should not be used. Waldron regards all killing as "murder," a rather nonneutral place to start given his claim to search for "neutral" principles.[26] He sees the law of war as a practical accommodation to the reality that the "murdering" in war would be even more extensive and brutal without *jus in bello* rules.[27] "Relaxing" those rules to permit more "murder," even of those he agrees are murderers who target civilians, would be a mistake[28] for three reasons: first, because it would give the murderers we target a ground for claiming they can target us; second, because we would apply the new license to kill in a biased and incompetent manner; and third, the "inherently abusive character of the attitude towards killing revealed by reasoning that," because we are allowed by principles we already have to kill some people then "surely, by the same reasoning, in our present circumstances of insecurity, there must be other people we are also allowed to murder."[29]

II. Normative Foundations: Law Enforcement or War?

The second set of essays in the book addresses what rules should apply to targeted killing. Jeff McMahan, Professor of Philosophy at Rutgers, examines the question in "Targeted Killing: Murder, Combat or Law Enforcement?"[30] He regards killing terrorists as "moral" when used for defense.[31] But he agrees with Waldron that targeted killing poses several dangers and concludes that law enforcement rules are best suited to limit that abuse because they require that suspects be arrested rather than killed (if possible), grant a presumption of innocence, impose a burden of proof beyond reasonable doubt, and extend many other protections, including a neutral fact-finding process that in the United States is controlled by independent judges and juries.[32] These protections must be suspended in some cases,[33] however, and in particular when the terrorists live, conspire, train within, and launch attacks from, a state that shelters them from arrest. When an "unusually dangerous terrorist" cannot be arrested with reasonable safety, the situation may be analogous to that of "a rampaging gunman who resists arrest," and who can therefore be killed under law enforcement

26. Jeremy Waldron, *Justifying Targeted Killing with a Neutral Principal?*, *in* TARGETED KILLINGS, *supra* note 1, at 113.

27. *Id.* at 116–18.

28. *Id.* at 129–30.

29. *Id.* at 131.

30. Jeff McMahan, *Targeted Killing: Murder, Combat or Law Enforcement?*, *in* TARGETED KILLINGS, *supra* note 1, at 135.

31. *Id.* at 136–37, 141.

32. *Id.* at 146–50, 154–55.

33. McMahan, *supra* note 30, at 147; *see also* Tennessee v. Garner, 471 U.S. 1, 11 (1985) (stating that there are times when it is not constitutionally unreasonable to inflict deadly force).

rules.[34] Ideally, he concludes, state law enforcement agencies should cooperate to make criminal enforcement effective, but where this is not possible, targeted killing pursuant to the law of war or new standards may be appropriate, at least on a "provisional" basis in case the risks of abuse cannot be contained.[35]

Claire Finkelstein, Professor of Law and Philosophy at the University of Pennsylvania (and the principal editor of the volume) contributes an essay entitled "Targeted Killing as Preemptive Action."[36] She regards targeted killing as generally indefensible under the law of war other than in actual combat in an armed conflict between conventional combatants.[37] She regards all members of organized armed groups as noncombatants unless they are in uniform, bear insignia, carry weapons, or are directly engaged in hostilities.[38] (At one point she even uses the phrase "noncombatant enemy force."[39]) She concludes that targeted killing can be justified morally and legally, but only as preemptive force under law enforcement standards when the individual targeted poses an imminent threat that cannot otherwise be effectively negated, and only after the state seeking to use force issues a threat to use force unless the individual planned to be targeted surrenders and the individual fails to surrender.[40]

Professor Richard V. Meyer of Mississippi College School of Law and Senior Fellow at the U.S. Military Academy at West Point's Center for the Rule of Law, considers existing rules and practices related to targeted killing unacceptable.[41] He asserts that, in order to preclude uncertainty and the improper extension of the rules related to the targeting of individuals not strictly combatants, any state seeking to use force should be required to "declare war" on a state, group, or individual.[42] The state against which war is thus declared, or in which the group or individual sought to be attacked is located, would be able to challenge the legality of any such declaration of war before the International Court of Justice (ICJ), which would apply the UN Charter's rules that allow the use of force only with Security Council approval or in self-defense against armed attack under Articles 2(4) and 51.[43] If the state challenging the declaration wins, then the declaration of war is deemed invalid and the state, group, or individual becomes legally immune

34. McMahan, *supra* note 30, at 146–48.

35. *Id.* at 155.

36. Claire Finkelstein, *Targeted Killing as Preemptive Action*, *in* TARGETED KILLINGS, *supra* note 1, at 156.

37. *Id.* at 162.

38. *Id.* at 163–64.

39. *Id.* at 160.

40. *Id.* at 181–82.

41. Richard V. Meyer, *The Privilege of Belligerency and Formal Declarations of War*, *in* TARGETED KILLINGS, *supra* note 1, at 183.

42. *Id.* at 186.

43. *Id.*; U.N. Charter art. 2, para. 4; *id.* art. 51.

from attack; if the ICJ upholds the declaration of war, the state is presumably subject to attack (though Meyer does not go into that), and if the proposed target is a group or individual the state must "intern" them (or him) unless and until such individuals agree to surrender.[44]

III. Targeted Killing and Self-Defense

The book's next section—focused on self-defense—begins with an essay by Professor Craig Martin of the Washburn University School of Law entitled "Going Medieval: Targeted Killing, Self-Defense and the Jus ad Bellum Regime."[45] He concludes that self-defense is limited to the right under Article 51 to respond to "armed attacks" by states,[46] and is therefore unavailable as a justification for targeted killing.[47] He acknowledges that the George W. Bush and Obama Administrations have relied on self-defense and that the Security Council recognized that the attacks of 9/11 gave rise to the right of self-defense,[48] but he rejects or attempts to distinguish those authorities, relying instead on ICJ rulings and the scholarly literature that ignores U.S. (and other state) practice on this issue.[49] To extend the right of self-defense to attacking nonstate actors within other states without consent would undermine the *jus ad bellum* regime adopted in the U.N. Charter[50] and lead, he predicts, to such unprincipled and dangerous results as using self-defense to attack regimes for the purpose of "preventing" as opposed to "preempting" attacks.[51]

Russell Christopher, Professor of Law at the University of Tulsa School of Law, writes on "Imminence in Justified Targeted Killing."[52] He reasons, using hypotheticals, that imminence is merely a proxy for other values when used to limit self-defense, and renders self-defense ineffective in many cases.[53] He sees this requirement as the "principal obstacle" for justifying targeted killings[54] (which seems dubious). He rejects as empirically

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44. Meyer, *supra* note 41, at 217.

45. Craig Martin, *Going Medieval: Targeted Killing Self-Defense and the* Jus ad Bellum *Regime*, *in* TARGETED KILLINGS, *supra* note 1, at 223.

46. *See* U.N. Charter art. 51 (affirming that nothing in the Charter "impair[s] the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . .").

47. *See* Martin, *supra* note 45, at 229, 247 (concluding that the government's self-defense justification for targeted killings is "not consistent with the principles of self-defense under the *jus ad bellum* regime" and referring to the *jus ad bellum* regime as being "of the U.N. system").

48. *Id.* at 239.

49. *Id.* at 240–42.

50. *See id.* at 227 (stating that the U.N. system's creation represented the culmination of a movement to bring legal limits to the use of force).

51. *Id.* at 243–44.

52. Russell Christopher, *Imminence in Justified Targeted Killing*, *in* TARGETED KILLINGS, *supra* note 1, at 253.

53. *Id.* at 257–60, 269.

54. *Id.* at 257.

unfounded the view that individuals or groups that have established an intention and ability to attack, and who will do so as secretly and suddenly as possible, pose a "continuing" imminent threat, as the U.S. and British governments have concluded.[55] He also rejects the view of other scholars that imminence is based on the political principle that force may be used in defense by a state only when some other, more neutral institution is unable to act.[56] He sees no value in preserving the concept, given the obligation to use force only when necessary.[57]

Phillip Montague, Professor Emeritus of Philosophy at Western Washington University, in his essay "Defending Defensive Targeted Killings,"[58] uses hypotheticals to support the view that attacks on individual terrorists are morally justifiable in situations that represent joint action by a community against the joint actions of the groups to which such terrorists belong.[59] Such attacks are not defensive, in his view, but nonetheless are justified as communal responses to aggression by groups, a rationale consistent with the criminal law concepts of conspiracy, aiding and abetting, or materially assisting a terrorist group.[60]

IV. Exercising Judgment in Targeted Killing Decisions

The next section of essays examines the need for, and existence of, processes for evaluating the propriety of targeted killings before they are undertaken. Amos N. Guiora, Professor of Law at the S.J. Quinney College of Law at the University of Utah, considers "The Importance of Criteria-Based Reasoning in Targeted Killing Decisions."[61] Having served in the Israel Defense Forces (IDF), Guiora bases his conclusions on actual experience in reviewing proposed attacks on particular individuals.[62] He notes the substantial increase in targeted killings, especially by the United States (largely with drones), and believes such attacks, even if lawful in principle as self-defense or military measures, must each be reviewed under pre-established criteria by an attorney rather than entrusted to the intuition of military commanders as are attacks in conventional combat.[63] The process on which he insists, and which is applied in Israel, is based on a formal

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55. *Id.* at 256–57.

56. *Id.* at 269–70.

57. *Id.* at 284.

58. Phillip Montague, *Defending Defensive Targeted Killings*, *in* TARGETED KILLINGS, *supra* note 1, at 285.

59. *Id.* at 285–87.

60. *See id.* at 294–99 (defining the "special" morality wherein force is justified against those who are not being "individually aggressive" because it is a joint attempt to stop a harm that another group has set in motion).

61. Amos N. Guiora, *The Importance of Criteria-Based Reasoning in Targeted Killing Decisions*, *in* TARGETED KILLINGS, *supra* note 1, at 303.

62. *Id.* at 307 & n.12.

63. *Id.* at 306–07.

"checklist" that looks at the propriety of the target (degree of danger, reliability of intelligence, timeliness) and the ability to hit the target while protecting innocent civilians and upholding the rule of law (proportionality, necessity, and judicial review).[64]

Professor Gregory S. McNeal of the Pepperdine University School of Law challenges the factual assumptions of critics of targeted killing in "Are Targeted Killings Unlawful? A Case Study in Empirical Claims Without Empirical Evidence."[65] He summarizes the "collateral damage methodology" (CDM) used by the U.S. military to screen targeted attacks based on "empirical data, probability, historical observations from the battlefield, and physics-based computerized models for collateral damage estimates."[66] Based on this process and the extensive evidence the United States has released on its military program, he rejects as unfounded criticisms and factual claims by several commentators, especially those of law professor Mary Ellen O'Connell, whom he accuses not only of baseless factual and policy speculation, but also of outright "false" assertions, particularly with respect to her claim of the lack of military training in the law of war.[67] He recognizes that, while the military's targeted killing program can be observed, the CIA program is covert, but he insists that "the onus should be on the critics to demonstrate" that "the CIA substantially departs from the military's collateral damage estimation and mitigation processes."[68] He does not explain, however, why critics should bear this burden, or why the lack of knowledge about the CIA's activities does not present a strong case for placing all such activities under military control, or at least explicitly under the military standards.

Kevin H. Govern, Associate Professor of Law at the Ave Maria School of Law, writes specifically about "Operation Neptune Spear: Was Killing Bin Laden a Legitimate Military Objective?"[69] He provides the most complete description of targeted killing in any of the volume's essays, including that of Bin Laden, and concludes that the latter was a "legitimate military target" (as the head of Al Qaeda, which attacked the United States and which Congress authorized the President to attack), and that the decision was "thoroughly considered" and reasonable even if it "lean[ed] towards targeted killing in lieu of a capture operation."[70] Govern sees targeted killing as having been established through practice and acceptance by all states, groups, and individuals other than "those allied or sympathizing with AQ" and "some

64. *Id.* at 307, 308 & n.12.

65. Gregory S. McNeal, *Are Targeted Killings Unlawful? A Case Study in Empirical Claims Without Empirical Evidence*, *in* TARGETED KILLINGS, *supra* note 1, at 326.

66. *Id.* at 329.

67. *Id.* at 341.

68. *Id.* at 333.

69. Kevin H. Govern, *Operation Neptune Spear: Was Killing Bin Laden a Legitimate Military Objective?*, *in* TARGETED KILLINGS, *supra* note 1, at 347.

70. *Id.* at 347–48.

academics."[71] He concludes that targeted killing is being accepted, "not just out of political pragmatism and military necessity, but as an emergent norm of customary international law."[72]

Professor of Law Kenneth Anderson of the Washington College of Law of American University (and a Visiting Fellow at the Hoover Institution) examines the narrow but important issue whether targeted killing is a form of "Efficiency in Bello and ad Bellum: Making the Use of Force Too Easy?"[73] Anderson makes clear the ways in which targeted killing and the use of drones differ, for example, because targeted killing can be conducted from other platforms than drones, and drones can be used for major, conventional attacks, not just targeted killings.[74] He doubts that the relative increased safety for some individuals involved in utilizing drones, along with that of civilians whose lives are spared by more discriminate means, is likely to have a major impact on U.S. government decisions to go to war, given the many other considerations that are taken into account.[75] Ultimately, however, he concludes that although targeted killing may make resort to force "easier," that does not establish that resort to force may or has become "too easy."[76] Most people would agree, he believes, that responding to terrorist threats earlier, because drones have made it easier to respond, rather than waiting for a massive attack such as on 9/11, is just.[77] And making humanitarian intervention easier could greatly reduce human suffering, and increasing the ability of states to attack armed rebels may deter unjust conflicts.[78]

V. Utilitarian Trade-Offs and Deontological Constraints

The final section of essays returns to the ends-versus-means discussions in some earlier papers. Fernando Tesón, the Tobias Simon Eminent Scholar at Florida State University, writes in "Targeted Killing in War and Peace: A Philosophical Analysis,"[79] that terrorism is a uniquely evil form of conduct when it consists of "principled evildoing," which he defines as the deliberate killing of civilians in a unjust cause (e.g., to impose a particular religious order).[80] He believes that targeted killing is legitimate in peacetime where it

71. *Id.* at 370.

72. *Id.* at 348.

73. Kenneth Anderson, *Efficiency* in Bello *and* ad Bellum*: Making the Use of Force Too Easy?*, *in* TARGETED KILLINGS, *supra* note 1, at 374.

74. *See id.* at 379–80 (explaining that drones are used in a range of military operations and that targeted killings can be carried out by human beings).

75. *Id.* at 381–86.

76. *Id.* at 395–97.

77. *Id.* at 398.

78. *Id.* at 399.

79. Fernando R. Tesón, *Targeted Killing in War and Peace: A Philosophical Analysis*, *in* TARGETED KILLINGS, *supra* note 1, at 403.

80. *See id.* at 419 (arguing that killings "in the name of Islam" are an example of principled evildoing).

will save many innocent lives, serve a public purpose that is "just," is only directed against "morally culpable" individuals, and is used only where no nonlethal option is available.[81] Nonetheless, because governments are not good at abiding by limitations and because of the appropriate revulsion for "premeditated" killing, he concludes that "targeted killing in peacetime should be, in principle, *legally* prohibited," allowing the political leader of a state to waive the prohibition to prevent a deadly terrorist attack, but requiring an explanation thereafter for the waiver.[82]

Michael Moore, Professor of Law and Philosophy at the University of Illinois, contributes "Targeted Killings and the Morality of Hard Choices."[83] He explains why making a moral judgment of targeted killing (or other actions by our governments) is proper and unavoidable, despite the difficulties of settling on standards for doing so.[84] Moore provides the standards he considers appropriate using the strengths of both pure "consequentialism" or "deontology" and settles on a "three-level analysis of ethics" consisting of applying (1) the consequentialist standard: would the action produce a better state of affairs or worse; and if so (2) the deontological standard: does some moral concern (e.g., deliberately killing an innocent person to save another) trump the possible achievement of a better state of affairs; and if so (3) does some potential catastrophe create a moral imperative to override the deontological "no-no"?[85] Moore recognizes the real-world impracticality of this process (which is far more complicated) and that decision makers will rely on their intuition, experience, and common sense.[86] But he hopes that his methodical approach to the moral issues leads practitioners to be more systematic in their implementation of such policies.[87] His application of the scheme, while based on seven questions, is essentially a set of intelligently formed opinions leading to the conclusion that targeted killings could be moral if they pass the tests in (1) and (2), but should not be allowed on the basis of (3) to avoid potential abuse.[88]

In the final essay, "Targeted Killing and the Strategic Use of Self-Defense,"[89] Professor of Law Leo Katz of the University of Pennsylvania School of Law addresses the morality of a government's deliberately creating

81. *Id.* at 405.

