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Founded by Adam B. Ross & Dennis W. Donley Jr. in MCMXCVI

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PREFACE

This issue of the *Review* is fortunate to have elite conservative scholars focus on the increase of federal government power, and what can be done to curb this expansion.

First, Jason Boatright asks readers to consider what the law is before attempting to interpret the law. In his article, *No One Knows What the Texas Constitution Is*, Boatright points out that this question may not be a simple one for the Texas constitution. Boatright narrates the history of the enrollment and ratification process. Then, using the preamble of the Texas constitution and the Second Amendment of the U.S. Constitution as examples, he conveys the potential issues that could arise from the lack of a single enrolled, ratified document. Boatright concludes with a reminder that identifying the text of the law is an important first step in legal analysis, and it may not be as simple as it seems.

Next, in *Mexico's Gun-Control Laws: A Model for the United States?*, David B. Kopel offers an in-depth analysis of Mexico's gun laws and asks whether the United States should adopt our southern neighbor's policies in this area. Similar to the United States, Mexico has an explicit constitutional right to arms, but as Kopel demonstrates, this guarantee has been diluted by strict gun-control legislation. After comparing a translation of the constitutional guarantees and major firearms legislation in both countries, Kopel considers the effectiveness of the strict gun-control policies in Mexico. Kopel ultimately concludes that the United States should not adopt Mexico's gun policies.

The *Review* then offers a transcript of a panel held at *The Federalist Society's First Annual Executive Branch Review Conference* titled *Criminal Law at the Federal Level.* In this panel moderated by Adam Liptak, the Honorable George J. Terwilliger III, the Honorable Mary Beth Buchanan, and John G. Malcolm analyze the expanding role of the Executive Branch, specifically prosecutors, as they reflect on the potential for over-criminalization through excessive laws and regulations. Each of the panelists provides insight by drawing upon their experience in the United States Department of Justice.

After considering the role of prosecutors, a discussion about the role of judges directly follows in *Disputing the Dogma of Deference.* In this review of Clark M. Neily III's book, *Judicial Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government,* Timothy Sandefur reframes the discussion about judicial activism. His call for judicial engagement is a call for a judiciary that actually checks the legislature, as opposed to advocating on its behalf by affording too much deference to laws

that interfere with individual rights.

Nicholas Mosvick builds on this call for an engaged judiciary with a challenge to reconsider the infamous case *Lochner v. New York* in the book review titled *Rehabilitating Lochner: A Study in the Limitations of a Constitutional Revolution.* In his review of *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* by David E. Bernstein, Mosvick defies the notion that *Lochner* was the preeminent example of judicial activism. Instead, he argues that *Lochner* was an example of the Supreme Court establishing, or attempting to establish, a limiting principle to restrain government power. Mosvick analogizes this to the Rehnquist Court and its attempt to define a limiting principle with *United States v. Lopez* and *United States v. Morrison.*

Lastly, Michael Eshaghian discusses the expansion of executive power through drone strikes. Eshaghian reviews the case of Anwar al-Awlaki, the first victim of a drone strike on a U.S. citizen, in his note *Are Drone Courts Necessary? An Analysis of Targeted Killings of U.S. Citizens Abroad Through a Procedural Due Process Lens.* After delineating the process by which targets are identified and drone strikes are carried out, Eshaghian addresses the concern about the lack of judicial process for the subject of a drone strike. In the end, Eshaghian concludes that despite the Executive Branch's weighty interests to the contrary, some sort of judicial oversight is required in order to meet the due process requirement of the Constitution.

This year, in addition to the normal editing process, the staff of the *Review* implemented a new citation format for websites. Each static website now includes a permanent archived citation in addition to the website address. These "perma" citations capture a copy of the current website so the information will be available to future readers in the event that the website changes or is no longer available. I would like to thank the entire staff of the *Review* for their enthusiasm, hard work, and dedication in editing the articles and implementing this change.

I hope these articles provoke meaningful debate about the current reach and appropriate limits of the federal government's power. I would like to thank Adam Ross, Brantley Starr, and Amy Davis for their guidance and support throughout the year.

Kelsie Hanson
Editor in Chief

Austin, Texas
December 2013

NO ONE KNOWS WHAT THE TEXAS CONSTITUTION IS

BY JASON BOATRIGHT*

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I. INTRODUCTION

Seven different state constitutions have governed Texas,[1] and another constitution governed the Republic of Texas.[2] The current Texas constitution is commonly known as the Constitution of 1876.[3] It was framed by a constitutional convention in 1875 and ratified by Texas voters in 1876.[4] Since then, it has been amended 474 times in seventy different ratification elections.[5] The frequency with which the current constitution has been amended has made it notoriously long, detailed, and difficult to understand—so much so that in 1972 the state tried to replace the Constitution of 1876 with an entirely new document.[6] That effort failed and the problems that it had intended to address remain.[7] The Texas constitution is still notoriously long and specific,[8] but it has a far more fundamental and important problem. The current Texas constitution might

1. *See Printing History—Texas Constitutions 1824–1876*, THE UNIV. OF TEX. SCH. OF LAW, http://tarlton.law.utexas.edu/constitutions/printing_history [http://perma.cc/3F5V-TYY2] (last visited Jan. 7, 2014) (listing the Constitución Politica del Estado Libre de Coahuila y Tejas (1827) and Constitution or Form of Government of the State of Texas (1833), which were Mexican state constitutions; Constitution of the State of Texas (1861), which was the state's Confederate constitution; and Constitution of the State of Texas (1845), Constitution of the State of Texas (1866), Constitution of the State of Texas (1869), and Constitution of the State of Texas (1876), which have been Texas state constitutions under the United States).

2. *Id.* (listing the Constitution of the Republic of Texas of 1836 (1838)).

3. *See, e.g.*, *In re* Nestle USA, Inc., 387 S.W.3d 610, 619 (Tex. 2012) (calling the current constitution the "Constitution of 1876"). *See also In re* United Scaffolding, Inc., 377 S.W.3d 685, 692 (Tex. 2012) (same).

4. SETH SHEPARD MCKAY, SEVEN DECADES OF THE TEXAS CONSTITUTION OF 1876, at 136, 179 (1942).

5. TEXAS LEGISLATIVE COUNCIL, AMENDMENTS TO THE TEXAS CONSTITUTION SINCE 1876, at 1–2 (2012), *available at* http://www.tlc.state.tx.us/pubsconamend/constamend1876.pdf [http://perma.cc/QW49-RNC4].

6. JANICE C. MAY, THE TEXAS CONSTITUTIONAL REVISION EXPERIENCE IN THE '70'S, at 2 (1975).

7. *Id.* at 147.

8. *See* Editorial, *State Constitution Is an Anachronistic Mess*, SAN ANTONIO EXPRESS-NEWS, Sept. 1, 2011, http://www.mysanantonio.com/opinion/editorials/article/State-Constitution-is-an-anachronistic-mess-2150440.php [http://perma.cc/4NEM-X9C8] ("In one of the Lone Star State's most tortured traditions and by a small number of voters, the Texas Constitution is amended time after time, usually involving statutory level issues or increasing the state's debt."); Editorial, *Texas Constitution Needs Some Updates—and a Diet*, NEWS-JOURNAL.COM (Longview, Texas), Sept. 25, 2013, http://www.news-journal.com/opinion/editorials/editorial-texas-constitution-needs-some-updates-and-a-diet/article_6570bd56-815b-5d96-86a4-4f0a39e600a2.html [http://perma.cc/N66L-DQ98] ("The Texas Constitution is a big mess.").

have several different versions, or no version, currently in effect because the constitutional convention and Texas voters approved six different original versions of the Constitution of 1876. Thus, Texas has not only had eight different constitutions over the last 180 years, it might have as many as six constitutions, or no constitution at all, in effect right now.

II. THE CONSTITUTION OF THE STATE OF TEXAS OF 1876

In order to become law, the Constitution of 1876 had to satisfy three requirements.[9] First, the constitutional convention had to frame the constitution in 1875.[10] Second, the convention had to submit the framed constitution to Texas voters for a ratification election.[11] Third, voters had to ratify the framed constitution in an election in 1876.[12] However, none of that happened.

The constitutional convention framed two different constitutions. The convention voted in favor of one of them, and ordered that it be enrolled,[13] but it did not actually enroll that constitution. Instead, it enrolled another constitution—one with a text containing hundreds of punctuation marks and words that were different from those in the version that was approved and ordered to be enrolled.[14] Neither of the two framed constitutions amended or replaced the other.[15]

The convention submitted four other constitutions to voters

9. 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–97 (1898).

10. *Id.* at 573–74 (reproducing a March 13, 1875 Joint Resolution that called for a Constitutional Convention to frame a new Texas constitution).

11. *Id.* at 775 (reproducing an Ordinance of the Texas Constitutional Convention that required the submission of the framed constitution to voters for ratification or rejection).

12. *Id.*

13. An enrolled bill is a bill passed by both houses of the legislature and signed by their presiding officers. BLACK'S LAW DICTIONARY 186 (9th ed. 2009).

14. *Compare* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS 270–71 (1875), *available at* https://ia600400.us.archive.org/5/items/journalofconstit00texa/journalofconstit00texa_bw.pdf [hereinafter JOURNAL OF THE CONVENTION OF 1875] (quoting the preamble that the Committee on Bill of Rights submitted for convention approval), *and id.* at 436 (showing convention approval of that language), *and id.* at 818–19 (showing convention approval of a constitution containing that language), *with id.* at 820 (reporting that delegates signed an enrolled constitution), *and Tex. Const. of 1876*, TEX. STATE LIBRARY & ARCHIVES COMM'N, https://www.tsl.state.tx.us/treasures/constitution/1875-01.html (last visited Jan. 7, 2014) [hereinafter *Enrolled Constitution*] (showing the enrolled version of the preamble).

15. *See generally* JOURNAL OF THE CONVENTION OF 1875, *supra* note 14, at 820 (reporting that delegates signed an enrolled constitution that was supposed to have been the constitution they had previously approved and ordered to be enrolled).

for ratification; one was written in English, another was in German, one was in Spanish, and the fourth was in Bohemian.[16] Voters ratified those four constitutions.[17] The English version that voters ratified was different from both of the versions that the convention framed. Of course, each of the constitutions not written in English was different from the two English constitutions that the convention framed, as well as the English constitution that the voters ratified. None of the four ratified constitutions amended or replaced any of the other three ratified constitutions or the two framed constitutions. Thus, there were six different original versions of the current constitution.

In fact, there are six different current versions of the current Texas constitution because some sections have never been amended.[18] No court has identified which, if any, of the six versions is in effect today.

The existence of six versions of the current constitution is an important problem that might be impossible to solve, as each of the different current versions of the Texas constitution could be the law today. No particular version is clearly more or less legitimate than the others. No Texas court has chosen which, if any, of the different current versions of the Texas constitution is in effect, nor has a court issued an opinion establishing criteria for determining which, if any, would be.

A. Versions of the Preamble in English

The framing and ratification history of the preamble reveals why several versions of the Texas constitution at the constitutional convention were framed and ratified. It also shows

16. *See* JOURNAL OF THE CONVENTION OF 1875, *supra* note 14, at 818 (the convention ordered the printing of 5,000 copies of the constitution in German); *id.* at 215 (3,000 copies were ordered to be printed in Spanish); *id.* at 216 (1,000 copies were ordered to be printed in Bohemian). *See also* CONSTITUTION OF THE STATE OF TEXAS (Galveston, News Steam Book and Job Establishment 1875), *available at* http://tarlton.law.utexas.edu/constitutions/texas1876 [hereinafter *Ratified English Constitution*]; CONSTITUTION DES STAATES TEXAS (Austin, E. Von Boeckmann & Sohn 1875) [hereinafter *German Constitution*]; CONSTITUCIÓN Y ORDENANZAS DEL ESTADO DE TEXAS (Austin, El Democratic Statesman 1875) [hereinafter *Spanish Constitution*]; USTAVA STATU TEXAS (Austin, Uredni Vydani Gazette Office 1875) [hereinafter *Bohemian Constitution*].

17. MCKAY, *supra* note 4, at 179 (noting that voters approved the constitution by a vote of 136,606 to 56,652).

18. TEXAS LEGISLATIVE COUNCIL, *supra* note 5, at 5.

why a court probably would not be able to explain why any of those versions of the Texas constitution is the law today.

The Convention approved this preamble and ordered that it be enrolled: "Humbly invoking the blessings of Almighty God, the people of the State of Texas do ordain and establish this Constitution."[19]

However, that preamble was not enrolled. This one was: "Humbly invoking the blessings of Almighty God, the people of the State of Texas, do ordain and establish this Constitution."[20]

The Convention ordered that the enrolled version be printed and distributed to voters before the ratification election,[21] but it was not. Here is the English version of the preamble that was submitted to voters for ratification: "Humbly invoking the blessing of Almighty God, the people of the State of Texas do ordain and establish this Constitution."[22]

The three English preambles look very similar to each other. They differ only in the presence or absence of the letter *s* or a comma. Even small differences in the text of the constitution, however, can create large differences in meaning. Courts interpret the Texas constitution according to the ordinary meaning that its literal text had at the time the text was adopted,[23] and commas performed very important grammatical functions at that time.[24]

Accordingly, the preamble that the Convention approved and ordered enrolled explains that Texans are invoking God's gifts while they ordain and establish the constitution.[25] The preamble

19. *See* JOURNAL OF THE CONVENTION OF 1875, *supra* note 14, at 270 (quoting the preamble that the Committee on the Bill of Rights submitted for convention approval); *id.* at 436 (showing convention approval of that preamble). The enrolled version of a bill is the final version. Dillehey v. State, 815 S.W.2d 623, 627 (Tex. Crim. App. 1991) (citing the TEXAS LEGISLATIVE COUNCIL, GUIDE TO LEGISLATIVE INFORMATION (1988)).

20. *See Enrolled Constitution*, *supra* note 14, at 1; *see also* JOURNAL OF THE CONVENTION OF 1875, *supra* note 14, at 820 (reporting that delegates signed an enrolled constitution).

21. JOURNAL OF THE CONVENTION OF 1875, *supra* note 14, at 753.

22. *See Ratified English Constitution*, *supra* note 16, at 1.

23. *See* Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp., 283 S.W.3d 838, 842 (Tex. 2009) (providing that courts rely on the constitution's literal text); Mumme v. Marrs, 40 S.W.2d 31, 35 (Tex. 1931) (explaining that the meaning of the constitution is construed based on the conditions and prevailing sentiments at the time it was adopted); Cramer v. Sheppard, 167 S.W.2d 147, 155 (Tex. 1942) (noting that, in interpreting the constitution, the courts will consider the absurdity of the conclusion only if the constitutional provision is open to more than one construction or interpretation).