82. *See id.* at 430–33 (arguing that governments struggle to make the assessments necessary to determine whether a targeted killing is justified and that premeditated killing is "blameworthy").

83. Michael S. Moore, *Targeted Killings and the Morality of Hard Choices*, *in* TARGETED KILLINGS, *supra* note 1, at 434.

84. *See id.* at 436–37 (arguing that targeted killings create a moral dilemma and an ethical framework is needed to resolve moral dilemmas).

85. *Id.* at 447–55.

86. *Id.* at 440.

87. *Id.* at 466 (expressing hope that decision makers will "see the possibility of ordered, rational analysis").

88. *Id.*

89. Leo Katz, *Targeted Killing and the Strategic Use of Self-Defense*, *in* TARGETED KILLINGS, *supra* note 1, at 467.

situations in which it is able to claim that it is authorized to kill in self-defense, which he calls "strategic" use of such killing.[90] Katz seems to assume that the United States prefers to kill terrorists rather than arrest them, and that by encouraging terrorists to act out in some way that appears to put the United States in danger, it is able to justify killing them in what it claims is self-defense, an assumption made without any empirical basis. Nonetheless, Katz concludes that moral principles lead to the conclusion that, even "strategic" killings (when dealing with actual terrorists) are solidly based, because the law consistently (and perversely) disregards the moral considerations he finds troubling.[91]

VI. Critiques

Based on the summary above, it should be clear that a reader seeking a single, nonredundant and objective account of targeted killing should find another book. On the other hand, this collection of essays provides several original and useful treatments of various aspects of the subject.

One shortcoming of this collection is its failure to include a description of U.S. practice relevant to targeted killing, a failure endemic of most international law scholarship. The United States has consistently construed Article 51 of the U.N. Charter to preserve the "inherent" right to act in self-defense, which means "reasonably" on the basis of all the relevant circumstances.[92] Presidents have authoritatively construed "assassination" under the relevant Executive Order to mean "murder" or unlawful killing and not to include killings in self-defense or otherwise legally justified.[93] No U.S. administration would accept the claim that it has acted "preventively" against a state or terrorist group that has attacked the United States and openly threatens to attack again.

There is nothing "new" about the principle that a state is entitled to protect itself from attacks by terrorists from within another state if the latter is unwilling or unable to prevent those attacks.[94] International lawyers

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90. *Id.*

91. *Id.* at 480.

92. *See* Abraham D. Sofaer, *International Law and the Use of Force*, 13 NAT'L INT. 53, 53–57 (1988) (collecting four official statements confirming this view from two Republican and two Democrat administrations).

93. The Solf Lecture describing this view was cleared in advance by all relevant agencies. Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 116–21 (1989).

94. Eric Posner takes this position. *See* Kenneth Anderson, *Stop Presses: "Even Eric Posner Says Drone Strikes in Pakistan Are Illegal,"* LAWFARE (Oct. 9, 2012,) http://www.lawfareblog.com/2012/10/stop-presses-even-eric-posner-says-drone-strikes-in-pakistan-are-illegal (responding to Eric Posner, *Obama's Drone Dilemma*, SLATE (Oct. 8, 2012,), http://www.slate.com/articles/news_and_politics/view_from_chicago/2012/10/obama_s_drone_war_is_probably_illegal_will_it_stop_.html). Anderson reasonably suggests that Posner's motive in taking this unjustified position may stem from his skepticism about international law; the less sensible it looks, the more clearly it

dislike this requirement because it is "old," like the reasonableness standard for self-defense. Secretary of State Daniel Webster's letter to British Foreign Secretary Henry Fox in 1841, on which international lawyers so heavily rely as authority for the "imminence" requirement, informed the British that they were wrong that the United States was either unable or unwilling to prevent attacks on Canada by rebels from the United States, and therefore must not attack the rebels unless necessary to deal with an "imminent" rebel attack that the United States could not itself prevent.[95] In context, Webster's statement makes clear that had the United States been unwilling or unable to prevent the rebel attacks, the British would have been justified in doing so themselves.

Of course, any lawyer (or philosopher) is free to reject the U.S. government's positions on these issues; but to ignore them is to treat as irrelevant to the content of international law the statements and activities of nations that make that law.

A second, flawed assumption prevalent in most of the essays is that the law enforcement model is inadequate for dealing with terrorists, in that it limits deadly force to situations in which its use is "necessary" to save lives. In fact, as some of the essays recognize, deadly force may be used in law enforcement when it is "reasonable" to do so, not just when it is the only way of preventing the loss of innocent human life. It is also incorrect that law enforcement may only be exercised against individuals on the basis of their individual conduct, rather than their status. Law enforcement officials may use deadly force against individual members of gangs or co-conspirators on reasonable expectations based on the prior conduct of other gang members or co-conspirators.

Understating the utility of the law-enforcement model for dealing with terrorism can lead to unjustified claims that the more controversial law of war model is needed to provide adequate protection. That may be correct with regard to members of "armed groups," but in general it is the lack of jurisdiction to apply law enforcement rules that renders them inadequate, not their content. Understating the law enforcement model can also be used to create the impression that using deadly force against individuals who attack the United States from foreign states represents a departure from the manner in which the United States treats individuals in such situations domestically. U.S. law enforcement allows such individuals to be killed under any set of circumstances in which using deadly force would be reasonable. So, there is nothing morally incongruous about killing "murderers" in foreign countries who refuse to surrender, relative to the usual, law enforcement remedies for dealing with violent individuals. Therefore, both the law enforcement and

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is shown to be useless. Posner need not try so hard; international lawyers can be counted on to provide him with plenty of ammunition to prove his point.

95. Abraham D. Sofaer, *On the Necessity of Preemption*, 14 EUR. J. INT'L L. 209, 217–18 (2003).

the law of war models support targeting individuals who participate in killing American civilians. The problem in such situations is that the foreign states in which such individuals are located are unable or unwilling to arrest or surrender them. Rationalizations that attempt to justify treating them as immune from attack despite their indisputably immoral and criminal underlying conduct disregards this morally significant reality.

Targeted killings abroad have taken place exclusively in states that cannot or will not satisfy their obligation to prevent attacks on the United States from their territories. Three of these states have explicitly or implicitly consented to U.S. actions within their borders (Afghanistan, Pakistan, and Yemen). The targeted killings in Libya were part of NATO's humanitarian intervention in response to Libya's directly targeting its civilian population.[96] The need for targeted killing stems, not from an armed confrontation "between states and . . . the irregular forces of non-state groups and movements using terrorist methods to offset the otherwise overwhelming conventional forces arrayed against them."[97] Far more often, the nonstate groups involved are either serving the states from which they operate, or have the support and protection of those states. This reality underlies the significance given by victim states (and by the Security Council) to state culpability or responsibility for terrorist actions, even if the state cannot be shown to have used the terrorist group to conduct attacks. Why should this shift be seen as lawless and immoral, rather than a demand that states satisfy their sovereign obligations? Just as the U.S. response to Soviet aggression accelerated that evil empire's collapse, targeted killing will someday be seen as evidence of a shift that is bringing the world together under rules that deny irresponsible sovereigns the power to support conduct universally recognized as inhumane or criminally antisocial.

A major theme of those opposed to targeted killing is that rules permitting states to target individuals who are killing their nationals would reverse established rules necessary to reign in irresponsible and dangerous uses of force. The changes attacked, however, are either reversals of controverted limitations placed on long-standing powers, such as the "inherent" right of self-defense and the right to kill as war criminals individuals who participate in an armed conflict without distinguishing themselves from the civilian population, or result from a radical increase in the extent of harm that can be caused by noncombatant enemies who are supported rather than prosecuted by the states from which they operate. Governments may in fact abuse the broader authority they are determined to exercise in these respects. But the danger also exists that the failure of international law to recognize rules that enable states to protect themselves

96. Paul R. Williams & Colleen (Betsy) Popken, *Security Council Resolution 1973 on Libya: A Moment of Legal & Moral Clarity*, 44 CASE W. RES. J. INT'L L. 225, 225–28 (2011).

97. Altman, *supra* note 1, at 2.

against criminal attacks can leave such defensive actions essentially unregulated rather than integrated into an agreed legal regime.

The principal danger in the use of targeted killings, as in other international uses of force, lies in the fact that these attacks on human beings are not subject to the robust review contemplated in our Constitution by the other branches of the U.S. government and the public. This is especially true of the covert CIA program. If a parallel system of drone attacks is necessary in the CIA, despite the availability of military drones, it should be subject to the rules mandated for the military operation. (The same goes for interrogation methods.) If the Executive Branch is able secretly to target persons who are not members of an armed group without review by Congress or the courts, and without periodic public disclosure of the facts, that process will ultimately lead to improper and unjust actions. The U.S. system of checks and balances—nasty, partisan, and public—is what keeps abuse of power in check, and we should cling to this heritage even as we develop new defenses. Congress must establish rules and procedures for implementing and reviewing targeted killings to ensure they are conducted consistent with American constitutional values.

Property Taxes and Community Land Trusts: A Middle Ground*

When Robert Swann first articulated his new approach to land ownership in 1972, he described a system wherein the user owns any buildings or improvements he places on the land, but leases the land itself from a nonprofit entity. Swann and his associates labeled this arrangement a Community Land Trust (CLT).[1] In exchange for the user paying a monthly rental fee for the land, Swann envisioned that the trust would pay the property taxes as well as any other costs associated with the land.[2] Swann hoped this arrangement would allow young farmers to obtain land at a relatively low cost as well as afford them long-term security on the land even if property values rose.[3]

Although he initially created the model for rural communities, Swann and his colleagues eventually established a think tank—the Institute for Community Economics (ICE)—that applied the CLT model to affordable housing as well.[4] Early CLT models associated with affordable housing aimed to control the resale price of homes situated on CLT land in order to preserve class diversity in spite of gentrification.[5] While many communities strive to develop business, local amenities, and schools, these improvements result in higher property values and often displace the very people the improvements initially aimed to help.[6] The leaders of ICE saw their CLT model as a way to combat this problem.[7]

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1. *See* John Emmeus Davis, *Origins and Evolution of the Community Land Trust in the United States*, *in* THE COMMUNITY LAND TRUST READER 3, 17–18 (John Emmeus Davis ed., 2010) (discussing Swann's 1972 publication that proposed the CLT model); Robert Swann, *The Community Land Trust: An Alternative*, SCH. COOPERATIVE INDIVIDUALISM, http://www.cooperativeindividualism.org/swann-robert_community-land-trust-an-alternative-1982.html (explaining the CLT model).

2. Swann, *supra* note 1.

3. *Id.*

4. *What Are Community Land Trusts?*, NAT'L COMMUNITY LAND TR. NETWORK, http://www.cltnetwork.org/index.php?fuseaction=Blog.dspBlogPost&postID=1396; *see also A Biographical History of the Georgist Movement*, SCH. COOPERATIVE INDIVIDUALISM, http://www.cooperativeindividualism.org/georgists_unitedstates-sp-sz.html (noting that Robert Swann founded the Institute for Community Economics in 1968).

5. Davis, *supra* note 1, at 21–22.

6. *See, e.g.*, Sarah Ilene Stein, Comment, *Wake Up Fannie, I Think I Got Something to Say to You: Financing Community Land Trust Homebuyers Without Stripping Affordability Provisions*, 60

Today, there are approximately 200 communities that operate CLTs and over 5,000 CLT homes in America.[8] The presence of CLTs in America has rapidly expanded; indeed, "the number of CLTs nationwide has more than doubled in the last ten years."[9] Each CLT has a different focus and most, although staying true to the most basic tenets of Swann's model, have diverged significantly from Swann's initial conception. Perhaps most notable are the low number of CLTs—roughly 45%—that pay the property taxes for the land they own.[10] This omission almost always affects the affordability of housing located on CLT land and ultimately undermines one of the primary policies behind CLTs.[11] On the opposite end of the spectrum, other CLTs benefit from state laws or municipal ordinances that allow them to utilize their 501(c)(3) tax-exempt status or other legal avenues to avoid paying property taxes for the land they own altogether.[12] This arrangement decreases the tax revenue municipalities can spend on infrastructure and schools,[13] essential services to which low-income families that occupy CLT homes desperately need access.

This Note explores the challenge of maintaining the affordability of homes situated on CLT land while ensuring that schools and other taxpayer-funded social services do not suffer in communities with a significant CLT presence. Part I outlines the typical features and goals of CLTs in the context of affordable housing. Part II elucidates the impact rising property taxes can have on the affordability of CLT land, especially in gentrifying areas. Part III examines the range of approaches states and municipalities take when assessing the value of CLT land and begins to explore the effects of these approaches on municipal revenue. Part IV proposes applying a new tax structure that will temper the negative ramifications of both extremes discussed in the preceding parts of the Note and briefly concludes.

EMORY L.J. 209, 217 (2010) (acknowledging the fear the leaders of the Dudley Street Neighborhood Initiative had that this phenomenon would occur in their community).

7. *See* Davis, *supra* note 1, at 21–22 (calling the first urban CLT backed by ICE "a means for controlling the development and fate of an impoverished inner-city neighborhood").

8. *What Are Community Land Trusts?*, *supra* note 4.

9. *Id.*

10. *See* Yesim Sungu-Eryilmaz & Rosalind Greenstein, *A National Study of Community Land Trusts* 3 (Lincoln Inst. of Land Policy, Working Paper No. WP07YS1, 2007) (suggesting that 10% of CLT homeowners pay their property taxes directly to the locality and reporting that another 45% of CLT homeowners reimburse the CLT for the property taxes levied on the land on which their homes are built, which implies that a total of 55% of homeowners pay the property taxes on CLT land and therefore that the other 45% of CLT property taxes are paid by the CLTs themselves).

11. BURLINGTON ASSOCS. IN CMTY. DEV., LLC, PROPERTY TAXES AND COMMUNITY LAND TRUSTS 1.

12. *See, e.g.*, TEX. TAX CODE ANN. § 11.1827 (West Supp. 2012) (listing the requirements for a community land trust to avoid Texas property taxes).

13. *See* JOHN S. O'BRIEN, LEGIS. BUDGET BD., FISCAL NOTE, S. 82-402, Reg. Sess., at 1 (Tex. 2011) (explaining that a tax exemption for CLTs would have a fiscal impact on municipalities and counties).

I. An Introduction to the Community Land Trust Model

A. Structural Features

Although each CLT operates differently, most share certain core characteristics.[14] All CLTs are nonprofit,[15] community-based organizations.[16] These organizations acquire multiple parcels of land in a specific geographic area with the intention of owning the land in perpetuity.[17] They then lease the land to private parties via transferable ninety-nine-year ground lease agreements.[18] A separate entity—usually the lessee—owns the structures that sit atop the land.[19] Nevertheless, the ground lease enables the CLT to limit the purpose for which the lessee can use the land (i.e., the leases can stipulate that a house lot must remain a house lot) and to restrict the resale price of the home via a formula laid out in the lease.[20] This model theoretically "removes the cost of land from the housing price"[21] while still allowing the CLT to control the affordability of the homes associated with its land.[22]

Most CLTs strive to keep their operations local and tailored to the specific needs of the community in which they are located.[23] To that end, an even proportion of CLT leaseholders, residents of the community at large, and miscellaneous individuals including but not limited to local government representatives and private lenders sit on the board of the typical CLT.[24] Additionally, most CLTs have two groups of voting members—one including every one of the CLT's lessees and one representing any adult who lives within the "community" as defined by the CLT and who has an interest in joining the organization.[25]

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14. *What Are Community Land Trusts?*, *supra* note 4.

15. *Id.*

16. JOHN EMMEUS DAVIS, NAT'L HOUS. INST., SHARED EQUITY HOMEOWNERSHIP 19 (2006).

17. Sungu-Eryilmaz & Greenstein, *supra* note 10, at 10.

18. C. GEORGE BENELLO ET AL., BUILDING SUSTAINABLE COMMUNITIES 38 (2d ed. 1997). Although ninety-nine-year ground leases are used 95% of the time, the length of leases CLTs employ range from twenty to ninety-nine years. Sungu-Eryilmaz & Greenstein, *supra* note 10, at 3. Some state laws require a shorter lease term. DAVIS, *supra* note 16, at 18.

19. DAVIS, *supra* note 16, at 18.

20. BENELLO ET AL., *supra* note 18, at 38.

21. Sungu-Eryilmaz & Greenstein, *supra* note 10, at 6.

22. DAVIS, *supra* note 16, at 18.

23. *See, e.g.*, Sungu-Eryilmaz & Greenstein, *supra* note 10, at 9 (stating that each CLT surveyed was created as a response to specific needs in each community).