24. *See generally* JOHN WILSON, A TREATISE ON GRAMMATICAL PUNCTUATION 34–35 (1871).

25. *Id.* at 34 ("Secondary or subordinate clauses . . . must be separated from the

that was enrolled commands readers to ordain and establish the constitution while they invoke Texans, who are God's gifts.[26] The English preamble that the convention submitted to voters explains that Texans are asking for God's approval while they ordain and establish the constitution.[27]

B. Translated Versions of the Preamble

The convention also ordered that the enrolled version of the constitution be translated and printed in German, Spanish, and Bohemian for distribution to voters for the ratification election.[28] The Convention ordered that 40,000 copies be printed in English, 5,000 in German, 3,000 in Spanish, and 1,000 in Bohemian.[29]

This is the preamble to the German version of the constitution: "Den Segen des allmächtigen Gottes erflehen, hat das Volk des Staates Texas diese Constitution entworfen und festgestellt."[30]

Here is the preamble in Spanish: "El Pueblo del Estado de Texas, invocando humildemente la bendicion del Todopoderoso, ordena y establece esta Constitucion."[31]

This is the Bohemian preamble: "Pokorně vzývaje pomoc všemocného boha lid státu Texas nařizuje a ustanovuje tuto ústavu."[32]

The German, Spanish, and Bohemian versions look very different from one another. Some have letters that do not exist in the other languages.[33] They each have different numbers of

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principal clauses, by means of commas . . . .").

26. *See id.* at 35 ("Expressions of a parenthetical nature—that is, intermediate phrases or clauses, which may be omitted without affecting the construction of the passage, or injuring its sense—are separated from the context by commas . . . ."). *See also* 2 OXFORD ENGLISH DICTIONARY 282 (1989) (defining "blessing" as it was used in 1875, and as it was used in this version of the preamble, as "beneficent gift[s] of God"); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 395 (Tex. 1989) (using a dictionary definition of a term as it was used in 1875 to find the intent of the framers of the constitution).

27. 2 OXFORD ENGLISH DICTIONARY 282 (1989) (defining "blessing" as it was used in 1888, and as it is used in this version of the preamble, as "bestowal of divine favour and prospering influence").

28. MCKAY, *supra* note 4, at 147.

29. *Id.* at 148.

30. *German Constitution, supra* note 16, at 3.

31. *Spanish Constitution, supra* note 16, at 3.

32. *Bohemian Constitution, supra* note 16, at 3.

33. *See* CHARLES JONAS, BOHEMIAN MADE EASY 15–16 (1890) (discussing the letters *ě*,

commas. And, of course, they have only one word in common. The other words that comprise each of the foreign-language preambles have close analogs in the other two languages, but some of the words do have somewhat different meanings. For example, at roughly the time that the Texas constitution was distributed to voters for ratification, the German word "Segen" meant "blessing" or "benediction," as in "[may] the Lord bless it!"[34] The Spanish word "bendicion" meant "benediction."[35] The Bohemian word "pomoc," however, meant "help" or "assistance,"[36] and was not a Bohemian word for "blessing" or "benediction."[37] Thus, the German, Bohemian, and Spanish versions of the preamble, like the three versions of the preamble in English, use words that the framers probably intended to have the same meaning, but they do not. Those slight differences among small parts of the texts result in preambles that have different meanings from one another. Moreover, the foreign-language versions have the same kinds of differences in meaning that the English preambles have: they use words that, just like the English words "blessing" and "blessings," are apparently intended to have the same meaning as one another, but again, they do not.

Asking for God's approval or help in ordaining and establishing a constitution was a common feature of preambles in other constitutions that were in effect around the time the Constitution of the State of Texas (1876) was adopted.[38] Invoking God's gifts, however, was not. It does not make as much

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34. 2 H. BAUMANN, MURET-SANDERS ENCYCLOPAEDIC ENGLISH-GERMAN AND GERMAN-ENGLISH DICTIONARY 877 (1910).

35. 1 MARIANO VELAZQUEZ DE LA CADENA, A DICTIONARY OF THE SPANISH AND ENGLISH LANGUAGES 56 (1865).

36. 2 V.E. MOUREK, A DICTIONARY OF THE ENGLISH AND BOHEMIAN LANGUAGES 544 (1879).

37. 1 V.E. MOUREK, A DICTIONARY OF THE ENGLISH AND BOHEMIAN LANGUAGES 74 (1879) (defining the word "benediction"); *id.* at 83 (defining the word "blessing").

38. *See, e.g.*, ILL. CONST. of 1870 pmbl., *available at* https://ia600400.us.archive.org/6/items/constitutionofst00illi/constitutionofst00illi.pdf [http://perma.cc/G6JK-DXEN] ("looking to Him for a blessing upon our endeavors"); MISS. CONST. of 1890 pmbl., *available at* http://mshistorynow.mdah.state.ms.us/articles/103/index.php?s=extra&id=270 [http://perma.cc/C7LN-FLJZ] ("invoking His blessing on our work"). *See also* Republican Party of Tex. v. Dietz, 940 S.W.2d 86, 89 (Tex. 1997) (providing that, in determining the meaning of a provision of the Texas constitution, courts rely heavily on the literal text, but they may also consider the meaning of analogous provisions of other jurisdictions' constitutions).

sense as asking for God's approval either.[39] Although a preamble might purport to use God's gifts, or express thanks for them, in ordaining and establishing a constitution,[40] none, presumably, would invoke God's gifts in ordaining and establishing a constitution. Nor would a provision of a constitution, even a Texas constitution, invoke Texans and call them God's gifts.[41] Thus, the meaning of the preamble that invokes God's blessing is reasonable, but the meaning of each of the preambles that invokes God's gifts probably is not.

Many Texas courts have held that a provision of the constitution should be construed in a way that would avoid unreasonable conclusions if a reasonable conclusion is available.[42] Therefore, if one version of the preamble had three meanings, two of which were unreasonable and the other reasonable, a court would likely choose to construe the preamble in a way that produced the reasonable meaning.

That, however, is not the choice that the existence of multiple versions of the preamble presents. Choosing which of the six versions is in effect today requires a decision about which preamble is the law, not what each preamble means.[43]

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39. The phrase "invoking God's blessing" in the *Ratified English Constitution* meant "appealing for aid or protection." 8 OXFORD ENGLISH DICTIONARY 55 (1989) (defining the word "invoke" in the sense in which it was used in the English preamble submitted to voters for ratification, and as it was in 1885). The phrase "invoking God's blessings" in the preamble that was approved, and in the enrolled preamble, meant "calling for a thing with earnest entreaty." *Id.* (defining the word "invoke" in the sense in which it was used in those preambles, and as it was used in 1865).

40. Some preambles to other constitutions do acknowledge the importance of God's gifts in the making of a constitution without asking for God's gifts or citing them as justification for establishing it. *See, e.g.*, TEX. CONST. of 1845, *available at* http://tarlton.law.utexas.edu/constitutions/texas1845/preamble_a1 [http://perma.cc/G6SU-KJZ6] ("acknowledging with gratitude the grace and beneficence of God"). *See also* Williams v. Castleman, 247 S.W. 263, 265 (Tex. 1922) (providing that, in construing the constitution, courts may examine previous Texas constitutions); IOWA CONST. of 1857 pmbl., *available at* http://publications.iowa.gov/9996/1/iowa_constitution_1857002.pdf [http://perma.cc/H89M-Y2N6] ("grateful to the Supreme Being for the blessings hitherto enjoyed").

41. District of Columbia v. Heller, 554 U.S. 570, 578 (2008) (citing F. DWARRIS, A GENERAL TREATISE ON STATUTES 268–69 (P. Potter ed., 1871)) ("But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.").

42. Cramer v. Sheppard, 167 S.W.2d 147, 155 (Tex. 1942). *See also* Sears v. Bayoud, 786 S.W.2d 248, 251 n.5 (Tex. 1990) (explaining that Courts should not "ignore clear evidence of constitutional intent in favor of technical rules of grammar").

43. *See* Ross E. Davies, *Which is the Constitution?*, 11 GREEN BAG 2D 209, 214–16 (2008) (distinguishing identification, which is about what the law is, from interpretation, which is about what the law means).

Accordingly, one of the three English preambles could be in effect today regardless of the precise meaning of the word "blessing" or "blessings," and regardless of the grammatical function of two commas or one.

For the same reason, one of the three non-English preambles might be the law today, whatever the word "Segen," "bendicion," or "pomoc" means. That is because the non-English preambles were probably official, legal documents, just like the versions of the constitution written in English. The non-English versions were printed and distributed to voters so that voters could decide whether to ratify or reject the new constitution.[44] Copies of all four versions were filed in the secretary of state's office.[45] Each contains a certificate of authenticity from the secretary of state.[46] Unlike bilingual ballots in some elections today, they were neither mere foreign-language instructions or questions in an election for an office or a proposition,[47] nor were they summaries of the English text of proposed amendments to the Texas constitution like the Spanish-language summaries placed on ballots in modern-day ratification elections.[48] Those summaries are not legal texts; they are summaries of proposed legal text.[49] The German, Spanish, and Bohemian versions of the

44. JOURNAL OF THE CONVENTION OF 1875, *supra* note 14, at 109 (explaining that the German version was submitted to voters so that people who could not read English could understand the text).

45. *Id.* at 753.

46. *Ratified English Constitution*, *supra* note 16, at 26; *German Constitution*, *supra* note 16, at 97; *Spanish Constitution*, *supra* note 16, at 85; *Bohemian Constitution*, *supra* note 16, at 59.

47. *See* TEX. ELEC. CODE ANN. § 272.005(c) (West 2003) (requiring, for those elections that have Spanish text on ballots, that all ballots have English text, and that the Spanish instructions for completing the ballot be placed beneath the English text).

48. *See id.* § 274.003(c) (West 2003) (requiring that, for each proposed constitutional amendment, the secretary of state certify in writing on the ballot the working of the proposition, and include ballot translation language, per 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(I) (2011)).

49. *See* TEXAS SECRETARY OF STATE, 2013 CONSTITUTIONAL BALLOT CERTIFICATION IN SPANISH, http://www.sos.state.tx.us/elections/forms/2013-ballot-certification.pdf [http://perma.cc/7VRM-2H7Y] (showing the Spanish-language ballot proposition for 2013). *See also id.* (citing TEX. ELEC. CODE ANN. § 274.003 (West 2003)) (explaining that the secretary of state certifies ballot propositions submitting constitutional amendments). *See also* TEX. ELEC. CODE ANN. § 274.001 (West 2003) (stating that propositions submitting constitutional amendments are merely descriptions of the text of constitutional amendments). *See also* TEXAS SECRETARY OF STATE, DECLARACIONES INTERPRETATIVAS PARA LA ELECCIÓN DE ENMIENDAS CONSTITUCIONALES DEL 5 DE NOVIEMBRE DE 2013, http://www.sos.state.tx.us/elections/voter/2013novballotexp-sp.shtml [http://perma.cc/M3GK-Q4PL] (containing explanations, rather than summaries, in Spanish of proposed constitutional amendments).

Texas constitution were themselves legal texts, submitted to voters for approval. Thus, the German, Spanish, and Bohemian versions of the Constitution of 1876 were distinguishable in appearance, but probably not in effect, from the three English versions.

C. The Existence of Different Versions of the Texas Constitution Results in Uncertainty

Common sense suggests that the constitutional convention probably did not intend to enact four different legally-effective Texas constitutions in four different languages, but nothing in the *Journal of the Constitutional Convention* or the *Debates of the Constitutional Convention* supports that notion. More importantly, nothing in the texts themselves indicates that they were intended to be anything other than ratified, legal texts. Recent Texas history supports that notion. The Texas Constitutional Convention of 1845 ordered that 1,000 copies of the ordinance annexing Texas to the United States be printed in Spanish and distributed to voters in areas of the state with the most Spanish-speaking citizens.[50] The text of the Spanish version of the ordinance was formally recorded in the convention's journal in the same way that the English version was recorded.[51] Similarly, the Texas Constitutional Convention of 1836 ordered that the constitution and laws of the Republic of Texas be translated into Spanish.[52] Consequently, deciding which, if any, of the six versions of the preamble is the law, in any of the four languages in which it was written, would depend on whether any of those versions satisfied the legal requirements for becoming law.

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50. DEBATES OF THE TEXAS CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS, at 85–86 (1845), *available at* http://tarlton.law.utexas.edu/constitutions/files/debates1845/1845_07_16_dbt.pdf [http://perma.cc/M5CD-YW95].

51. JOURNALS OF THE CONVENTION OF THE STATE OF TEXAS 70–73 (1845), *available at* http://tarlton.law.utexas.edu/constitutions/texas1845/journals/jul16 [http://perma.cc/C7SZ-JMQ7].

52. JOURNAL OF THE GENERAL CONVENTION OF 1836, at 58 (1838), *available at* http://tarlton.law.utexas.edu/constitutions/files/journals1836/1836_03_10thu_jnl.pdf [http://perma.cc/QG8X-LLB4]. *See also id.* at 65, *available at* http://tarlton.law.utexas.edu/constitutions/files/journals1836/1836_03_10fri_jnl.pdf [http://perma.cc/8T9Y-3MTX]. The previous year, the Texas General Convention of 1835 printed an identical Spanish-language version of its English-language declaration of intent to take up arms against Mexican General Santa Anna. *Declaration of the People of Texas (1835)—Spanish Text*, THE UNIV. OF TEX. SCH. OF LAW, http://tarlton.law.utexas.edu/constitutions/dpt1835spanish [http://perma.cc/HPN8-HH5Z].

No Texas court has ruled, or been asked to rule, on whether a particular version of the preamble is the law. Instead, Texas courts have cited several different versions of the preamble. Two Texas courts of appeals have quoted text from the enrolled preamble.[53] Another quoted the preamble that delegates approved and ordered to be enrolled.[54] One court used text from the English preamble that voters reviewed for ratification.[55] Thus, Texas courts appear to assume that there is a preamble to the Texas constitution, but they have not identified which one is correct, nor have they identified which preamble or preambles would be incorrect. In other words, Texas courts have identified three preambles that could be the law today, and they have done so without suggesting that those three preambles are the only ones that could be the law today. Therefore, a Texas court might choose to cite any version of the preamble.