24. *Id.* at 22. Approximately 30% of CLTs have this "classic tri-partite board structure." *Id.* The remainder of CLTs vary in how they structure their boards. *Id.*

25. DAVIS, *supra* note 16, at 19.

B. *Common Objectives Among CLTs*

Virtually every CLT strives to achieve sustained affordability of housing.[26] Houses on CLT land are much cheaper than their conventional counterparts—often by margins of 70% or 75%—because buyers do not pay for the value of the land when they purchase their home.[27] Additionally, CLTs often subsidize the home purchase, especially in cases where outside parties have donated land to the CLT.[28] When the original buyer wants to sell his house, CLTs invoke the ninety-nine-year ground lease, limiting the amount at which lessees can resell their house, to protect affordability for the next buyer.[29] This mechanism is particularly effective because the lease lasts even if the CLT that created it dissolves.[30]

On a more global level, CLTs aim to shift the control of land from the hands of private developers to the shared community at large.[31] Indeed, commentators on affordable housing policy have long criticized developments that originate as affordable units in order to accumulate tax incentives and other perks, but are quickly resold in order to earn developers a high return on their investment.[32] Policy makers also lament the practices of many outside investors who acquire deteriorating buildings only to charge high rent to low-income families facing limited housing options.[33] CLTs, conversely, seek only the profits necessary to sustain their model.[34] Their primary goal is not to reap financial reward, but rather to facilitate "long-term community control of neighborhood resources."[35] To that end, the CLT model rewards individuals that work to economically develop their region by funneling the value they create to their own community instead of to disinterested outsiders.[36]

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26. *Id.* at 54; Sungu-Eryilmaz & Greenstein, *supra* note 10, at 9; *What Are Community Land Trusts?*, *supra* note 4.

27. *See* Benito Arruñada & Amnon Lehavi, *Prime Property Institutions for a Subprime Era: Toward Innovative Models of Homeownership*, 8 BERKELEY BUS. L.J. 1, 11 (2010) (noting that buyers of CLT houses pay an average of 25%–30% of the market price).

28. *Id.* at 12.

29. *Id.* at 9–10.

30. DAVIS, *supra* note 16, at 54.

31. *What Are Community Land Trusts?*, *supra* note 4 (identifying the universal mission of CLTs "to increase long-term community control of neighborhood resources" and "empower residents through involvement and participation in the organization").

32. *See, e.g.*, Peter W. Salsich, Jr., *A Decent Home for Every American: Can the 1949 Goal Be Met?*, 71 N.C. L. REV. 1619, 1640 (1993) (describing investor impatience and listing several legislative responses to combat such impatience and preserve low-income housing opportunities).

33. *Community Land Trusts: Why Use It?*, POLICYLINK, http://www.policylink.org/site/c.lkIXLbMNJrE/b.5136897/k.2C06/Why_Use_it.htm.

34. *See What Are Community Land Trusts?*, *supra* note 4 ("CLTs do not need additional subsidies each time the house resells.").

35. *Id.*

36. *About Community Land Trusts*, GROUNDSPARK, http://groundspark.org/our-films-and-campaigns/homehands/hh_about#lowincome.

In addition to monitoring affordability and cultivating community resources, CLTs also institute protections designed to help lessees succeed as homeowners. For example, CLT leases allow the corporation to step in and cure any default the homeowner may incur in order to help said homeowner avoid foreclosure.[37] CLTs also often require their prospective lessees to undergo financial training before obtaining a mortgage.[38] These trainings cover topics such as the credit options available to low-income homebuyers and the appropriate relationship between property value and loan amount.[39] This involvement on the part of CLTs has proven effective; in 2008, the foreclosure rate of CLT homes was 0.52% as compared with the national rate of 3.3%.[40]

C. *General Criticisms of the CLT Model*

Despite the benefits CLTs offer homebuyers, the model has its critics.[41] To begin with, the ground leases restrict the resale price homeowners can seek.[42] While this restriction preserves access to affordable housing for prospective homebuyers, it also limits the return homeowners receive on their investment.[43] CLTs often respond to this criticism by pointing out that their model provides a middle ground between leasing and owning.[44] Many CLT homeowners could not afford to own a house if they had to buy the land as well,[45] so the resale restrictions pose no greater an imposition on homeowners than if their economic constraints precluded homeownership in the first place. Furthermore, the resale restrictions do not eliminate homeowner profits entirely; most ground leases allow the original price to increase by 25% of any increase in the market value of the home.[46]

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37. DAVIS, *supra* note 16, at 19. Fannie Mae and the Institute for Community Economics have agreed to attach a rider to the Uniform Community Land Trust Ground Lease for mortgages that will be sold to Fannie Mae. JOSEPH L. MINNICH III & KEVIN R. HICKEY, FANNIE MAE GUIDELINES ON THE VALUATION OF A PROPERTY SUBJECT TO A LEASHOLD INTEREST AND/OR COMMUNITY LAND TRUST (CLT) 3 (2001). This rider will allow "for the removal of resale . . . restrictions that would hinder the mortgagee's ability to dispose of the property upon foreclosure." *Id.*

38. Arruñada & Lehavi, *supra* note 27, at 12.

39. *Id.*

40. *Id.* at 11. The Mortgage Bankers Association calculated these percentages in early 2009. *Id.*

41. *See* URBAN STRATEGIES COUNCIL, AN INTRODUCTION TO COMMUNITY LAND TRUSTS 2 (2007) (articulating common criticisms of the model).

42. DAVIS, *supra* note 16, at 19.

43. *Id.*; *see also Frequently Asked Questions*, SHARED EQUITY HOMEOWNERSHIP, http://www.homesthatlast.org/faq/ ("Shared equity homeownership programs maintain affordability by limiting the extent to which homeowners can profit from rising home prices. This limitation strikes some people as unfair.").

44. *See* Arruñada & Lehavi, *supra* note 27, at 11 ("The property product designed by CLTs is located at an intermediate point along the landownership/lease continuum. It divides the bundle of property rights between the individual homeowner and the land trust in an innovative manner, rather than opting for the conventional 'own all or nothing' strategy.").

45. *Id.* at 11–12.

46. *Id.* at 10.

Additionally, the CLT lease contains other potentially paternalistic provisions such as a prohibition on absentee ownership and limitations on the homeowners' ability to sublet their home.[47] CLTs may view these restrictions as necessary precautions to ensure homeowners do not receive a windfall by buying a price-controlled home and then renting it out at market rates.

Finally, most CLTs pass the property taxes for the land they own on to their lessees.[48] The goal of many CLTs to revitalize the community, which if achieved raises both the value of the land and very likely the property tax owed, makes their simultaneous commitment to permanent affordability a challenge.[49] To get a sense of the property tax consequences of economic development, a few examples are in order.

II. Gentrification and Its Impact on Property Taxes

When efforts to revitalize a community—a key undertaking of most CLTs—are effective, gentrification may occur.[50] Larry Keating defines gentrification "as the upward change in land use to middle and upper income residential."[51] As Ebenezer O. Aka points out, scholars characterize the higher property values that result from gentrification as a double-edged sword.[52] On one hand, high property values result in higher tax revenue, which in turn leads to economic benefits for the local neighborhood, municipality, county, and state.[53] On the other hand, however, these high tax rates mean that citizens have to pay a higher price for living in an improving area.[54] As Aka goes on to note, many long-term residents of gentrifying communities are unable to keep up with increasing property tax rates as property values begin to rise.[55]

The problem Aka identifies pervades communities throughout the nation. From 1990 to 2000, the median housing price in five gentrifying neighborhoods in Atlanta rose from $48,200 to $116,700.[56] In the Sawmill community of Albuquerque, New Mexico, property values increased from

47. DAVIS, *supra* note 16, at 19.

48. *See supra* note 10 and accompanying text.

49. BURLINGTON ASSOCS. IN CMTY. DEV., LLC, *supra* note 11, at 1.

50. Ebenezer O. Aka, Jr., *Gentrification and Socioeconomic Impacts of Neighborhood Integration and Diversification in Atlanta, Georgia*, 35 NAT'L SOC. SCI. J. 1, 2 (2010).

51. *Id.* at 1.

52. *Id.* at 2; *see also* ROWLAND ATKINSON, ESRC CTR. FOR NEIGHBOURHOOD RESEARCH, DOES GENTRIFICATION HELP OR HARM URBAN NEIGHBOURHOODS? AN ASSESSMENT OF THE EVIDENCE-BASE IN THE CONTEXT OF THE NEW URBAN AGENDA 7 (2002) (contrasting the benefits of gentrification such as increased property values and increased local fiscal revenue with the drawbacks such as displacement through rent and price increases).

53. Aka, *supra* note 50, at 2.

54. *Id.*

55. *Id.*

56. *Id.* at 6.

$1.05 per square foot of undeveloped land in 1995 to $4.10 per square foot about a decade later.[57] As the national research and action institute PolicyLink identified, rising property taxes have been a major challenge facing Albuquerque homeowners.[58] Indeed, these taxes tripled between 1995 and 2000.[59]

East Austin, Texas, is undergoing gentrification as well, and a CLT based there is working to contribute to the revitalization. The Guadalupe Neighborhood Development Corporation (GNDC) utilizes the CLT model[60] while "work[ing] for the improvement, revitalization and preservation of the residential neighborhood."[61] The GNDC operates exclusively in East Austin, a neighborhood that has experienced a meteoric rise in land value since 2000. Indeed, the City of Austin's Department of Planning found that "property value in East Austin's 78702 ZIP code increase[d] more than 100 percent from 2000 to 2005."[62] From 2003 to 2004 alone, land values surrounding the upscale condo installation Pendernales Lofts increased by as much as 70 percent.[63] East Austin residents have expressed concern that they will have to move because of increasing property values and the attendant increase in property taxes.[64] A 64-year-old lifetime resident of East Austin who lives two blocks from Pendernales Lofts said "her tax bill rose more than $200 as her property value jumped from $38,944 to $47,792" within the span of a year.[65] According to the Austin American-Statesman, "[t]he leap was almost entirely because of the increase in the value of her land, from $15,000 to $22,500."[66] Another family that lives a few doors down from the lofts say they may have to leave the home they have occupied for over three decades.[67]

These stories make clear that CLTs must address the problem of property taxes when exploring ways to sustain affordability and avoid gentrification-induced displacement. The next Part details the ways in which CLTs have attempted to handle this issue.

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57. *Community Land Trusts: Case Studies*, POLICYLINK, http://www.policylink.org/site/c.lkIXLbMNJrE/b.5136913/k.7B27/Case_Studies.htm#1.

58. *Id.*

59. *Id.*

60. *See* GUADALUPE NEIGHBORHOOD DEV. CORP., ANNUAL REPORT 6 (2010) (describing GNDC's plans to place property in East Austin in its land trust).

61. *Mission*, GUADALUPE NEIGHBORHOOD DEV. CORP., http://guadalupendc.org/?page_id=5.

62. Cate Smithson, *Extreme Makeover: Gentrification Transforms East Austin*, ABC NEWS (Apr. 27, 2009), http://abcnews.go.com/OnCampus/story?id=7399717&page=1#.T5buXZh1-fQ.

63. Jeremy Schwartz, *Urban-Style Condominiums Are Bringing Lofty Hopes, Fears of Gentrification to a Historically Latino Neighborhood*, AUSTIN AMERICAN-STATESMAN, May 5, 2005, at A1.

64. *Id.*

65. *Id.* at 3.

66. *Id.*

67. *Id.*

III. Current Approaches to the Taxation of CLT Land

Although property taxes play a significant role in determining whether a CLT model succeeds or fails,[68] outside forces limit most property tax choices available to CLTs. For example, CLTs must decide whether to pay their own property taxes or to pass the property taxes on to their lessees either directly or through a higher lease payment.[69] CLTs can only choose to absorb the cost of taxes on the land themselves if they receive enough outside funding. They usually rely on the same sources of funding as other affordable housing programs,[70] and this funding has been slashed in recent years.[71] Many CLTs would prefer to allocate the funding they receive to acquiring land that is capable of helping as many families as possible.[72] As a result, virtually all CLTs pass the property taxes levied on the land onto the homeowner.[73]

In an attempt to reign in property tax bills for their lessees, CLTs often try to influence the assessed value of their land.[74] To do this, however, CLTs must work within the confines imposed by their state or local government, and these parameters frequently undergo changes as courts, state agencies, and legislators take up the issue of what constitutes the appropriate level of taxation of CLTs.[75] State governments—and even local jurisdictions within each state—vary widely in their approach to this issue.[76] Individual localities conduct their own property value assessments, but some states step in and advise their localities on best practices when assessing the value of CLT land.[77] Other states directly legislate the matter.[78]

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68. *See* NAT'L CMTY. LAND TRUST NETWORK, *Property Tax Assessments*, *in* THE CLT TECHNICAL MANUAL ch. 17, at 1–5 (Kirby White ed., 2011) (emphasizing the role property taxes play in determining affordability and detailing the way that several CLTs address the issue).

69. *Id.* at 1.

70. *Community Land Trusts: Financing*, POLICYLINK, http://www.policylink.org/site/c.lkIXLbMNJrE/b.5136909/k.EAF3/Financing.htm.

71. *See, e.g.*, Blake Aued, *Congress Cuts Funding for Athens Affordable Housing*, ONLINE ATHENS, ATHENS BANNER-HERALD, http://onlineathens.com/local-news/2012-02-07/congress-cuts-funding-athens-affordable-housing (last updated Feb. 8, 2012) ("Federal funding for affordable housing in Athens will be cut nearly in half this year."); Peter Bodley, *Feds Slash Affordable Housing Funds*, ABC NEWSPAPERS (Mar. 19, 2012), http://abcnewspapers.com/2012/03/19/feds-slash-affordable-housing-funds/ ("The Anoka County Housing and Redevelopment Authority (HRA) Feb. 14 [sic] had 28 percent less in federal HOME (Home Investment Partnership Program) dollars to allocate this year compared with 2011.").

72. *See Community Land Trusts: Challenges*, POLICYLINK, http://www.policylink.org/site/c.lkIXLbMNJrE/b.5136905/k.1FF4/Challenges.htm (expressing appreciation for the $400,000 grant the Anti-Displacement Program gifted to the Portland Community Land Trust but lamenting the limited number of families the money would likely be able to help).

73. NAT'L CMTY. LAND TRUST NETWORK, *supra* note 68, ch. 17, at 1.

74. BURLINGTON ASSOCS. IN CMTY. DEV., *supra* note 11, at 2 (detailing a fight the Community Land Trust in Orange County is waging with local assessors).

75. NAT'L CMTY. LAND TRUST NETWORK, *supra* note 68, ch. 17, at 1.

76. BURLINGTON ASSOCS. IN CMTY. DEV., *supra* note 11, at 1.

77. NAT'L CMTY. LAND TRUST NETWORK, *supra* note 68, ch. 17, at 3.

78. *Id.*

This Part explores a sampling of approaches different states and localities take to the taxation of CLT land. It identifies which approaches facilitate the achievement of the overarching goals of CLTs and which approaches undermine those goals, while remaining mindful of the vital services municipalities rely on property tax revenue to provide.

A. Determination of CLT Property Taxation Conducted at a Local Level

Although several states do not have laws that require municipalities to factor the restrictions imposed on CLT land into the assessed value of the property, most of these states do not prohibit local assessors from doing so.[79] Illinois and Washington do not have any special tax legislation, but the state of Washington, for example, has "fairly widespread support from assessors in jurisdictions with price-restricted units."[80] Assessors in other states—such as New York—are less willing to modify property values because of CLT restrictions.[81] Below are some approaches localities with no state oversight take to CLT property taxation.

1. The Locality Levies No Taxes on the Land.—Some localities that lack state guidance direct their assessors to value CLT land at $0. Albuquerque, New Mexico, for example, takes this approach toward the land owned by Sawmill Community Land Trust.[82] When Sawmill CLT drafted its lease agreement in 2006, it indicated that it would bake the price of property taxes into the land lease fee that it charged its lessees.[83] The high property taxes in Albuquerque—indeed, property taxes tripled between 1995 and 2000—prompted Sawmill to negotiate with the tax assessor in an attempt to make its properties tax exempt.[84] The assessor responded favorably—Bernalillo County now assesses the net taxable value of Sawmill land to be $0 and cuts the value of the improvements atop the land to one-third of fair market value in order to calculate property taxes.[85] By way of example, the County

79. RYAN SHERRIFF, CTR. FOR HOUS. POLICY, SHARED EQUITY HOMEOWNERSHIP STATE POLICY REVIEW 14 (2010).

80. *Id.* at 14–15.

81. *See* David West, *Valuation of Community Land Trust Homes in New York State*, J. PROP. TAX ASSESSMENT & ADMIN., Oct. 2011, at 15, 22 ("[New York a]ssessors are unsure of the validity of the CLT model and don't know how to fit CLT homes into the prescribed property types and typical transaction models.").

82. BURLINGTON ASSOCS. IN COMM. DEV., *supra* note 11, at 2.

83. SAWMILL CMTY. LAND TRUST, LAND LEASE AGREEMENT 6 (2006).

84. *Community Land Trusts: Case Studies*, POLICYLINK, http://www.policylink.org/site/c.lkIXLbMNJrE/b.5136905/k.1FF4/Challenges.htm.

85. For an illustration of this valuation process, one can search the Bernalillo County records for a specific property, and then compare the land valuations in different years. *See Property Search*, BERNALILLO COUNTY, N.M., http://www.bernco.gov/property-tax-search/. For example, the 2006 and 2011 Notice of Values for 1028 19th Street NW show that the land was valued at $21,012 in 2006 and $0 in 2011. *2011 Notice of Values, 1028 19th St NW*, BERNALILLO COUNTY, N.M. (2012), http://www.bernco.gov/property-tax-search-result-details/; *2006 Notice of Values, 1028 19th St NW*, BERNALILLO COUNTY, N.M. (2012), http://www.bernco.gov/property-tax-search-

charged a parcel of Sawmill CLT land $898.70 in property taxes in 2006 and $0 in 2011 as a result of the county assessor's choice to value CLT land at $0.[86]

While CLTs in New Mexico laud the assessor's willingness to eliminate taxation on CLT land, this practice decreases revenue in a county that already spends more than it earns.[87] Indeed, the New Mexico Business Coalition estimated that the state of New Mexico needed $13 million in 2011 in order to comply with state laws requiring a balanced budget.[88] Because of this revenue shortage, the state asked Bernalillo County commissioners to raise property taxes an average of $30 on a $150,000 home.[89] Given this request, the County should reconsider the way it values CLT properties (indeed, the County lost $898.70 by valuing CLT property at $0 in the example above)[90] in order to rejuvenate its revenue stream and continue funding local services without adding to the state deficit.

2. The Locality Assesses Property Encumbered by CLT Restrictions Differently than Unencumbered Property.—Some local tax assessors acknowledge CLT restrictions when assessing the value of the property even though the state does not direct them to do so. Moraine Township in Illinois, for example, assesses the value of CLT homes based on the restricted resale price contained in the ground lease.[91] Section III(B)(2) of this Note addresses the impacts of such a practice in the context of the state uniformly imposing a modified valuation requirement on CLT property.

3. Local Jurisdictions Assess CLT Property at Fair Market Value.—In states that do not have specific legislation directing the tax assessment of CLT properties, local jurisdictions control the method of assessment.[92] As Ryan Sherriff of the Center for Housing Policy has noted, "Even if some assessors agree [to take shared equity restrictions into account when

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result-details/. The 2011 Notice of Values for the same property considered a third of the full value of the improvements as the taxable value. *2011 Notice of Values, 1028 19th St NW, supra.*

86. *Compare 2006 Tax Bill, 1028 19th St NW*, BERNALILLO COUNTY, N.M., http://www.bernco.gov/property-tax-search-result-details/ (assessing $898.70 in taxes on land and improvements), *with 2011 Tax Bill, 1028 19th St NW*, BERNALILLO COUNTY, N.M., http://www.bernco.gov/property-tax-search-result-details/ (assessing $1,226.64 in taxes on improvements and $0 on land).

87. *See* Press Release, N.M. Bus. Coal., Bernalillo County Commission Weighs Tax Increase (Sept. 20, 2011), *available at* http://www.nmbizcoalition.org/Weekly_Emails.aspx (noting that county commissioners "faced . . . more government expenses than there [was] revenue" in 2010 and 2011).

88. *Id.*

89. *Id.*

90. *See supra* note 86.

91. SHERRIFF, *supra* note 79, at 15.

92. *Id.* at 14–15.

assessing property values], others may not follow suit, creating a potential barrier for price-restricted, shared equity homes."[93]

New York, for example, does not have a state law guiding property value assessment of CLTs.[94] In fact, the Appellate Division of the New York Supreme Court in *In re 78 South First Street Housing Development Fund Corp. v. Commissioner of Finance of New York*[95] held that assessors need not factor certain limited restrictions into their property valuation analysis.[96] In arriving at this decision, the court reasoned that the legislature would have included a provision urging value modification had it wanted to require assessors to take that course of action.[97] The New York State Department of Taxation and Finance issued a related opinion three years after *78 South First Street*, which ruled, "In determining the assessed value of a single family residence, an assessor is not bound by an impermanent restriction on resale price voluntarily agreed to by a recipient of a federal subsidy paid to a low or moderate income buyer of such a residence."[98] While this opinion does not directly reference CLT property, the phrase "impermanent restriction" applies to CLT property,[99] thus paving the way for assessors to refuse to adjust property values for CLT land.

Due to the paucity of legislative guidance, assessors in New York municipalities are largely left to their own devices.[100] David West contacted assessors charged with valuing CLT property in New York to get a sense of how they respond to this freedom.[101] He found that some assessors do take the restrictions CLTs place on property into account; they liken the resale restrictions "to an easement or other restrictive covenant that an informed buyer would consider in [the] sale price."[102] West spoke with other assessors, however, who did not assess CLT property differently than regular residential property.[103] These assessors expressed two main concerns. First, they worried that CLTs imposed "undue influence on the sale" and that buyers may not have acted "prudently or knowledgeably" when purchasing a

93. *Id.* at 15.

94. Carla J. Robinson, *Valuation and Taxation of Resale-Restricted, Owner-Occupied Housing* 21 (Lincoln Inst. of Land Policy, Working Paper WP08CR1, 2008).

95. 616 N.Y.S.2d 405 (N.Y. App. Div. 1994).

96. *Id.* at 405.

97. *Id.* at 408–09.

98. OFFICE OF REAL PROP. TAX SERVS., N.Y. DEP'T OF TAXATION & FIN., VOL. 10, OPINIONS OF COUNSEL SBRPS NO. 34 (1997).

99. *See id.* (discussing New York's tax assessment laws as they apply to low-income housing properties, such as those started by the Housing Action Coalition).

100. *See* West, *supra* note 81, at 20 ("The de facto policy is that assessors can, and in some cases do, consider resale restrictions in assessment, but if the assessor does not, CLTs' homeowners cannot force consideration.").

101. *Id.*

102. *Id.*

103. *Id.*

home on CLT land.[104] Second, they expressed concerns that appraising CLT land lower than unencumbered land would affect the value of other properties in the neighborhood.[105]

John Emmeus Davis conducted a hypothetical analysis to illustrate the gravity of situations where assessors value CLT property at fair market rates.[106] In that analysis, Davis presented a house valued at $210,000 that a shared-equity scheme that functions similarly to a CLT enabled a low-income individual to buy for $85,000.[107] If the house appreciated at a rate of 7% per year, Davis calculated that the house would be worth $295,000 in five years.[108] Because of the restrictions incorporated into the typical CLT ground lease, however, the buyer may only be able to sell the house for $94,000 after those same five years.[109] In light of this analysis, Davis emphasized,

> If the municipal assessment of her property does not take into account either its below-market purchase price or its restricted resale price, the homeowner will be taxed as if 100% of this value belonged to her. By her fifth year of occupancy, in this particular case, she would be forced to pay property taxes on $201,000 of value she does not own.[110]

This example illustrates that high tax rates imposed on CLT land pose a significant challenge to affordability for many low-income individuals, thereby undermining a primary goal of the CLT model.[111]

B. State Legislation of CLT Property Taxation

In light of the risk that the municipal tax assessor may not value CLT land differently than unencumbered land, thereby jeopardizing the affordability of CLT property, many states have passed laws requiring each municipality to value CLT land in a specific, uniform way. Below are some forms such legislation assumes.

1. Exemption.—Several states have enacted laws that make property owned by a CLT tax-exempt. For example, the 2011 session of the Texas legislature passed a bill that requires municipalities to offer such an

104. *Id.*
105. *Id.*
106. DAVIS, *supra* note 16, at 85.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *See id.* ("At a certain point, no matter how affordable the cost of purchasing these resale-restricted homes may have been, taxes that are pegged to the property's market value will render the cost of holding these homes unaffordable for persons of modest means.").

exemption.[112] Specifically, the law states that organizations are entitled to a real property tax exemption if they meet the following requirements: (1) the organization is exempt from federal taxation under Section 501(a); (2) a majority of the board of directors of the organization have their primary residence in the state; and (3) at least two of the board positions are reserved for a low-income individual residing in the state, an individual whose residence is located in a low-income area, or a representative appointed by the organization who represents low-income individuals.[113] Additionally, the law mandates that the appraiser use a specific method for appraising the restricted property "regardless of whether the chief appraiser considers that method to be the most appropriate method of appraising the property."[114]

The fiscal analysis that accompanied the introduction of the bill does not attempt a detailed analysis of the potential impact the bill could have on municipal revenue. The analysis merely notes, "There could be a fiscal impact to a municipality or a county that created or designated community land trusts, but the amounts would vary depending on the number of property tax exemptions granted and the value of the optional exemptions."[115] The analysis goes on to express the assumption that a municipality will not offer property tax exemptions if it could not afford to do so.[116] This assumption suggests that the ability of municipalities in Texas to offer exemptions that will help CLT homeowners afford their homes is limited by their capacity to generate enough revenue to operate the services for which they are responsible.

2. Modification of CLT Land Valuation Scheme.—Some states have enacted laws that entitle CLT land to a unique property-valuation scheme stipulating how the CLT's restrictions should impact the assessed value of its land. For example, North Carolina enacted a law in 2009 that dictates a special appraisal method for assessors to employ on CLT land.[117] To qualify as a CLT under this statute, the organization must be a nonprofit housing development entity with 501(c)(3) status that transfers its property to a qualifying owner.[118] The CLT must possess the characteristics described in subpart I(A) of this Note: it must retain an interest in the property pursuant to

112. *See* TEX. TAX CODE ANN. § 11.1827 (West Supp. 2012) (providing specific requirements that CLTs must satisfy to be entitled to tax-exempt status); *see also id.* § 11.1825 (providing additional requirements CLTs and all organizations constructing or rehabilitating low-income housing must satisfy to be entitled to tax-exempt status).

113. *See id.* § 11.1825(b) (listing these requirements, as well as that the organization has a purpose of providing low-income housing, has met the requirements of a charitable organization, and has a formal policy for communicating with the project's households).

114. *Id.* § 11.1825(q).

115. JOHN S. O'BRIEN, LEGIS. BUDGET BD., FISCAL NOTE, S. 82-402, Reg. Sess., at 1 (Tex. 2011).

116. *Id.*

117. N.C. GEN. STAT. § 105-277.17 (2011).

118. *Id.* § 105-277.17(b)(1).

a ground lease for not less than ninety-nine years, and it must include resale restrictions that limit the price for which homeowners can sell the improvements atop its land.[119]

If the entity qualifies as a CLT pursuant to the above requisites, the statute spells out a specific valuation scheme property-value assessors must employ.[120] The statute terms the first appraisal after a property is classified as CLT land the initial investment basis, which the statute defines as "[t]he most recent sales price, excluding any silent mortgage amount, of community land trust property."[121] It then decrees that subsequent reappraisals may not exceed the sum of the initial investment basis and the capital gain allowed in the CLT's ground lease.[122]

Provided that the fair market value of the land exceeds this statutory cap, the valuation scheme lowers the value of CLT land for property tax purposes.[123] The General Assembly of North Carolina conducted a study in association with the bill in order to ascertain the extent of the scheme's impact on municipal revenue.[124] The study identified three community land trusts in North Carolina that would qualify under the statute: Durham Community Land Trust, Orange Community Housing and Land Trust (which has since been renamed Community Home Trust),[125] and Cape Fear Housing Land Trust.[126]

At the time of the study, the Orange Community Housing and Land Trust owned 135 properties—127 in Chapel Hill and 8 in Carrboro—that were subject to property taxes.[127] The trust estimated that the assessed values would drop an average of $36,449.30 in Carrboro and $9,970.13 in Chapel Hill.[128] As demonstrated by the chart below, this decrease in value would cause a total tax loss of $28,571.48 to the taxing entities affected, which includes a loss of $3,593.02 in revenue for the Carrboro–Chapel Hill School District.[129]

119. *Id.* § 105-277.17(b)(2), (7).

120. *Id.* § 105-277.17(c).

121. *Id.* § 105-277.17(b)(5), (c).

122. *Id.* § 105-277.17(c).

123. MARJORIE RUTHERFORD, FISCAL RESEARCH DIV., LEGISLATIVE FISCAL NOTE, H. 2009-481, Gen. Sess., at 2 (N.C. 2009).

124. *Id.* at 1–3.

125. *About Us*, COMMUNITY HOME TR., http://communityhometrust.org/about-us/.

126. MARJORIE RUTHERFORD, FISCAL RESEARCH DIV., LEGISLATIVE FISCAL NOTE, H. 2009-481, Gen. Sess., at 2 (N.C. 2009).

127. *Id.*

128. *Id.*

129. *See id.* at 3 (breaking down the tax revenue lost by each affected entity that, when added together, totals $28,571.48).

Potential Impact of CLT Valuation Scheme on Municipal Revenue[130]

Local Taxing Entity	Tax Rate (per $100)	Total Drop in Value	Total Tax Loss
Orange County	$0.998	($1,562,181.92)	($15,590.58)
City of Carrboro	$0.686	($295,917.00)	($2,030.88)
City of Chapel Hill	$0.581	($1,266,264.92)	($7,327.00)
Carrboro–Chapel Hill School District	$0.230	($1,562,181.92)	($3,593.02)

To put the lost revenue to the school district in perspective, for the 2009–2010 fiscal year, the Orange County Board of Commissioners projected that it would allocate $3,096 per student to Chapel Hill Carrboro City and Orange County Public Schools.[131] The Board also reported that the Carrboro–Chapel Hill schools would receive a total of $18.7 million from the special district tax during the 2009–2010 fiscal year.[132] Finally, the Board noted that revenue losses from the prior year did not result in a decrease in school funding,[133] which demonstrates at least some commitment to maintaining school funding levels despite fluctuations in revenue and ultimately suggests that the modified valuation does not lower property tax revenue in a way that municipalities cannot afford.

3. State Legislation Adjusting Property Taxes Based on Income.—Some states limit property tax amounts for individuals below a certain income threshold. These limitations end up applying to most CLT homeowners because of the income restrictions CLTs place on parties interested in leasing CLT land.[134] Vermont incorporated such a limitation into a comprehensive education act entitled the Equal Educational Opportunity Act of 1997.[135] In Vermont, public education is funded by a combination of state grants and a homestead property tax.[136] Homestead property taxes comprised approximately $312 million of the state's total education budget for fiscal year 2007.[137] Despite the continued need for property tax revenue to round out

130. *Id.*

131. Orange Cnty. Bd. of Comm'rs, Minutes of May 26, 2009 Budget Public Hearing 3 (Aug. 18, 2009).

132. *Id.*

133. *Id.* at 1.

134. *See, e.g.*, SAWMILL CMTY. LAND TRUST, *supra* note 83, at 14–15 (stipulating that the income of CLT lessees must be less than a certain percentage of the median income in order to qualify to purchase a home atop CLT land).

135. *See* Equal Educational Opportunity Act of 1997 § 51, 1997 Vt. Acts & Resolves 279, 320–24 (codified as amended at VT. STAT. ANN. tit. 16, §§ 6061–66 (2004)) (detailing the Homestead Property Tax Income Sensitivity Adjustment provisions of the Act).

136. VT. DEP'T OF EDUC., OVERVIEW OF VERMONT'S EDUCATION FUNDING SYSTEM UNDER ACT 68 & ACT 130, at 2 (2006).

137. *Id.*

the state's education budget, the Act's establishment of state education block grants supplements local property tax revenue[138] thus allowing municipalities to adjust property taxes for low-income individuals downward without depleting the school district's funding.

The Vermont Legislature crafted the Act in response to the Vermont Supreme Court's holding in *Brigham v. State*,[139] which interpreted the Vermont Constitution as requiring that students in the state receive equal access to education revenues.[140] Indeed, the Constitution reads, "Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth."[141]

The court's opinion in *Brigham* recognized that Vermont school districts derive funding from two sources: funds raised from property taxes levied by cities or towns "and funds distributed by the state."[142] It identified as a problem the fact that the state only supplements funding to the extent that it enables districts to provide "a minimally adequate education program."[143] As a result of this structure, only wealthier districts can generate the property tax revenue necessary to provide enough funding for each student to receive a constitutionally minimally adequate education.[144] The court reasoned that wide disparities in student expenditures "correlate generally with taxable property wealth within" each school district in the state[145] and ultimately urged the legislature to remedy these disparities via legislative reform.[146]

The basic contours of the resultant Act operate as follows. Part I calls for equal education for all students.[147] Specifically, it develops plans to promote public school quality, prepare and professionally develop educators, and coordinate budgeting across programs that already contribute to school revenue such as the Department of Education and the Agency of Human

138. VT. STAT. ANN. tit. 16, §§ 2948(c), 2961, 4011 (2004).

139. 692 A.2d 384 (Vt. 1997).