Texas judges are not the only Texas public officials who have the authority to interpret and influence state law, nor are they the only officials who have cited different versions of the preamble. The Attorney General of Texas has cited a version with two commas[56] and a version with one comma.[57] The Texas legislature has published versions of the preamble that contain one comma.[58] However the Texas Legislative Council—an agency in the legislative branch of state government[59]—has cited and quoted a version of the preamble with two commas.[60] Thus,

53. City of Houston v. Trail Enters., Inc., 377 S.W.3d 873, 886 (Tex. App.—Hous. [14th Dist.] 2012, pet. filed); Robinson v. Crown Cork & Seal Co., 251 S.W.3d 520, 541 (Tex. App.—Hous. [14th Dist.] 2006) (Frost, J., dissenting), *rev'd on other grounds*, 335 S.W.3d 126 (Tex. 2010).

54. Waite v. Waite, 64 S.W.3d 217, 232 n.4 (Tex. App.—Hous. [14th Dist.] 2001, pet. denied).

55. Church v. Bullock, 100 S.W. 1025, 1027 (Tex. Civ. App. 1907).

56. OFFICE OF THE ATTORNEY GENERAL, CONSTITUTION OF THE STATE OF TEXAS (ADOPTED FEBRUARY 15, 1876) (1986).

57. OFFICE OF THE ATTORNEY GENERAL, CONSTITUTION OF THE STATE OF TEXAS (1973).

58. THE REVISED STATUTES OF TEXAS, n.pag. (1895), *available at* http://babel.hathitrust.org/cgi/pt?id=mdp.35112105478434;view=1up;seq=11 ("Published by Authority of the State of Texas (Pursuant to Chapter 82, Acts 1895)"). *See also* THE REVISED STATUTES OF TEXAS ADOPTED BY THE REGULAR SESSION OF THE SIXTEENTH LEGISLATURE, A.D. 1879, n.pag. (1887) (containing the seal of, and an explanation by, the Texas secretary of state certifying "that the foregoing volume is a true and correct copy of the original bills on file in this department").

59. TEX. GOV'T CODE ANN. § 323.001(a) (West 2013).

60. TEXAS LEGISLATIVE COUNCIL, TEXAS CONSTITUTION: INCLUDES AMENDMENTS THROUGH THE NOVEMBER 5, 2013 CONSTITUTIONAL AMENDMENTS ELECTIONS 1 (2013), *available at* http://www.tlc.state.tx.us/pubslegref/TxConst.pdf [http://perma.cc/T4WL-

offices in all three branches of state government have cited more than one version of the preamble to the Texas constitution. None of them has suggested that one version is more or less likely to be the law than any other version, nor has any of them identified criteria by which anyone else could choose which, if any, version of the preamble is the correct one. Consequently, it is probably impossible to predict which version of the preamble that any Texas official, not just Texas judges, would use today.

III. THE SECOND AMENDMENT OF THE U.S. CONSTITUTION

The framing, ratification, and recent jurisprudential history of the Second Amendment to the U.S. Constitution demonstrate why uncertainty about the correct version of a constitutional amendment could be an important problem.[61] There are many versions of the Second Amendment, some of which contain no commas and some of which contain one, two, or three commas.[62] New Jersey ratified a version that had no commas.[63] South Carolina, Pennsylvania, New York, and Rhode Island ratified a Second Amendment with one comma.[64] Maryland and North Carolina ratified a version with two commas.[65] Delaware approved a text with three commas.[66] Some of those versions were framed but not ratified, or ratified by some states and not others.[67] No version of the Second Amendment was approved by enough states to be ratified and become law.[68]

The U.S. Supreme Court has cited several different versions of the Second Amendment.[69] In fact, the U.S. Supreme Court cited a version of the Second Amendment in its *Heller* decision—the opinion that confirmed the existence of an individual constitutional right to keep and bear arms—that was different

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61. *See* William W. Van Alstyne, *A Constitutional Conundrum of Second Amendment Commas*, 10 GREEN BAG 2D 469, 476 (2007).

62. Davies, *supra* note 43, at 210–11.

63. *Id.* at 210 & n.6.

64. *Id.* at 211 & n.7.

65. *Id.* at 211 & n.8.

66. *Id.* at 211 & n.9.

67. Van Alstyne, *supra* note 61, at 476.

68. U.S. CONST. art. V (providing that a proposed constitutional amendment becomes law when three-fourths of the states ratify it).

69. *See, e.g.*, Presser v. Illinois, 116 U.S. 252, 260 (1886) (quoting a version of the Second Amendment with one comma); United States v. Miller, 307 U.S. 174, 176 (1939) (quoting a version of the Second Amendment with three commas).

from the version that the U.S. Court of Appeals had cited in the very opinion that the U.S. Supreme Court was reviewing.[70] That matters because the grammatical function of the clauses created by commas in the Second Amendment was the first and longest part of the analysis of the majority opinion in *Heller*.[71] The *Heller* Court quoted a version of the Second Amendment with three commas, but it did not explain why, not did it hold that the version with three commas is the law today. The existence of those three commas created, in the opinion of the Court, a series of prefatory and operative clauses that rendered the reference to the militia merely introductory and the reference to the right to keep and bear arms effective.[72]

Had the Court reviewed a version of the Second Amendment that did not contain three commas, there would have been no clauses, or fewer or different clauses, that could have vitiated the introductory function of the militia clause and the operative function of the rights clause.[73] The absence of those clauses could have resulted in the outcome that the dissenting opinions in that case supported.[74] Thus, differences in the number and placement of commas in the Second Amendment could create meanings, and legal outcomes, that are profoundly different from what they otherwise would be.[75]

Because no court has ruled on which version of the Second Amendment is in effect, it is possible that a future U.S. Supreme Court case could overturn or modify the *Heller* decision, not merely because the Court might disagree with the *Heller* Court's construction of the Second Amendment, but because the future Court might disagree with the *Heller* Court's choice of Second Amendment text. The U.S. Supreme Court has not identified

70. *Compare* Parker v. District of Columbia, 478 F.3d 370, 378 (D.C. Cir. 2007) (citing a version of the Second Amendment with two commas), *with* District of Columbia v. Heller, 554 U.S. 570, 576 (2008) (citing a version of the Second Amendment with three commas).

71. *See Heller*, 554 U.S. at 576–605 (discussing the grammatical function and legal effect of the prefatory and operative clauses).

72. *See Heller*, 554 U.S. at 578–79, 595–96.

73. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998) (discussing function of justification clauses and operative clauses in the three-comma Second Amendment to the U.S. Constitution).

74. *See Heller*, 554 U.S. at 578; *see also id.* at 643–44 (Stevens, J., dissenting).