140. *Id.* at 386; *see also* Equal Educational Opportunity Act of 1997 § 165, 1997 Vt. Acts & Resolves 279, 287–89 (codified as amended at VT. STAT. ANN. tit. 16, §§ 4000–03, 4010–16, 4025–29 (2004)) (instructing the State Board of Education to develop funding mechanisms that respond to the Supreme Court's holding in *Brigham*).

141. VT. CONST. ch. II, § 68.

142. *Brigham*, 692 A.2d at 387–88.

143. *Id.* at 388.

144. *See id.* at 389–90 (holding that the funding system's reliance on local property taxes violated the state's constitutional guarantee of equal educational opportunities).

145. *Id.* at 389.

146. *Id.* at 386.

147. VT. STAT. ANN. tit. 16, § 1 (2004).

Services.[148] Parts II through XIII address funding. These sections discuss basic education funding and emphasize that state block grants will be provided to equalize school districts' capacity to provide the same amount per pupil regardless of the local tax base.[149] More specifically, the Act creates general state support grants for each equalized pupil[150] and mandates annual disclosure of the local share property tax percentage the district intends to collect if education spending exceeds the state's grant.[151]

Despite the residual reliance on property taxes this Act requires, it still preserves funding for every pupil without levying unaffordable property taxes on low-income families. Indeed, Part VII of the Act awards a property tax credit to claimants whose annual household income does not exceed $47,000.00.[152] The credit equals the amount of taxes paid in excess of a graduated percentage of household income.[153] As mentioned above, the income brackets usually correspond with income restrictions CLTs impose on their lessees,[154] which means that these tax credits apply to most CLT homeowners. The chart below illustrates the income brackets that receive a tax credit and the percentage of household income a claimant in each bracket must pay before receiving a tax credit for the taxes that exceed that amount.

Threshold Percentage of Tax Credit by Household Income[155]

Household Income	Credit for Property Tax Paid in Excess of This Percent of Household Income
$0–$9,999.99	2
$10,000.00–$24,999.99	4.5
$25,000.00–$47,000.00	5

Municipalities in Vermont have responded favorably to the Act. In 2009, Springfield, Vermont, issued a town plan that lauds the Act's role in "benefit[ing] the Springfield School District by providing a source of funding beyond the local property tax."[156]

148. *See id.* tit. 16, § 165 (listing standards of quality for public schools that include annual action plans to improve student performance by providing professional development); 1997 Vt. Acts & Resolves 279, 285–86 (promoting unified budgeting).

149. VT. STAT. ANN. tit. 16, §§ 2948, 2961, 4000, 4011, 4027 (2004 & Supp. 2011); *id.* tit. 32, § 5402 (Supp. 2011).

150. *Id.* tit. 16, § 4011 (Supp. 2011).

151. Equal Educational Opportunity Act of 1997 § 4027, 1997 Vt. Acts & Resolves 279, 294–95. This provision was enacted into law but later repealed. VT. STAT. ANN. tit. 16, § 4027(a) (2003) (repealed 2004).

152. VT. STAT. ANN. tit. 32, § 6066 (2008).

153. *Id.*

154. *See supra* note 134 and accompanying text.

155. VT. STAT. ANN. tit. 32, § 6066 (2008).

156. SPRINGFIELD PLANNING COMM'N, SPRINGFIELD TOWN PLAN 36 (2009).

Despite this acknowledged benefit, however, Springfield's plan also highlights the strain the municipality faces. A study conducted by Applied Economic Research of Laconia, New Hampshire, and cited in the Springfield plan indicates that Springfield's comparatively weak manufacturing market causes the area to lose residents to "more prosperous areas in Vermont and New Hampshire."[157] Since the town receives a specific amount of revenue for every student attending Springfield schools pursuant to the Act, the town's declining population (and by extension, declining school enrollment) means that the school expects to "see less funding for maintenance and improvements."[158] In response to this anticipated problem, the Springfield plan ultimately calls for "[e]nsur[ing] that new housing projects pay their fair share of property taxes" and, until a "fair share housing study" can be conducted, hold off on building all assisted housing units.[159] This final recommendation suggests that requiring uniform funding for every student in the state of Vermont places enough financial strain on Springfield to dissuade the city from engaging in affordable housing initiatives that cannot contribute their fair share to the tax base.

IV. Model Proposal

In light of the benefits and drawbacks of the above approaches, this Part advocates for a model CLT taxation code that strikes a better balance between maintaining affordability and contributing to the improvement of property tax-funded municipal services. The unpredictability of local assessing tendencies in the absence of state legislative oversight indicates that a comprehensive state law is preferable to a locality-by-locality approach.[160] Indeed, a statewide approach can provide for the establishment of a uniform formula for CLT property tax rates that will allow the state to know ahead of time the revenue that a given municipality will generate and thus the supplementary funding (in the form of state block grants) municipalities will require to compensate for the tax breaks they give to CLT land. The proposal that follows, therefore, draws upon a combination of the approaches taken by Vermont and North Carolina. It advocates for a specific formula for determining the assessed value of CLT property while also providing state block grants to ensure that the equality and adequacy of funding for each public school student does not depend entirely upon municipal property tax revenue.

157. *Id.* at 28.
158. *Id.* at 36.
159. *Id.* at 30–31.
160. *See supra* section III(A)(3).

A. *Create a State Budget for Block Grants Ensuring Equality of Basic Education Funding for Every Public School Student*

States should create grants that supplement local property tax revenue and aim to equalize funding for every public school student in the state no matter the wealth of the student's school district. Under Part VIII of the Vermont statute, the state appropriated $750,000 annually as a state grant in lieu of property taxes.[161] The state amasses the revenue to cover this appropriation via state taxation such as a corporate income tax,[162] bank franchise taxes,[163] a telecommunications service charge,[164] meals and room tax,[165] gasoline tax,[166] and sales tax.[167] The limited revenue Vermont can generate through these taxing mechanisms imposes an obvious cap on the effectiveness of this approach. Indeed, as the Springfield, Vermont, Town Plan recognizes, this funding allotment cannot eliminate the need for property tax-based school funding entirely.[168]

Despite these limitations, however, establishing a grant program would lessen a school district's reliance on property tax revenue (indeed, municipalities could rely at least in part on state block grants rather than property tax revenue to fund their public education systems) and consequently afford the local taxing entity the ability to adjust the assessed value of CLT property downward. As mentioned above, Springfield has voiced its appreciation for the relief the grant program has provided from its overreliance on property taxes to fund its schools.[169] Springfield also noted that it would benefit more from the grant program if it could improve the quality of life in its community, which would attract additional residents and consequently additional state grant money.[170] The limitations in funding a state block grant can provide, therefore, should not stop states from adopting this approach as a partial solution to localities resisting CLTs because of the impact those CLTs will have on their property tax revenue.

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161. *See* VT. STAT. ANN. tit. 32, § 3702 (2008) (providing that "[t]he secretary of administration shall determine annually the amount of payment due, as a state grant in lieu of property taxes, to each municipality in the state in which is located any state-owned property"); *see also id.* tit 32, § 3703(c) (adding that "[t]he total of any grants under subsection (a) of this section for buildings owned by the University of Vermont and State Agricultural College shall be limited to a maximum of $750,000.00").

162. *Id.* § 5832.

163. *Id.* § 5836.

164. *Id.* § 9771.

165. *Id.* §§ 9241, 9242.

166. *Id.* tit. 23, § 3106 (2007).

167. *Id.* tit. 32, §§ 8903, 9771–73 (Supp. 2011); *id.* § 9774 (2008).

168. *See supra* notes 156–59 and accompanying text.

169. *See supra* note 156 and accompanying text.

170. *See* SPRINGFIELD PLANNING COMM'N, *supra* note 156, at 27, 32 (emphasizing the need to address issues other than housing in order to keep people with moderate to higher incomes in town and recognizing the connection between a higher school-aged population and state grant money).

B. *Institute a Property Valuation Scheme for CLT Land That Takes the Restrictions Imposed by the CLT Arrangement into Account*

In addition to adopting a state block grant program akin to that of Vermont's, states should also impose a specific CLT property-valuation scheme like that of North Carolina. As noted above, North Carolina projected that its special CLT property valuation scheme would only take $3,593.02 away from the Carborro–Chapel Hill School District annually.[171] The scheme would therefore lessen the burden of property taxes on CLT lessees while still accumulating some revenue from these properties to benefit the school district. As explained above, the North Carolina Legislature knew exactly how many CLTs were present in the state when they considered the bill, and the legislature was able to calculate the exact amount of revenue municipalities would forgo if they provided CLT land with the proposed tax break.[172] The state block grants should help supplement the slight deficit in property tax revenue created by adjusting the assessed value of CLT property to account for the restrictions CLTs place on the property. By combining Vermont's block grants with North Carolina's modified property tax formula for CLT land, therefore, states could follow North Carolina in compiling a list of all the CLT properties in each municipality, calculate ahead of time how much revenue municipalities would forgo by creating a special tax rate for such properties, and create a block grant, as Vermont does, equal to the amount of the projected loss. Since the amount of the block grant would be necessarily limited by the amount of revenue the state can generate via other methods of taxation—corporate income tax, bank franchise tax, telecommunications service charge, meals and room tax, gasoline tax, and sales tax in Vermont's case[173]—the state should lower the statutory tax rate municipalities impose on CLT land only to the extent that it can afford to provide municipalities with the difference in revenue via its block grant. Ultimately, this modified valuation scheme will impact municipal revenue less drastically than a complete exemption would, which, as the study accompanying the Texas statute creating a complete exemption stated, will help localities afford to approve more CLT properties within their borders.[174]

C. *Capture the Revenue Generated by Sustained School Excellence and Community Improvement*

It is important to keep in mind that CLTs often either work to revitalize and improve the communities in which they locate or buy land in communities that are experiencing gentrification already. As mentioned

171. *See supra* note 129 and accompanying text.
172. *See supra* notes 124–31 and accompanying text.
173. *See supra* notes 162–69 and accompanying text.
174. *See supra* note 110 and accompanying text.

earlier in the Note, the Guadalupe Neighborhood Development Corporation buys land in East Austin where property values rose 100% from 2000 to 2005[175] and the Sawmill Community Land Trust buys land in Albuquerque where property taxes tripled from 1995 to 2000.[176] If CLTs achieve their goal of revitalizing downtrodden areas, the property values will likely increase and the positive aspects of gentrification—namely increased municipal revenue[177]—will outweigh the small impact the relatively few CLT properties in a community have on overall property tax revenue.

V. Conclusion

States need to impose lower tax rates on CLT land in order to facilitate the CLT mission of preserving permanent affordability for homeowners even as their community improves and gentrifies. At the same time, states must be mindful that property taxes help municipalities fund education, and that municipalities cannot afford to lower taxes on CLT land if doing so will adversely affect their already-depleted public education budget. Hopefully, by instituting state block grants and statewide CLT property-valuation schemes, states will foster a continued CLT presence that will achieve the CLT mission of sustained affordability and community revitalization for years to come.

—Alese Bagdol

175. *See supra* note 62 and accompanying text.
176. *See supra* note 57 and accompanying text.
177. *See supra* note 53 and accompanying text.

* * *

Applying State Contingency Fee Caps in Multidistrict Litigation (MDL) Settlements*

I. Introduction

An attorney signs a retainer agreement to represent a Connecticut resident allegedly harmed by taking a new prescription drug manufactured by a New York drug company. The attorney will charge a 40% contingency fee according to the agreement. The attorney decides to bring the case in federal court in the Southern District of New York on the basis of diversity jurisdiction and files suit under New York state tort law. Given that the defendant's headquarters are in New York, the plaintiff works full-time in

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New York, and the plaintiff's injury—a heart attack—happened in New York, the attorney believes New York law will apply to all substantive legal issues under New York choice-of-law rules.

Just weeks later, upon the defendant's motion in this case and in 500 other cases filed nationwide involving the same drug, the Judicial Panel on Multidistrict Litigation approves the transfer of all 501 cases to the federal district court in Connecticut for consolidated multidistrict litigation (MDL) proceedings. In a matter of months, the defendant settles almost all of its pending claims with the MDL plaintiffs in a single settlement, while the case is still pending before the MDL transferee court.[1] The original Connecticut plaintiff settles for $800,000, and the attorney keeps 40% ($320,000) as her contingency fee. But the Connecticut plaintiff wants the benefit of New York state law, which caps contingency fees for this size settlement at 25%,[2] or $200,000 in this case. Can the Connecticut plaintiff enforce the state contingency fee caps?

Stated differently, the question posed by this hypothetical is whether state laws capping contingency fees apply to settlements of federal diversity cases pending before MDL transferee courts. Because several state laws broadly cap contingency fee awards, this question will continue to arise in cases consolidated through the MDL process. This question also raises a plethora of interesting legal issues, including the application of state law in federal courts, the possibility of forum shopping between state and federal forums, and the equities among plaintiffs and their counsel, all consolidated in the same MDL court.

This Note ultimately argues that state contingency fee caps should apply to settlements of federal diversity cases pending before MDL courts. Part II of this Note begins by giving background on state contingency fee caps and the MDL consolidation process. Part III then moves to the Note's core analysis: it argues that state fee caps should apply to MDL settlements for three important reasons. Next, Part IV addresses two policy concerns that critics have advanced against the analysis in Part III. After resolving these policy concerns, the Note briefly concludes in Part V.

1. The term "MDL transferee court" refers to the federal district court where multiple cases are consolidated for pretrial proceedings pursuant to the MDL consolidation statute. *See* 28 U.S.C. § 1407 (2006) (setting forth the procedure for consolidating multiple cases). An "MDL transferor court," on the other hand, refers to the federal district court where an MDL plaintiff originally brought suit, and from which the suit is transferred for pretrial proceedings. *Id.*

2. N.Y. SUP. CT. APP. DIV. 1ST DEPT. R. 603.7(e); N.Y. SUP. CT. APP. DIV. 2D DEPT. R. 691.20(e); N.Y. SUP. CT. APP. DIV. 3D DEPT. R. 806.13; N.Y. SUP. CT. APP. DIV. 4TH DEPT. R. 1022.31.

II. Background on State Contingency Fee Caps and MDL Consolidation

A. State Contingency Fee Caps

Several state laws broadly cap contingency fees in most kinds of tort suits.[3] For example, New Jersey's rule caps contingency fees in all tort cases, "including products liability claims . . . but excluding statutorily based discrimination and employment claims."[4] Other state laws cap contingency fees in more narrow contexts, like medical malpractice or worker's compensation suits.[5] For the purposes of this Note, the state contingency fee caps that apply broadly are most relevant, since many MDL settlements arise outside of the narrower contexts like medical malpractice.[6] This Note addresses three states' broad contingency fee caps—those of New Jersey, New York, and Florida—as examples of the kinds of state caps at issue. What follows is a brief description of each of these states' fee caps.

New Jersey's fee caps are found in a rule entitled "Contingent Fees" within the New Jersey Rules of Court.[7] As mentioned, the New Jersey caps apply "[i]n any matter where a client's claim for damages is based upon the alleged tortious conduct of another" with the exception of statute-based discrimination and employment claims.[8] The rule creates a four-tiered fee

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3. *See* CONN. GEN. STAT. ANN. § 52-251c(a) (West 2005) (capping contingency fees in cases involving "personal injury, wrongful death or damage to property"); R. REGULATING FLA. BAR 4-1.5(f)(4)(B) (capping contingency fees "in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims"); MICH. CT. R. 8.121(A) (capping contingency fees "[i]n any claim or action for personal injury or wrongful death based upon the alleged conduct of another or for no-fault benefits"); N.J. CT. R. 1:21-7(c) (capping contingency fees "[i]n any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims and claims among family members . . . but excluding statutorily based discrimination and employment claims"); N.Y. SUP. CT. APP. DIV. 1ST DEPT. R. 603.7(e) (capping contingency fees in "any claim or action for personal injury or wrongful death, other than one alleging medical, dental or podiatric malpractice"); OKLA. STAT. ANN. tit. 5, § 7 (West 2011) (capping contingency fees in all cases at 50%).