75. *See* Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. & Jeffrey P. Kaplan, Ph.D. as Amici Curiae Supporting Petitioners, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

the criteria by which such a choice could be made. Presumably, the Court's choice of text would depend on whether it decided that the text of the U.S. Constitution must be framed and ratified, or only framed or ratified, to become law.[76]

One law professor has argued that the Second Amendment is not in effect at all, because no version of it was framed and subsequently ratified by a sufficient number of states.[77] That conclusion is correct, but impractical because, among other reasons, too much depends on its existence. The U.S. Congress and state legislatures, including the Texas legislature, have enacted laws that are profoundly affected by the Second Amendment.[78] The courts, of course, have issued opinions interpreting many of those laws.[79] State and federal law enforcement agencies enforce and implement laws that the Second Amendment has been thought to authorize or circumscribe.[80] In addition, of course, American citizens have been making, buying, selling, keeping, and using firearms for centuries.[81] The idea that a court would jeopardize all of those activities and the institutions surrounding them because of a legal problem with the ratification of the Amendment over 200 years ago is almost certainly incorrect.[82]

Other legal scholars have argued that the version with three commas is the law because: (1) it is the one that the Constitutional Convention enrolled, and (2) it is the version that

76. *See* Davies, *supra* note 43, at 214–15 (discussing Coleman v. Miller, 307 U.S. 433, 452–56 (1939)) (noting that the U.S. Supreme Court has held that such a choice would be a non-justiciable political question).

77. Van Alstyne, *supra* note 61, at 476.

78. *See, e.g.*, TEX. GOV'T CODE ANN. § 411.177 (West 2012) (authorizing the Texas Department of Public Safety to issue licenses to private citizens to carry concealed handguns).

79. *See, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (holding that the Fourteenth Amendment to the U.S. Constitution renders the Second Amendment individual right to keep and bear arms recognized in the *Heller* decision fully applicable to the states).

80. *See, e.g.*, *Texas Concealed Handgun Laws and Selected Statutes*, TEXAS DEPARTMENT OF PUBLIC SAFETY, REGULATORY SERVICES DIVISION, http://www.txdps.state.tx.us/InternetForms/Forms/CHL-16.pdf [http://perma.cc/F737-2ECW] (last visited Jan. 7, 2014). *See also National Instant Criminal Background Check System*, FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/nics/nics [http://perma.cc/7UEQ-GD52] (last visited Jan. 7, 2014) (noting that the system is required by the Brady Handgun Violence Prevention Act of 1993).

81. District of Columbia v. Heller, 554 U.S. 570, 581–84 (2008).

82. Van Alstyne, *supra* note 61, at 477 (reproducing an email from Eugene Volokh to Van Alstyne describing the contention that there is no Second Amendment as "unsound" and not a "serious argument").

the United States Code uses.[83] However, enrollment and codification are two different processes, neither of which renders a legal text an effective federal law.[84] Moreover, if enrollment were more important than ratification, the act of copying an approved law would be more important than the act of approving it or ratifying it. Such an outcome would grant more power to clerks than to the framers and the people—those who are constitutionally authorized to write an amendment and those who are constitutionally authorized to ratify one.[85] Also, the version with three commas is not the version that the United States Code uses.[86]

One law professor has argued that the printed version of the U.S. Constitution ratified by the voters, rather than the handwritten and signed version approved by the Constitutional Convention, is the correct version, because the people ratified it, and the people are the source of all government power.[87] That argument, however, does not adequately account for the fact that the people ratified Article V of the U.S. Constitution, which requires that amendments be framed before they may be ratified.[88] Perhaps more importantly, the notion that the people exercise their sovereign power through ratification, but not through framing, is inconsistent with the idea of republican government, under which the people have delegated the exercise of their sovereign power to representatives who act in the name, and on behalf of, the people who elect them.[89] Put

83. *See, e.g.*, David S. Yellin, *The Elements of Constitutional Style: A Comprehensive Analysis of Punctuation in the Constitution*, 79 TENN. L. REV. 687, 707 n.91 (2012).

84. *See* 1 U.S.C. § 112 (2012) (providing that publication of a legal text in the U.S. Statutes at Law "shall be legal evidence of . . . proposed or ratified amendments to the Constitution of the United States"). The appearance of a legal text in the U.S. Code is prima facie evidence that the provision has the force of law, but that does not confer legal status on the text. U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 448 (1993).

85. U.S. CONST. art. V (requiring ratification of constitutional amendments).

86. Harry Bain, *Errors in the Constitution—Typographical and Congressional*, PROLOGUE, Fall 2012, at 8–11 (showing that the U.S. Code is different from the enrolled U.S. Constitution), *available at* http://www.archives.gov/publications/prologue/2012/fall/const-errors.html [http://perma.cc/HB2F-X8MA].

87. Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 294–95 (1987).

88. U.S. CONST. art. V (requiring that the U.S. Congress, or a constitutional convention proposed by two-thirds of state legislatures, propose amendments to the U.S. Constitution for ratification by the people).

89. *Id.* (requiring that proposed amendments "be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of

differently, the people do not merely ratify the constitution, they also frame it insofar as they elect representatives. These representatives either write and approve the text that is submitted to the people's legislatures for ratification,[90] or elect the delegates who write and approve the text that is submitted to the people's legislatures for ratification.[91] Thus, the notion that the people are the source of all governmental power does not give rise to the inference that ratification is the most important step in the creation of a constitution; it gives rise to the inference that framing and ratification are equally important steps in the process of making a constitution.

Thus, there is no consensus among legal scholars regarding which version, if any, of the Second Amendment to the U.S. Constitution is in effect. Nor do they agree on which criteria a court should use to choose a particular version. In fact, it is possible that a court would hold that it is forbidden from identifying such criteria and from holding that a particular version of the Second Amendment is in effect. One legal scholar has argued that the U.S. Supreme Court ruled, in its *Coleman v. Miller* opinion, that determining whether an amendment to the U.S. Constitution was in effect was a political question, rather than a legal one.[92] As a result, the Court declined to answer it.[93] However, in that case, the Court did not hold that determining the validity of a constitutional amendment was nonjusticiable; the Court held that the questions that the Court was asked to answer in order to judge the validity of the amendment—questions regarding economics, publicity, and other concepts that had little, if anything, to do with the job of a court—were political and nonjusticiable.[94] Indeed, the *Coleman* Court favorably cited another U.S. Supreme Court case, *Dillon v. Gloss*,[95] in which the Court held that the Eighteenth Amendment to the U.S. Constitution had been validly ratified and was in effect.[96]

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ratification may be proposed by the Congress").

90. *Id.* art. I, § 2 ("The House of Representatives shall be composed of members chosen every second year by the people of the several states . . . .").

91. *Id.* art. IV, § 4 (providing that the "United States shall guarantee to every state in this union a republican form of government").

92. Davies, *supra* note 43, at 214.

93. *Id.*

94. Coleman v. Miller, 307 U.S. 433, 452–54 (1939).

95. *Id.* at 452 (citing Dillon v. Gloss, 256 U.S. 368 (1921)).

96. *Dillon*, 256 U.S. at 376–77.

The *Dillon* Court explained that the Eighteenth Amendment became effective the day that the last state required for ratification approved the amendment,[97] rather than the day that the U.S. Secretary of State proclaimed it to be ratified.[98]

The *Dillon* Court did not explain its choice,[99] but the fact of the choice is important because, if the U.S. Supreme Court has the power to choose which act in the framing and ratification process renders a constitutional amendment effective, it could probably choose which version of the Second Amendment to the U.S. Constitution would be in effect. The U.S. Supreme Court, however, has issued no ruling that would enable anyone to predict with any confidence which version would be in effect.

The same is true of courts in Texas. Many courts have opined that the Texas constitution should be construed according to the intention of the Convention that framed it.[100] Other Texas Courts have held that the constitution should be read according to the decision of the voters who adopted it.[101] And some Texas courts have opined that the constitution should be construed according to the wishes of the framers and the voters.[102] However, none of those courts ruled that a version of the constitution that was framed but not ratified, or ratified but not framed, was in effect. Like the courts that held that the constitution should be construed in a way that avoids unreasonable results and finds a reasonable one, the courts that opined that the constitution should be construed according to the intention of the Convention, or the voters, or both, were trying to find the meaning of a text that was the law, rather than

97. *Id.* at 376 & n.13.

98. *Id.* at 376–77.

99. *Id.*

100. *See, e.g.*, Smissen v. State, 9 S.W. 112, 116 (Tex. 1888). *See also* Western Co. v. Sheppard, 181 S.W.2d 850, 853 (Tex. Civ. App.—Austin 1944, writ ref'd) (explaining that, in finding the meaning of the Texas constitution, the search is to determine "the purpose, meaning and intent of the framers"). *See also* Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 394–95 (Tex. 1989) (noting the difficulty inherent in determining the intent of voters over a century ago and discussing the intent of the framers at length).

101. *See, e.g.*, Lanford v. Fourteenth Court of Appeals, 847 S.W.2d 581, 585 (Tex. Crim. App. 1993) (citing Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989) and Williams v. Castleman, 247 S.W. 263, 265 (1922)).

102. *See, e.g.*, Johnson v. Tenth Judicial Dist. Court of Appeals at Waco, 280 S.W.3d 866, 872 (Tex. Crim. App. 2008); Stringer v. Cendant Mortg. Corp., 23 S.W.3d 353, 355 (Tex. 2000) (citing Farrar v. Bd. of Trs. of Emps. Ret. Sys. of Tex., 243 S.W.2d 688, 692 (Tex. 1951)).

trying to find the text that is the law.[103] Thus, none of those holdings would help a court choose which of the six preambles to the Texas constitution, if any of them, is in effect today.

IV. DOES THE LACK OF A SINGLE CONSTITUTION EVEN MATTER?

The absence of criteria for determining the legally-effective preamble to the Texas constitution might not seem like much of a problem because, unlike the Second Amendment to the U.S. Constitution, the preamble to the Texas constitution is rarely litigated[104] and has little, if any, force of law.[105] However, the point of examining the framing and ratification history of the preamble to the Texas constitution, and the different versions and meanings that its history has created, is not to suggest that uncertainty regarding the correct text and true meaning of the preamble threatens the stability of law and life in Texas. Rather, it is to suggest that if the very first, and probably simplest, provision of the Texas constitution is difficult or impossible to identify and construe, some of the other sections of the constitution that are far longer and more complex than the preamble probably are, too. That, in turn, suggests that the framing and ratification history of the Texas constitution, and the various versions that resulted from them, pose a profound problem for the state.

Indeed, the preamble is not the only provision of the current Texas constitution that has several versions, any or none of which might be in effect today. Every section of the original text of the current Texas constitution has a ratified version that differs from a framed version, because the Convention framed

103. *See, e.g.*, City of El Paso v. El Paso Cmty. Coll. Dist., 729 S.W.2d 296, 298 (Tex. 1987).

104. The Texas preamble has not been cited in a holding of any appellate court. It could be one day, though. The words, "We the People of the United States . . . do ordain and establish this Constitution" in the Preamble to the U.S. Constitution are similar to the words, "the people of the State of Texas do ordain and establish this Constitution" in the preamble to the Texas constitution. *Compare* U.S. CONST. pmbl., *with* TEX. CONST. pmbl. The former constituted an important part of the reasoning of one of the most famous cases in American legal history. *See McCulloch v. Maryland*, 17 U.S. 316, 404–05 (1819) (noting that the phrase "We the people" in the Preamble to the U.S. Constitution identifies the source of constitutional authority).

105. *See* 1 GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 1 (1977) (explaining that the preamble "cannot be an independent source of power although it may help in the definition and interpretation of powers found in the body of the constitution").

three English versions, and voters ratified three non-English versions. The differences are far more extensive than that, though. Many sections of the English version of the Texas constitution that was enrolled differ from the English version that was ratified. In fact, of the 279 sections of the original text of the current Texas constitution, 188 sections are different in the enrolled English version from the corresponding sections in the ratified English version.[106]

Many of the differences in those sections are probably not important because they are differences in punctuation and orthography that probably cannot affect the meaning of the text. For example, the enrolled version of article I, section 8 provides, "In all criminal prosecutions, the accused shall have a speedy public trial by an impartial jury."[107] However, the version submitted to voters for ratification in English provides, "In all criminal prosecutions the accused . . . ."[108] The comma after "prosecutions" in the enrolled version creates an introductory clause that would not change the meaning of the sentence as a whole.[109] Similarly, one version of article I, section 12 italicizes the term "*habeas corpus*," while another version does not.[110] That could not affect the meaning of the terms.[111] Likewise, one version of article I, section 23 contains the word "defence," while another contains "defense."[112] The difference in spelling cannot change the meaning of the words, which had identical meanings in 1876 and, unlike today, were used interchangeably in British and American English.[113]

Other sections, however, do have enrolled and ratified versions that differ in ways that could produce different meanings. Some of those created differences in meaning are

106. *Comparison of the Enrolled and Ratified Texts of the Constitution of 1876* (on file with the author).

107. *Enrolled Constitution*, *supra* note 14, at 1.

108. *Ratified English Constitution*, *supra* note 16, at 1.

109. WILSON, *supra* note 24, at 34 (explaining that a comma can create a "commencing" clause).

110. *Compare Enrolled Constitution*, *supra* note 14, at 1, *with Ratified English Constitution*, *supra* note 16, at 1.

111. WILSON, *supra* note 24, at 120 (explaining that italicized words demonstrate emphasis or, as is the case with the term "*habeas corpus*," a foreign origin).

112. *Compare Enrolled Constitution*, *supra* note 14, at 2, *with Ratified English Constitution*, *supra* note 16, at 2.

113. 4 OXFORD ENGLISH DICTIONARY 375 (1989) (defining "defence" and "defense" interchangeably as those words were used in the late nineteenth century). *See also id.* (noting that "defence" is used primarily in Britain in the twentieth century).

slight at most. For example, many sections of the Texas constitution have sections that contain words that are capitalized in one version of the section, but not in another version. The version of article I, section 8 that was enrolled provides that, "in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the Court."[114] On the contrary, the ratified version in English contains the phrase, "under the direction of the court . . . ."[115] It is possible that the capitalized word referred only to especially important courts, and the non-capitalized word referred to all courts.[116] On the other hand, there might be no difference in meaning between the capitalized word "Court" and the lower case word "court," because both words could refer to only those courts that the Texas constitution authorized and established.[117]

Some sections that have versions differing in the capitalization of certain words probably have somewhat more important differences in meaning than the versions of article I, section 8 do. For example, the enrolled version of article I, section 28 provides: "[n]o Power of suspending laws in this State shall be exercised except by the Legislature."[118] However, the ratified version provides, "[n]o power of suspending laws in this State shall be exercised except by the Legislature."[119] The version that contains the capitalized word "Power" is probably referring to particular powers enumerated elsewhere in the constitution or recognized at common law, while the version that contains the lower case word "power" could refer to any power of suspending laws, including those not yet enumerated or recognized. Thus, a difference that might seem to be unimportant, like the capitalization, or lack of capitalization, of a single letter could produce an important difference in meaning.

On the other hand, some sections of the Texas constitution have differences that appear to be important, but that, for

114. *Enrolled Constitution, supra* note 13, at 1.