4. N.J. CT. R. 1:21-7(c).

5. *E.g.*, CAL. BUS. & PROF. CODE § 6146 (West Supp. 2012) (medical malpractice); DEL. CODE ANN. tit. 18, § 6865 (1999) (medical malpractice); FLA. STAT. ANN. § 73.092 (West 2004) (eminent domain proceedings); FLA. STAT. ANN. § 768.28(8) (West Supp. 2012) (actions brought against the state of Florida); HAW. REV. STAT. ANN. § 662-12 (LexisNexis 2012) (actions brought against the state of Hawaii); KAN. STAT. ANN. § 44-536 (Supp. 2011) (worker's compensation); N.Y. JUD. LAW § 474-a (McKinney Supp. 2012) (medical, dental, and podiatric malpractice); TENN. CODE ANN. § 29-26-120 (2000) (medical malpractice); TEX. LAB. CODE ANN. § 408.221 (West Supp. 2012) (requiring commissioner or court approval of fees in worker's compensation cases); WIS. STAT. ANN. § 102.26(2) (West 2010) (worker's compensation); WIS. STAT. ANN. § 655.013 (West 2004) (medical malpractice).

6. *E.g.*, *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 556 (E.D. La. 2009) (reviewing MDL settlement of product liability tort claims); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2008 WL 3896006, at *5–8 (D. Minn. Aug. 21, 2008) (same); *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 491–94 (E.D.N.Y. 2006) (same).

7. N.J. CT. R. 1:21-7(c).

8. *Id.*

cap schedule, where the contingency fee allowed decreases as the amount of the claimant's recovery increases. Specifically, the rule provides:

> an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:
>
> (1) 33 1/3 % on the first $500,000 recovered;
>
> (2) 30% on the next $500,000 recovered;
>
> (3) 25% on the next $500,000 recovered;
>
> (4) 20% on the next $500,000 recovered; and
>
> (5) on all amounts recovered in excess of the above by application for reasonable fee in accordance with the provisions of paragraph (f) hereof . . . .[9]

If an attorney thinks the fee permitted by the fee schedule is inadequate, she can apply for a hearing to determine reasonable fees, as long as she provides written notice to the client.[10] Interestingly, the New Jersey federal district court has incorporated the state cap into its local rules, but only with respect to lawyers admitted pro hac vice.[11] Local Rule 101.1(c)(4) states, "[a] lawyer admitted *pro hac vice* [to the federal district court] is deemed to have agreed to take no fee in any tort case in excess of New Jersey Court Rule 1:21-7 governing contingent fees."[12]

Like the New Jersey caps, the New York caps can be found in the state court rules. In New York, however, each of the intermediate appellate courts, which are called the Appellate Divisions of the Supreme Court, adopted the fee caps.[13] Because there are four appellate divisions, there are four separate fee cap rules, but they share very similar language. The fee caps apply to "any claim or action for personal injury or wrongful death, other than one alleging medical, dental or podiatric malpractice."[14] All of the New York rules provide that a contingency fee will be "deemed to be fair and reasonable" if it satisfies one of two schedules.[15]

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9. *Id.*

10. N.J. CT. R. 1:21-7(f).

11. D.N.J. CIV. R. 101.1(c)(4).

12. *Id.*

13. N.Y. SUP. CT. APP. DIV. 1ST DEPT. R. 603.7(e); N.Y. SUP. CT. APP. DIV. 2D DEPT. R. 691.20(e); N.Y. SUP. CT. APP. DIV. 3D DEPT. R. 806.13; N.Y. SUP. CT. APP. DIV. 4TH DEPT. R. 1022.31.

14. *E.g.*, N.Y. SUP. CT. APP. DIV. 1ST DEPT. R. 603.7(e). The only New York rule whose language differs slightly is the Second Department's rule. It provides that the caps apply "[i]n any claim or action for personal injury or wrongful death, *or loss of services resulting from personal injury or for property or money damages resulting from negligence or any type of malpractice*, other than one alleging medical, dental or podiatric malpractice." N.Y. SUP. CT. APP. DIV. 2D DEPT. R. 691.20(e) (emphasis added). Although this language may expand the Second Department's rule, all of the Departments' rules still apply broadly to personal injury and wrongful death cases.

15. *E.g.*, N.Y. SUP. CT. APP. DIV. 1ST DEPT. R. 603.7(e). For reference, the specific language of the fee schedule for the First Department, which is functionally identical to the fee schedules of the other Departments, is as follows:

One schedule, Schedule B, applies if the original agreement set a contingency fee "not exceeding 33⅓ percent of the sum recovered."[16] So, if the parties originally agreed to a flat one-third fee, it will be deemed reasonable under Schedule B. The other schedule, Schedule A, applies when there is no contract providing for a flat fee less than or equal to one-third.[17] Schedule A requires a contingency fee to be less than or equal to the following tiered standard: "(i) 50 percent on the first $1,000 of the sum recovered, (ii) 40 percent on the next $2,000 of the sum recovered, (iii) 35 percent on the next $22,000 of the sum recovered, (iv) 25 percent on any amount over $25,000 of the sum recovered."[18] Contingency fees that meet neither of these two schedules "constitute the exaction of unreasonable and unconscionable compensation."[19] Like the New Jersey rule, all of the New York rules also allow the attorney to apply for higher fees.[20] But in New York, attorneys can only seek higher fees in "extraordinary circumstances."[21] Notably, an attorney cannot claim extraordinary circumstances if she originally agreed to a flat fee equal to or less than one-third.[22]

Finally, the Florida rule is part of the Florida Bar Rules.[23] The rule is again found in a provision entitled "Contingent Fees" and applies broadly to suits "for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims."[24] The rule provides that fees in excess of the listed schedules are "presumed, unless rebutted, to be clearly excessive."[25] It then sets out three fee schedules, each with different allowable fees depending on whether an answer is filed, and whether the

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Schedule A
(i) 50 percent on the first $1,000 of the sum recovered,
(ii) 40 percent on the next $2,000 of the sum recovered,
(iii) 35 percent on the next $22,000 of the sum recovered,
(iv) 25 percent on any amount over $25,000 of the sum recovered; or,
Schedule B
A percentage not exceeding 33⅓ percent of the sum recovered, if the initial contractual arrangement between the client and the attorney so provides, in which event the procedure hereinafter provided for making application for additional compensation because of extraordinary circumstances shall not apply.

Id.

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. R. REGULATING FLA. BAR 4-1.5(f)(4). The Florida Supreme Court recently released an opinion that made certain amendments to the Florida Bar Rules, but the opinion did not affect any of the fee cap provisions that are discussed here. *In re* Amendments to the Rules Regulating the Fla. Bar, No. SC10-1967, 2012 WL 1207226 (Fla. Apr. 12, 2012).
24. R. REGULATING FLA. BAR. 4-1.5(f)(4).
25. R. REGULATING FLA. BAR. 4-1.5(f)(4)(B)(i).

defendants admit liability when filing their answer and request a trial on damages only.[26] The fee caps ultimately range from 15% to 40% of the client's recovery.[27] Notably, the rule allows the client to petition the court to allow higher fees, but it does not appear the attorney can independently do so.[28]

These three state fee caps are similar in that they deem contingency fees above a certain percentage of the client's recovery unreasonable or excessive. Although the exact fee caps vary, all three rules regulate an attorney's ability to charge fees in excess of the schedules provided. Next is a brief description of the MDL consolidation process.

B. MDL Consolidation

The MDL consolidation procedures under 28 U.S.C. § 1407 serve as an important alternative to the class action method of consolidating mass litigation.[29] Since 1968, "over one thousand" MDLs have been litigated through this procedure.[30] Each MDL consolidation, in turn, can involve hundreds or even thousands of claimants.[31] As class certification becomes increasingly more difficult, and as the Judicial Panel on Multidistrict Litigation is increasingly more willing to consolidate product liability cases, the importance of MDL consolidation is growing.[32]

The MDL statute allows "civil actions involving one or more common questions of fact [that] are pending in different districts" to be temporarily transferred to one federal district court for pretrial proceedings.[33] To achieve transfer, the party seeking transfer must show: (1) that there are common factual questions among the cases, and (2) that transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."[34] The Panel, a group of seven federal circuit and

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26. *Id.*

27. *Id.* Also, if any post-judgment action is required for recovery—such as an appeal—the rule allows the attorney to collect an extra 5% contingency fee. *Id.*

28. R. REGULATING FLA. BAR. 4-1.5(f)(4)(B)(ii).

29. *See* Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2223 (2008) ("The MDL model, applied creatively, can be an effective alternative in certain situations to class treatment for accomplishing an aggregate or global settlement."). *But see* Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. KAN. L. REV. 775, 794 (2010) ("MDL aggregation is not *exactly* an alternative to class action aggregation of claims. Cases consolidated in an MDL proceeding may, and often do, raise class allegations, and an MDL proceeding can very well result in a class settlement . . . .").

30. Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 107–08, 114 (2010).

31. *See id.* at 108 n.2 (referencing recent MDLs involving thousands of claimants).

32. Willging & Lee, *supra* note 29, at 787, 793–94.

33. 28 U.S.C. § 1407(a) (2006).

34. *Id.*

district judges, decides whether cases meet these criteria.[35] The Panel has jurisdiction only over cases filed in federal court; however, if a plaintiff could have originally filed the case in federal court, she can first remove the case to federal court, then request transfer to the MDL.[36]

MDL consolidation is designed for pretrial purposes only. According to the statute, a transferred case "shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated."[37] In practice, many cases transferred to an MDL are not transferred back to the original district court, often because they settle while pending before the MDL transferee court.[38] Because so many cases settle at this point, attorneys must consider what law applies to these MDL settlements.

III. State Fee Caps Should Apply to MDL Settlements

With this background in mind, this Note turns to the core analysis of whether state fee caps should apply to MDL settlements. The analysis proceeds in three parts, considering (1) whether state fee caps are "state law" for choice-of-law purposes, (2) which law and choice-of-law rules an MDL transferee court applies in a diversity case, and (3) whether state fee caps are substantive for choice-of-law purposes. All three parts of this analysis suggest that fee caps should apply to MDL settlements.

This analysis makes three important assumptions. First, it assumes that an MDL transferee court has the power to review a settlement reached while the case is pending before it, according to the law it would be bound to follow. In other words, this Note assumes that a settlement reached while a case is pending before an MDL transferee court is subject to the law the transferee court would follow. Given that federal transferee courts often

35. *Id.* § 1407(a), (d).

36. Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 65 n.78 (2007); *see also* Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation 1.1 [hereinafter MDL R. P.] (defining "[t]ransferor district" as "the federal district court where an action was pending prior to its transfer pursuant to Section 1407, for inclusion in an MDL"); *In re* Celotex Corp. "Technifoam" Prods. Liab. Litig., 68 F.R.D. 502, 503 n.2 (J.P.M.L. 1975) ("The Panel, of course, does not have the power under Section 1407 to consider the propriety of coordinated or consolidated pretrial proceedings in state court actions.").

37. 28 U.S.C. § 1407(a); *see also* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28, 34–36 (1998) (holding that a district court handling MDL pretrial proceedings may not invoke 28 U.S.C. § 1404 to transfer venue of one of the consolidated cases to itself and reaffirming that MDL cases must be remanded back to the original transferor court for trial).

38. *See* Lori J. Parker, *Causes of Action Involving Claim Transferred to Multidistrict Litigation*, *in* 23 CAUSES OF ACTION § 13 (2d ed. 2013) ("Only about 20% of cases transferred to MDL's eventually find their way back to the local district court."); *id.* § 24 ("MDL's often serve as forums for negotiation of settlements between defendants and multiple plaintiffs.").

conclude they have power to review these settlements,[39] this assumption is not that heroic.

Second, this analysis assumes that the cases at issue are filed in or removed to federal court based on diversity jurisdiction, rather than federal question jurisdiction. This is done simply to limit the scope of this Note. The *Erie* doctrine, which is discussed in subpart III(C), applies in both federal diversity cases and federal question cases.[40] Yet courts and scholars discuss the *Erie* doctrine more often in the context of federal diversity cases.[41] Thus, the doctrine's application in the context of federal diversity cases is, at the very least, more established.[42] By limiting the discussion to federal diversity cases, this Note does not address the additional considerations involved in applying *Erie* in federal question cases.

Third and finally, this Note assumes that the cases at issue are filed against nongovernmental defendants, such as companies selling pharmaceuticals, medical devices, tobacco, or consumer products.[43] This

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39. *E.g.*, *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 558–62 (E.D. La. 2009); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2008 WL 3896006, at *5–6 (D. Minn. Aug. 21, 2008); *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 491–94 (E.D.N.Y. 2006). In the class action context, Federal Rule of Civil Procedure 23(h) gives courts authority to award reasonable attorney's fees. FED. R. CIV. P. 23(h). This means that courts have more explicit authority to review attorney's fees in the class action context than in the MDL context. It also means there is the potential for a direct collision between the state contingency fee caps and Rule 23 in class actions. *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2077–79 (2010) (discussing the possibility that Rule 23 directly collides with state contingency fee caps). However, a discussion of the application of state contingency fee caps in class actions is beyond the scope of this Note.

40. *See* 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4520, at 635 (2d ed. 1996) ("The Erie case and the Supreme Court decisions following it apply in federal question cases as well.").

41. *See* Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) ("It is unquestionably true that up to now *Erie* and the cases following it have not succeeded in articulating a workable doctrine governing choice of law in diversity actions."); Donald Earl Childress III, *When* Erie *Goes International*, 105 NW. U. L. REV. 1531, 1554–55 (2011) ("[I]t is beyond doubt that the *Erie* doctrine requires a federal court sitting in diversity to apply the law of the state in which it sits."). The focus on *Erie*'s application in diversity cases may be partly because *Erie* and two of the seminal opinions that followed it were all diversity cases. *See Hanna*, 380 U.S. at 461, 463–64 (considering service of process in a diversity case and holding that service shall be made in a manner prescribed by federal law); Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (considering the statute of limitations in a diversity case and determining that a court should apply state law if applying federal law would "significantly affect the result of a litigation"); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (determining that, in diversity cases, the court must apply state substantive law).

42. Secondary sources recognize that there is confusion about whether *Erie* applies in federal question cases. *E.g.*, 19 WRIGHT ET AL., *supra* note 40, § 4520, at 635 ("It frequently is said that the doctrine of Erie Railroad Company v. Tompkins applies only in diversity of citizenship cases; this statement simply is wrong." (footnote omitted)).

43. For a sense of the types of defendants involved in MDL cases, see generally U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MULTIDISTRICT LITIGATION TERMINATED THROUGH SEPTEMBER 30, 2012 (2012), *available at* http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Terminated_Litigations-2012.pdf. This data suggests that the typical MDL consolidation is brought against a nongovernmental entity, though suits against governments are represented in the data.

assumption, again, is to narrow the scope of the analysis. In tort suits against the federal government under the Federal Tort Claims Act, federal law caps attorney's fees.[44] This sort of federal fee cap—applicable in tort suits against the federal government—would alter the *Erie* analysis that follows, since such federal fee caps might conflict with the state fee caps at issue here.[45] Thus, to narrow the scope of the analysis, this Part focuses on cases where businesses and other nongovernmental entities are defendants, as in the hypothetical presented at the beginning of the Note. In these cases, federal law does not provide a fee cap like the one provided in suits against the federal government.

A. State Fee Caps Are State Law for Choice-of-Law Purposes

The first consideration in determining whether the state fee caps apply to MDL settlements is whether the state fee caps are treated as "state law" for choice-of-law purposes. In federal diversity cases, federal courts are required to apply state law in certain circumstances,[46] which are discussed in more detail in subpart III(C). As a result, before reaching a choice-of-law analysis, one must determine whether the state fee caps are even considered state law for choice-of-law purposes. As discussed in subpart II(A), the New Jersey and New York fee caps are part of the states' Rules of Court, and the Florida fee caps are part of the Florida Bar Rules.[47] The question is thus whether these rules, which are adopted by judges rather than by legislatures,[48] qualify as state law.

The answer is that the fee caps are state law for choice-of-law purposes. In the landmark decision *Erie Railroad Co. v. Tompkins*,[49] the Supreme Court held that when federal courts are to apply state law, they must apply it whether it is "declared by its Legislature in a statute or by its highest court in a decision."[50] Subsequent cases have clarified that in applying state law,

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44. *See* Federal Torts Claim Act, 28 U.S.C. § 2678 (2006) (capping attorney's fees in cases brought against the United States under the Act). State laws may also cap attorney's fees in tort suits against the state itself. *E.g.*, FLA. STAT. ANN. § 768.28 (West 2012) (providing that, in a tort action against the state of Florida, "[n]o attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement"). The assumption that the defendants are not governments also eliminates the problem of a possible conflict between the state fee caps at issue and state fee caps that apply only in tort suits against the state government.

45. For a full discussion of federal laws that could potentially conflict with the state fee caps, see section III(C)(2).

46. *Hanna*, 380 U.S. at 471 ("[B]oth the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law . . . .").

47. *See supra* subpart II(A).

48. *See* Fla. Bar re Amendment to the Code Prof'l Responsibility (Contingent Fees), 494 So. 2d 960, 961–62 (Fla. 1986) (adopting the Florida fee cap); Am. Trial Lawyers Ass'n v. N.J. Supreme Court, 330 A.2d 350, 351 (N.J. 1974) (noting that the New Jersey Supreme Court had adopted the fee cap rule a few years earlier); Gair v. Peck, 160 N.E.2d 43, 53 (N.Y. 1959) (noting that the judges of the New York Appellate Division's First Department adopted that Division's fee cap).

49. 304 U.S. 64 (1938).

50. *Id.* at 78.

federal courts must look to how the state high court has applied the law or how the federal court believes the state high court would apply the law.[51] Federal judges should not apply state law according to their own independent view of it.[52]

Here, in determining whether the state fee caps apply, a federal court must ask whether the state's highest court would apply the caps. In the three states considered here, the state high court either adopted the fee caps, held them to be valid, or both. First, the New Jersey Supreme Court itself adopted the fee cap rule in 1971.[53] Several years later, the same court also affirmed a decision of an intermediate state court that the fee caps were "constitutionally unassailable, [and] clearly came within the ambit of this Court's responsibility to regulate relationships between Bar and public."[54]

New York's highest court has also upheld the New York contingency fee caps, although the New York intermediate courts were responsible for adopting them. In *Gair v. Peck*,[55] the New York high court held that the Appellate Division's First Department had the power to pass the original version of its fee cap.[56] Finally, the Florida Supreme Court adopted its fee caps in *Florida Bar re Amendment to the Code of Professional Responsibility (Contingent Fees)*.[57] In the opinion, the court adopted a proposal by the Florida Bar to amend its rules to provide fee caps.[58] In short, all three of the states' highest courts expressed early approval of the fee caps by adopting them, upholding them, or both.

Given that all three state high courts have approved the state fee caps—and in New Jersey and Florida, even adopted them—a federal court should consider them state law for choice-of-law purposes. This is because there is little doubt that each of these high courts would enforce their respective fee caps. Indeed, at least in New Jersey and Florida, the high courts have had the opportunity to enforce the fee cap rules since their original decisions adopting or upholding the caps. In *McMullen v. Conforti & Eisele Inc.*,[59] the New Jersey Supreme Court applied its state fee cap to a settlement reached after the fee cap was adopted into state law, even though the parties'

51. *See, e.g.*, Schlein v. Mills (*In re* Schlein), 8 F.3d 745, 754–55 (11th Cir. 1993) (looking to state court decisions to determine how to apply a Florida wage exemption statute); J.C. Wyckoff & Assocs., Inc. v. Standard Fire Ins. Co., 936 F.2d 1474, 1485 (6th Cir. 1991) ("[W]e are bound by what we believe Michigan courts would do, rather than what we may think personally would be the result most harmonious with the state statute." (quoting Diggs v. Pepsi-Cola Metro. Bottling Co., Inc., 861 F.2d 914, 927 (6th Cir. 1988)) (internal quotations omitted)).

52. *J.C. Wycoff*, 936 F.2d at 1485.

53. *See Am. Trial Lawyers Ass'n*, 330 A.2d at 351 (noting that it had adopted the fee cap a few years earlier in 1971).

54. *Id.* at 352.

55. 160 N.E.2d 43 (N.Y. 1959).

56. *Id.* at 53.

57. 494 So. 2d 960 (Fla. 1986).

58. *Id.* at 961–62.

59. 341 A.2d 334 (N.J. 1975).

contingency fee agreement was signed before the fee cap was adopted.[60] More recently, in *Florida Bar v. Pellegrini*,[61] the Florida Supreme Court approved a referee's recommended discipline for an attorney who violated the state fee caps.[62] Thus, the New Jersey and Florida high courts have since applied the fees caps, further suggesting that a federal court applying state law on this issue would apply the relevant fee caps. Although the New York high court has not addressed the New York fee caps since *Gair v. Peck*, New York's intermediate courts continue to enforce the fee caps.[63] Given that *Gair v. Peck* is still good law, there is little doubt that the New York high court would enforce the New York fee caps.

To summarize, the state high courts of New Jersey, New York, and Florida have recognized—by adopting, upholding, and applying—their respective state fee caps. This means a federal court applying state law in this context would apply the fee caps. The fee caps are therefore state law for choice-of-law purposes.

B. An MDL Court Applies the Law of the Transferor Court

Now that it is clear that state fee caps are state law for choice-of-law purposes, the next question is what law an MDL transferee court applies. Because this Note analyzes settlements reached while cases are pending in the MDL transferee court, and because it assumes the MDL transferee court has power to review settlements under the law that binds it, an important question is precisely what law is binding in the MDL transferee court.

The answer to this question depends on whether the original transferor court was to apply state or federal law. On the one hand, if the original case was a federal diversity case and the transferor court was bound to apply state law, the transferee MDL court is bound to follow the law that the original transferor court would have followed.[64] In other words, the "transferee district court must apply the state law, including its choice-of-law rules, that would have been applied had there been no change of venue."[65] On the other hand, if the original case was brought under federal question jurisdiction and the original federal district court was to apply federal law, the transferee MDL court applies the federal law as it exists in its own circuit.[66] Some

60. *Id.* at 335–36.

61. 714 So. 2d 448 (Fla. 1998).

62. *Id.* at 450, 452–53.

63. *See, e.g.*, Connors v. Wildstein, 706 N.Y.S.2d 189, 190 (N.Y. App. Div. 2000) (holding an agreement invalid because it violated the Second Department's fee caps).

64. *In re* Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 97 F.3d 1050, 1055 (8th Cir. 1996) ("When considering questions of state law, however, the transferee court must apply the state law that would have applied to the individual cases had they not been transferred for consolidation.").

65. Parker, *supra* note 38, § 12.5.

66. *In re* Gen. Am. Life Ins. Co. Sales Practices Litig., 391 F.3d 907, 911 (8th Cir. 2004) ("When a transferee court receives a case from the MDL Panel, the transferee court applies the law

courts have added that the interpretation of federal law by the circuit of the original federal district court "merits close consideration, but does not have stare decisis effect in a transferee forum situated in another circuit."[67]

For this Note, what is most important is that in federal diversity cases, the transferee MDL court is bound to apply the state law that the transferor court would have applied. This means that state law—and thereby state fee caps—will apply in federal diversity cases pending before MDL courts.

C. *Fee Caps Are Substantive Under a Choice-of-Law Analysis*

1. The Erie *Analysis and Substantive Versus Procedural State Law.*— So far, the analysis points to applying the state fee caps to settlements of cases pending before an MDL transferee court. This part of the analysis further shows why this conclusion is correct under a choice-of-law analysis. State fee caps, which are considered state law, will apply in federal diversity cases if they are considered "substantive" rather than "procedural" for choice-of-law purposes.[68] To understand the meaning of this distinction, a brief summary of *Erie Railroad Co. v. Tompkins*[69] and subsequent precedent is necessary. In the seminal *Erie* case, the Supreme Court

> held that federal courts sitting in diversity cases, when deciding questions of "substantive" law, are bound by state court decisions as well as state statutes. The broad command of *Erie* was therefore identical to that of the [Rules] Enabling Act: federal courts are to apply state substantive law and federal procedural law.[70]

Since *Erie*, federal courts have grappled with the question of whether specific state laws are substantive, and must be applied by federal courts, or whether they are procedural, and do not bind federal courts. Two subsequent Supreme Court decisions are of particular importance: *Guaranty Trust Co. v. York*[71] and *Hanna v. Plumer*.[72]

In *York*, the Court held that if the difference between federal and state law would be "outcome-determinative," the state law is substantive; otherwise, it is procedural.[73] The question that federal courts after *York* were to ask is whether the outcome of the litigation would be significantly affected

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of the circuit in which it is located to issues of federal law."); In re *TMJ*, 97 F.3d at 1055 ("When analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located.").

67. *In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1176 (D.C. Cir. 1987).

68. *See* Hanna v. Plumer, 380 U.S. 460, 465 (1965) ("[F]ederal courts are to apply state substantive law and federal procedural law.").

69. 304 U.S. 64 (1938).

70. *Hanna*, 380 U.S. at 465 (discussing *Erie*).

71. 326 U.S. 99 (1945).

72. 380 U.S. 460 (1965).

73. *York*, 326 U.S. at 109.

by ignoring the relevant state law.[74] This question—rather than "any traditional or common-sense substance-procedure distinction"—was conclusive.[75] Although the *York* test was seemingly broad, the Court reaffirmed the *Erie* policy that, in federal diversity cases, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."[76]

Next, in *Hanna v. Plumer*, the Supreme Court, building on *York*, established the choice-of-law analytical framework as it generally exists today.[77] Under *Hanna*, the first question to ask is whether there is a "direct collision" between a federal text (the Constitution, a federal statute, or a federal rule) and the state law at issue.[78] If there is a direct collision—in other words, if the federal text covers the point or addresses the issue at hand—then federal courts are to apply the federal text without engaging in an *Erie* analysis.[79] If there is no direct collision, then courts are to apply an *Erie* analysis.[80]

Hanna further clarified what an "*Erie* analysis" involves. An *Erie* analysis after *Hanna* asks two questions. The first is whether applying state law over federal law is outcome-determinative in the *York* sense, in that it would significantly alter the outcome of the litigation.[81] The second question, which was designed to limit the breadth of the *York* test standing alone, is whether the choice between federal and state law would lead to *either* (1) "forum-shopping" or (2) "inequitable administration of the laws."[82] These considerations are "the twin aims of the *Erie* rule" and are crucial in determining whether the difference between state and federal law is more than "trivial."[83] To recap, if the choice between state and federal law is outcome-determinative in the *York* sense, and the choice would lead to either forum shopping or inequitable administration of the laws, the state law is deemed substantive and should apply. If the choice between state and federal law would lead to neither, even if it is outcome-determinative in the *York* sense, then the state law is deemed procedural and federal law applies.

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74. *Id.*

75. *Hanna*, 380 U.S. at 466 (describing *York*, 326 U.S. at 109).

76. *York*, 326 U.S. at 109.

77. 19 WRIGHT ET AL., *supra* note 40, § 4508, at 244 ("Then, in Hanna v. Plumer, decided in 1965, the Court provided the next (and to date, the latest) reconceptualization of the Erie doctrine.").

78. *Hanna*, 380 U.S. at 471–74.

79. *Id.* at 473–74. In *Hanna*, there was a direct collision between Massachusetts law and Federal Rule of Civil Procedure 4(d)(1), both regarding service of process. *Id.* at 470. Because the Court concluded the Federal Rule was valid, the Court applied it, rather than state law. *Id.* at 474.

80. *Id.* at 469–71.

81. *Id.* at 467–68.

82. *Id.* at 468.

83. *Id.*

2. Fee Caps Are Substantive Under a Direct Application of Hanna.— Under a direct application of the *Hanna* analysis just described, state laws capping fees are substantive rather than procedural for a few reasons. First, under *Hanna*, there is no direct collision between the state fee caps and federal law on this issue. As mentioned, federal law does regulate attorney's fees in certain specific contexts. For example, federal law caps attorney's fees in tort suits brought against the United States under the Federal Tort Claims Act.[84] Several federal fee-shifting laws also allow prevailing parties to recover attorney's fees in certain types of cases, such as civil rights actions.[85] There is, however, no federal law broadly capping contingency fees in tort cases against nongovernmental defendants.[86] Thus, assuming the defendants are not governments, there is no direct collision between the state fee caps at issue and federal law, and an *Erie* analysis is necessary to determine whether federal courts must apply the state fee caps.

Under the *Erie* analysis as outlined by *Hanna*, the first question is whether the choice of state law over federal law is outcome-determinative in the *York* sense.[87] The fee caps here are outcome-determinative because they significantly alter the outcome of the litigation if applied. As seen in the hypothetical at the beginning of this Note, whether the 25% fee cap applied or the 40% fee could be charged made a difference of thousands of dollars for the plaintiff. If the caps applied, the outcome of the litigation for the plaintiff would have been significantly different. Although the caps do not affect the funds exchanged between the two parties, they seriously impact the total dollar amount that a party to a contingency fee contract takes home.

Hanna also requires that the choice between state and federal law lead to forum shopping or inequitable administration of the laws.[88] Undeniably, the fee caps here would lead to forum shopping. If the attorney is deciding where to file suit, she will much prefer a forum without laws capping

84. 28 U.S.C. § 2678 (2006).

85. *See* 42 U.S.C. § 1988(b) (2006) (providing that a court may, in its discretion, award reasonable attorney's fees to a prevailing party in a civil rights action brought under various civil rights statutes).

86. One federal law does cap fees in a narrow set of circumstances. A Local Rule of the Federal District Court of New Jersey provides that "[a] lawyer admitted *pro hac vice* [to the federal court] is deemed to have agreed to take no fee in any tort case in excess of New Jersey Court Rule 1:21-7 governing contingent fees." D.N.J. CIV. R. 101.1(c)(4). This local rule simply applies the New Jersey state fee caps to lawyers admitted pro hac vice to New Jersey federal district court. This means that, in MDL cases consolidated in New Jersey federal district court and handled by lawyers admitted pro hac vice, state and federal law capping contingency fees would be identical, so an *Erie* analysis would not be necessary. But, in all other cases, the analysis that follows is essential to determining whether the state fee caps apply to settlements of cases filed and consolidated in federal court.

87. *Hanna*, 380 U.S. at 467–68.

88. *Id.* at 468.

contingency fees, assuming all other things equal.[89] An attorney would surely file in a federal forum to avoid a fee cap as stringent as 15% or 20%.[90] Forum shopping, then, would be a real threat if federal courts did not enforce state fee caps and the states with fee caps continued to do so. Interestingly, if the client is deciding where to file suit, she will prefer a forum with laws capping contingency fees.[91] This means that the choice of forum will depend on who decides where to file suit. Yet, regardless of who makes the decision, forum shopping remains a threat in the context of state fee caps. The risk of forum shopping and the fact that the choice between state and federal law is outcome-determinative in the *York* sense means that state fee caps are substantive and must apply in federal diversity cases under *Hanna*.

Worth noting is that a handful of courts have reached this conclusion regarding state fee caps, but they often do so without a detailed *Erie* analysis. For instance, in *Eagan by Keith v. Jackson*,[92] the Pennsylvania federal district court held that the New Jersey fee cap rule applied, rather than Pennsylvania law, in a settlement of a diversity case.[93] The court did not go through an extensive *Erie* analysis to explain why the states' laws regarding fees were substantive and would apply over federal law. It instead summarily concluded that "[r]ules regulating attorneys' fees are considered substantive" to justify its application of state law.[94] Other federal diversity cases applying state fee caps have similarly assumed that the state caps applied without mentioning *Erie* concerns.[95] Although they lack this reasoning, these decisions are still consistent with the *Hanna* analysis mandating that such caps apply.

3. Cases Holding that State Fee Caps Are Procedural Are Analytically Unsound.—Cases holding that state fee caps are procedural are poorly reasoned and depart from established choice-of-law precedent. One such case is *Mitzel v. Westinghouse Electric Corp.*,[96] where the Third Circuit held

89. *See* Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 FORDHAM L. REV. 1833, 1857 (2011) ("Given the substantial sums at stake, especially in high value cases, one would expect contingent-fee attorneys strongly to prefer to file cases in jurisdictions without fee caps, other things being equal.").

90. *See* R. REGULATING FLA. BAR 4-1.5(f)(4)(B)(i)(c) (capping fees at as low as 15% or 20% on damages over $1 million when "all defendants admit liability at the time of filing their answers and request a trial only on damages").

91. *See* Baker & Silver, *supra* note 89, at 1858 ("Other things being equal, the client can be presumed to prefer . . . to prosecute his claim in the fee cap jurisdiction . . . ." (footnote omitted)).

92. 855 F. Supp. 765 (E.D. Pa. 1994).

93. *Id.* at 778.

94. *Id.* at 778 n.18.

95. *See, e.g.*, Estate of McMahon v. Turner Corp., No. 05-4389, 2007 WL 2688557, at *2–3 (D.N.J. Sept. 7, 2007) (determining that New Jersey fee cap rules applied to settlement of diversity case with no *Erie* analysis); Newcomb v. Daniels, Saltz, Mongeluzzi & Barrett Ltd., 847 F. Supp. 1244, 1250–51 (D.N.J. 1994) (concluding that New Jersey fee caps, rather than Pennsylvania law, applied but not providing an *Erie* analysis of why state law rather than federal law applied).

96. 72 F.3d 414 (3d Cir. 1995).

that the New Jersey fee caps were procedural, not substantive.[97] The court recognized that "[g]enerally, the right of a party or an attorney to recover attorney's fees from another party in a diversity action is a matter of substantive state law."[98] Yet in the next sentence, the court added, "contingency fee agreements have been treated differently."[99]

According to the Third Circuit, statutes capping contingency fees are fundamentally different than statutes shifting fees between plaintiffs and defendants. Whereas contingency fees "apportion resources between plaintiffs and their counsel," statutes giving a prevailing party a right to recover fees apportion resources between plaintiffs and defendants.[100] In this way, contingency fee caps "are collateral to the substantive merits of lawsuits in a way that awards of attorney's fees between parties are not."[101] The court thus held that the state fee caps were procedural and therefore did not apply.[102]

In reaching this conclusion, the Third Circuit misapplied core *Erie* principles. First, a correct *Erie* analysis is not based on "any traditional or common-sense substance-procedure distinction."[103] Instead, the first question under *Hanna* is whether the state fee caps significantly alter the outcome of the litigation.[104] The Third Circuit ignored the fact that the fee caps affect the plaintiff's ultimate recovery, even if they do not affect the check that one party writes to the other. The Third Circuit also did not carefully consider one of "the twin aims of the *Erie* rule"—to prevent forum shopping.[105] The court failed to recognize the incentives to forum shop when the state forum enforces the caps and the federal forum does not.[106] Overall, the Third Circuit focused on its own notions of the substance–procedure distinction, rather than the distinction as developed by *Hanna*.

Another older Third Circuit opinion reaching the same conclusion is similarly flawed. In *Elder v. Metropolitan Freight Carriers, Inc.*,[107] the Third Circuit reasoned that "[r]ules regulating contingent fees pertain to conduct of members of the bar, not to substantive law which determines the existence or parameters of a cause of action."[108] This statement is incorrect. Contingency fee caps do, in fact, determine the existence of a cause of

97. *Id.* at 417.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. Hanna v. Plumer, 380 U.S. 460, 466 (1965).
104. *See id.* at 466–68 (explaining that the first step in a substance–procedure analysis is whether applying the federal or state rule would affect the outcome of the case).
105. *Id.* at 468.
106. *See supra* note 89 and accompanying text.
107. 543 F.2d 513 (3d Cir. 1976).
108. *Id.* at 519.

action: whether an attorney can sue a client for nonpayment of the full contractual fee. Indeed, fee caps would preclude an action to recover the full contractual fee if that fee exceeded the cap. Like the *Mitzel* court, the *Elder* court also ignored the fact that fee caps alter parties' recoveries and can lead to forum shopping if not enforced by federal courts.[109] Again, the court's conclusion that fee caps are procedural is not analytically sound under *Hanna.* This Note now turns to one final reason why fee caps are substantive for choice-of-law purposes.

4. Fee Caps Are No Different than State Fee-Shifting Laws.—State fee caps should be treated the same way as state fee-shifting laws, which are considered substantive for choice-of-law purposes. State fee-shifting laws force the losing party to reimburse the attorney's fees of the prevailing party under certain circumstances.[110] Federal courts have concluded that these fee-shifting laws are substantive rather than procedural. For instance, the Third Circuit, citing other Third Circuit cases, recognized:

> Where there is a statutory provision shifting attorneys' fees and costs in a state statute creating the plaintiff's cause of action, a federal court exercising diversity or supplemental jurisdiction over that claim should, under [*Erie*,] apply the state provision shifting fees and costs in the absence of a controlling federal statute, rule, or policy.[111]

Cases adopting this analysis often cite as support dicta in the Supreme Court case *Alyeska Pipeline Services Co. v. Wilderness Society.*[112] In *Alyeska*, the Court stated,

> [I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.[113]

The *Alyeska* Court explained that a pre-*Erie* opinion of its own decided that a state law requiring an attorney's fee award applied in a case removed to federal court.[114] Citing *Hanna*, the Court in *Alyeska* concluded, "nothing after *Erie* require[d] a departure" from the result in that pre-*Erie* decision.[115]

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109. *See supra* note 89 and accompanying text.

110. *E.g.*, N.J. STAT. ANN. § 10:5-27.1 (West Supp. 2012) (allowing the prevailing party to recover fees in civil rights actions).

111. Abrams v. Lightolier Inc., 50 F.3d 1204, 1223 (3d Cir. 1995).

112. 421 U.S. 240 (1975).

113. *Id.* at 259 n.31 (quoting 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 54.77 (2d ed. 1974)).

114. *Id.* (discussing People of Sioux Cnty. v. Nat'l Surety Co., 276 U.S. 238 (1928)).

115. *Id.*

The Court therefore recognized in dicta that state laws giving or denying the right to attorney's fees are substantive under *Hanna*.[116]

For choice-of-law purposes, state laws capping contingency fees are not distinguishable from the substantive fee-shifting laws just discussed. Both types of laws are outcome-determinative under *York*,[117] since they both affect the ultimate dollar amount one or both parties will receive. Both types of laws also involve forum-shopping considerations.[118] In the context of fee-shifting statutes, there is a concern that confident plaintiffs would strongly prefer to file claims in a state forum that allowed fee shifting for prevailing parties, rather than a federal one that did not.[119] Similarly, plaintiffs would prefer to file claims in a state court if it exclusively enforced its fee caps.[120] The only difference between the two types of laws is that fee caps allocate funds between one party and her counsel, and fee-shifting laws allocate funds between plaintiffs and defendants. Yet this difference is not material under *Hanna* since the caps still influence ultimate recoveries and implicate forum-shopping considerations. In short, state fee caps are substantive in the same ways that state fee-shifting laws are, so the caps must apply in diversity cases.

IV. Policy Considerations Support, Rather than Undermine, This Analysis

The analysis in Part III shows why state laws capping contingency fees must apply to settlements reached in federal diversity cases pending before MDL transferee courts. Policy considerations support, rather than undermine, this analysis. To show this is the case, this Part briefly addresses two policy arguments that are advanced against the conclusion just reached.

A. Applying State Fee Caps Will Not Seriously Threaten Judicial Resources

Applying state fee caps in this context will not seriously threaten judicial resources, as some have argued. Commentators say that applying each state's law "could pose serious administrative difficulties in MDLs, which often draw cases from many states."[121] Courts adopting blanket fee caps in MDL settlements voice similar concerns. They believe that looking

116. *Id.*

117. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (holding that state laws are substantive if they "significantly affect the result of a litigation"); *see also supra* note 87 and accompanying text.

118. Hanna v. Plumer, 380 U.S. 460, 468 (1965) (discussing the importance of forum-shopping considerations in the *Erie* analysis); *see also supra* notes 88–91 and accompanying text.

119. *See* Ashland Chem. Inc. v. Barco Inc., 123 F.3d 261, 265 n.3 (5th Cir. 1997) ("Undoubtedly, the possibility of receiving or paying attorneys' fees will be a consideration when plaintiffs decide where to file a diversity action and when defendants decide whether to remove such an action to federal court.").

120. *See supra* note 91 and accompanying text.

121. Silver & Miller, *supra* note 30, at 120 n.43.

to each state's attorney's fees laws and "[c]onducting fifty independent analyses of reasonableness [of the fees] would drain judicial resources and would eliminate the efficiency the MDL was designed to create."[122]

In important ways, these concerns are unfounded. First, only six states have broad fee caps.[123] In addition, courts reviewing fees in MDL settlements have had no problem identifying these state laws, in addition to state laws with narrower fee caps.[124] Thus, judicial resources would not be expended in identifying the relevant fee caps.

It is also not clear that a court reviewing a large MDL settlement would have to do a case-by-case determination of whether such caps applied. The court would simply have to order the following: if the law of a state that has contingency fee caps would have otherwise governed the case, such caps govern the fees on that case. This is similar to what the court did in *In re Zyprexa Products Liability Litigation*.[125] The court there ordered that if, in any specific case, state law would have capped fees below the 35% cap it set, the state cap could be enforced in that particular case.[126] Such a blanket order would probably be sufficient, outside the occasional dispute between an attorney and client about which state's law would have actually governed the dispute had it not settled.

Even if case-by-case determinations were necessary, transferee MDL courts were designed to handle the complexities that arise in consolidating cases in a single forum.[127] These courts already make important choice-of-law decisions on pretrial motions.[128] If anything, they are particularly well equipped to undertake such complex choice-of-law analyses. In sum, judicial resources would not be seriously threatened by enforcing state fee caps in MDL settlements; even if case-by-case determinations were necessary, MDL courts were designed to handle and do handle such complex questions.

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122. *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 563 (E.D. La. 2009).

123. CONN. GEN. STAT. ANN. § 52-251c(b) (West 2005 & Supp. 2012); R. REGULATING FLA. BAR 4-1.5(f); MICH. CT. R. 8.121; N.J. CT. R. 1:21-7; N.Y. SUP. CT. APP. DIV. 1ST DEPT. R. 603.7(e); OKLA. STAT. ANN. tit. 5, § 7 (West 2011).

124. *E.g.*, *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 494–96 (E.D.N.Y. 2006).

125. *Id.*

126. *Id.* at 496–97.

127. *See* 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3861, at 356 (3d ed. 2007) (explaining that the Manual on Complex and Multidistrict Litigation and the modern MDL consolidation process were prompted by the increasing "number of cases requiring special treatment because of their size, complexity, or multidistrict character").

128. *E.g.*, *In re* TMJ Implants Prods. Liab. Litig., 872 F. Supp. 1019 (D. Minn. 1995), *aff'd*, 97 F.3d 1050 (1996) (conducting a choice-of-law analysis in ruling on a motion for summary judgment in a consolidated MDL proceeding).

B. *The Uniform Treatment of All Plaintiffs and Attorneys in a Single MDL Should Not Trump the* Erie *Policy or Federalism Concerns*

Ignoring state fee caps would provide more uniform treatment of MDL plaintiffs and attorneys, but the desire for uniformity cannot override the *Erie* policy or federalism concerns. Some courts and commentators argue that uniformity is paramount in the MDL setting. Attorney Jeremy Grabill believes that "plaintiffs from around the country brought together in mass tort litigation [should] pay the same percentage contingency fee to their attorneys when all of their claims are resolved in a centralized forum."[129] Likewise, in applying a universal fee cap, the district court in *In re Vioxx Products Liability Litigation*[130] similarly reasoned, "the claimants' attorneys were all tasked with navigating their clients through an identical settlement matrix and in accomplishing this they all faced similar challenges, regardless of in which state their fee arrangement was consummated."[131] The court further noted, "the MDL statute's mandate of fairness requires a uniform, consistent result for all attorneys and their clients."[132]

These arguments ignore the limited purpose and power of MDL consolidation. In designing the MDL consolidation procedure, Congress's intent was "to provide judicial machinery to transfer, for coordinated or consolidated pretrial proceedings, civil actions, having one or more common questions of fact, pending in different judicial districts."[133] The legislative history of the MDL statute does not evidence an intent to diminish the application of state law. Instead, MDL consolidation is "merely a procedural

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129. Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 177 (2012).

130. 650 F. Supp. 2d 549 (E.D. La. 2009).

131. *Id.* at 563.

132. *Id.*

133. H.R. REP. NO. 90-1130, at 1 (1968); *see also* S. REP. NO. 90-454, at 1 (1967) (stating that the main purpose of the MDL statute was "to provide for the temporary transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in different districts which involve one or more common questions of fact"). The MDL statute was a response to hundreds of damages actions filed in various federal courts "[f]ollowing the successful Government prosecution of electrical equipment manufacturers for antitrust law violations" in the 1960s. H.R. REP. NO. 90-1130, at 2. A Coordinating Committee of nine judges was established to help consolidate the pretrial proceedings in the damages actions. S. REP. NO. 90-454, at 3. The Committee assisted in setting a pretrial discovery schedule, and the parties and presiding judges consented to consolidating discovery for all of the cases. H.R. REP. NO. 90-1130, at 2; S. REP. NO. 90-454, at 3. Because of the success of the consolidated proceedings in the electrical equipment cases, Congress wanted to create a statutory procedure for consolidation that would not depend on the parties' and judges' consent to consolidation. H.R. REP. NO. 90-1130, at 2. Congress "believe[d] that the possibility for conflict and duplication in discovery and other [pretrial] procedures in related cases [could] be avoided or minimized by such centralized management." *Id.*

device designed to promote judicial economy."[134] The Ninth Circuit has explained,

> Within the context of MDL proceedings, individual cases that are consolidated or coordinated for pretrial purposes remain fundamentally separate actions, intended to resume their independent status once the pretrial stage of litigation is over.[135]

In short, there is no evidence that Congress intended the MDL statute for anything as radical as abolishing the application of state law in federal courts. Federal MDL transferee courts in diversity cases must respect state law on the substantive legal issues before them,[136] and this practice should be no different for the substantive state law of contingency fee caps.

Moreover, federal MDL courts should not strip away the ability of state courts to regulate the important substantive area of attorney's fees. By ignoring New Jersey fee caps, an MDL court would inhibit New Jersey's ability to regulate fees it could have otherwise regulated if the case were brought in state court. The Supreme Court has even recognized the value of federal courts applying state laws regulating attorney's fees. In *People of Sioux County v. National Surety Co.*,[137] the Court addressed a state law allowing insurance policy beneficiaries to recover attorney's fees in certain suits, noting: "It would be at least anomalous if this [attorney's fees] policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts."[138] The state's serious interest in having its attorney's fees laws applied in federal cases did not escape the Court. This further shows that a desire for uniformity of outcomes across plaintiffs and their attorneys cannot trump the longstanding *Erie* policy, nor can it violate basic federalism concerns.

V. Conclusion

The analysis in this Note shows that state laws capping contingency fees should apply to settlements of diversity cases pending before MDL transferee courts. This analysis is particularly relevant since MDL transferee courts are increasingly ignoring state law by broadly capping contingency fees in MDL settlements.[139] These courts have overlooked the important choice-of-law considerations involved in their decisions. This Note urges MDL transferee courts tasked with reviewing settlements to pay close attention to state laws

134. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., 489 F. Supp. 2d 932, 936 (D. Minn. 2007).

135. *In re* Korean Air Lines Co., Antitrust Litig., 642 F.3d 685, 700 (9th Cir. 2011).

136. *See supra* subpart III(B).

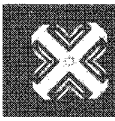
137. 276 U.S. 238 (1928).

138. *Id.* at 243. The validity of this case's reasoning was confirmed in the post-*Erie* case of *Alyeska Pipeline Servs. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975).

139. *E.g.*, *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 564–65 (E.D. La. 2009) (stating that state fee caps are "relevant" but effectively ignoring them by capping all fees at 32%).

capping attorney's fees. Ignoring them to achieve efficiency or uniformity goals ignores the *Erie* doctrine and threatens important state policies. Like any other state substantive law, state fee caps should apply in MDL settlements.

—*Monica Hughes*



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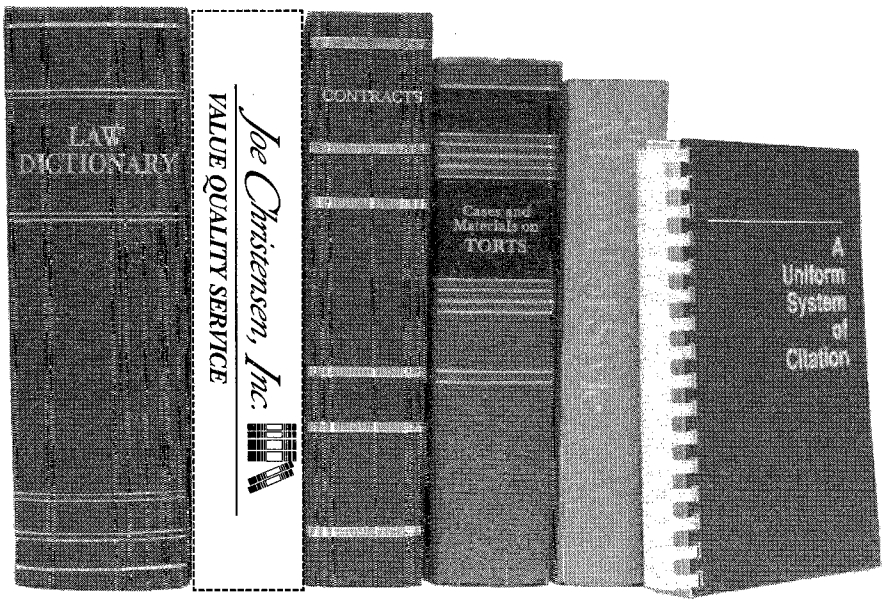

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