115. *Ratified English Constitution, supra* note 16, at 1.

116. *See generally* WILSON, *supra* note 24, at 118 ("Words marking some great event, or remarkable change in religion or government, are commenced with capital letters . . . .").

117. *See* TEX. CONST. art. V, § 1 (requiring that the judicial power of the state reside in certain courts). *See also* Collingsworth Cnty. v. Allred, 40 S.W.2d 13, 15 (Tex. 1931) (explaining that two sections of the Texas constitution that related to the same subject must be read in the light of each other).

118. *Enrolled Constitution, supra* note 13, at 2.

119. *Ratified English Constitution, supra* note 16, at 2.

various reasons, probably are not. For example, the version of article I, section 3 that was enrolled provides, "All persons, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."[120] The version that was submitted to voters for ratification provides, "All free men when they form a social compact have equal rights . . . ."[121] No Texas court has quoted the version of article I, section 3 that contains the phrase "All persons." Every one of the dozens of Texas courts that have quoted that section has quoted the version that contains the phrase "All free men."[122] However, no court has restricted the rights guaranteed in article I, section 3 only to men. On the contrary, courts routinely apply the section to cases involving women.[123] And, of course, article I, section 3 was ratified after emancipation, so it would apply to all people. Thus, the existence of two different phrases in two different versions of article I, section 3 does not create a different legal meaning; courts construe the version that contains the phrase "All free men" in the same way they would construe the version that contains the phrase "All persons."

Other sections, however, have differences that could be very important indeed. The double jeopardy clause of the Texas constitution is one of those sections. It has never been amended. Not only do the original versions of the double jeopardy clause differ from one another, but two commonly used versions of the Texas double jeopardy clause differ from one another today. Here is the text of the clause published on the Texas legislature's website: "No person, for the same offense, shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction."[124]

This is the text of the Texas double jeopardy clause published by the West Corporation: "No person, for the same offense, shall

120. *Enrolled Constitution*, *supra* note 13, at 1.

121. *Ratified English Constitution*, *supra* note 16, at 1.

122. *See, e.g.*, Richards v. League of United Latin Am. Citizens (LULAC), 868 S.W.2d 306, 310 (Tex. 1993).

123. *See, e.g.*, Wessely Energy Corp. v. Jennings, 736 S.W.2d 624 (Tex. 1987) (applying article I, section 3 of the Texas Constitution to women).

124. *Texas Constitution and Statutes*, TEXAS LEGISLATURE ONLINE, http://www.statutes.legis.state.tx.us/Docs/CN/pdf/CN.1.pdf [http://perma.cc/Q9R7-FPW6] (last visited Jan. 7, 2014) (forbidding double jeopardy at all times).

be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction."[125]

The version published online by the Texas legislature contains text from the version in English submitted to voters for ratification.[126] The version published by West contains text from the enrolled version.[127] Texas courts have quoted both versions.[128] No court has explained why it quoted the version it quoted. This is important because one of the versions might produce a result that is profoundly different from that of the other. The version submitted to voters for ratification, i.e., the one published by the Texas legislature, provides that a person cannot be placed in double jeopardy, ever.[129] The version that the Constitutional Convention enrolled—the one published by the West Corporation—provides that a person cannot be placed in double jeopardy after a not-guilty verdict.[130]

Those differences in meaning depend completely on the presence, or absence, of a single semicolon. That might seem unlikely, but it would probably not be surprising to the kind of people who framed the Texas double jeopardy clause. To understand why, consider a widely-published story about the drafting of the U.S. Constitution. The committee in charge of drafting Article I, Section 8, Clause 1, which is known as the General Welfare Clause, did not separate the terms "to pay the Debts and provide for the common Defence and general Welfare of the United States" with any punctuation.[131] Gouverneur Morris apparently wanted to grant the U.S. Congress an

125. TEX. CONST. art. I, § 14 (West 2007) (forbidding double jeopardy after acquittal).

126. *Compare Texas Constitution and Statutes*, *supra* note 124 (using language from the English version of the constitution submitted to voters for ratification), *with Ratified English Constitution*, *supra* note 16, at 2.

127. *Compare* TEX. CONST. art. 1, § 14 (West 2007) (using language from the enrolled version of the constitution), *with Enrolled Constitution*, *supra* note 14, at 1–2.

128. *See, e.g.*, *Ex parte* Necessary, 333 S.W.3d 782, 787 n.1 (Tex. App.—Houston [1st Dist.] 2010) (citing the version published online by the Texas legislature); *Ex parte* Lewis, 219 S.W.3d 335, 340 (Tex. Crim. App. 2007) (quoting the version published by West).

129. *See* WILSON, *supra* note 24, at 48 ("When several short sentences follow each other, slightly connected in sense or in construction, they may be separated by a semicolon . . . .").

130. *See id.* at 40 ("When the concluding part of a sentence refers to two or more preceding expressions, it is separated from the last expression, and the expressions from each other, by means of commas . . . .").

131. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 182 (1912).

independent power to provide for the general welfare so, as a member of the Committee on Style, he changed the committee's draft by inserting a semicolon in front of the phrase, "general Welfare."[132] The Constitutional Convention realized what Morris had done and removed the semicolons in an attempt to withhold from Congress the independent power to provide for the general welfare.[133] Thus, something as simple as the presence or absence of a semicolon could be a powerful feature of constitutional text and would have been understood to be so by the framers of the Texas double jeopardy clause.

Texas courts have held that the double jeopardy clause of the Texas constitution is conceptually identical to the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution[134] and grants the same, rather than more, rights to defendants as the U.S. Constitution's Double Jeopardy Clause.[135] The federal Double Jeopardy Clause provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."[136] The U.S. Supreme Court has held that this Clause protects criminal defendants against three things: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.[137] That is similar to the version of the Texas double jeopardy clause that has a semicolon, which prohibits double jeopardy of any defendant, ever, rather than the version that does not have a semicolon and prohibits double jeopardy after a not-guilty verdict.

Since Texas Courts have held that the Texas double jeopardy is conceptually identical to, and offers the same rights as, the federal Double Jeopardy Clause,[138] a Texas court might decline to construe the Texas double jeopardy clause as prohibiting double jeopardy only after a not-guilty verdict, even if the court were reviewing the version of the clause that has a semicolon.

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132. *Id.* at 183.
133. *Id.*
134. Stephens v. State, 806 S.W.2d 812, 815 (Tex. Crim. App. 1990).
135. *Ex Parte* Davis, 893 S.W.2d 252, 256 (Tex. App.—Austin 1995), *aff'd*, 957 S.W.2d 9 (Tex. Crim. App. 1997).
136. U.S. CONST. amend. V.
137. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).
138. *See* cases cited *supra* notes 134–35.

However, if that were so, it would be unclear what purpose, if any, the words, "nor shall a person be again put upon trial for the same offense, after a verdict of not guilty" in the Texas double jeopardy clause would serve. When construing the Texas constitution, Texas courts must avoid constructions that render text superfluous.[139] Therefore, Texas courts would probably try to construe that part of the Texas double jeopardy clause in a way that would render the "not guilty" language effective as well as consistent with the protections provided by the federal Double Jeopardy Clause—something that the meaning of the text would render very difficult, at best.

That would not be a problem if a court chose to construe the version of the Texas double jeopardy clause that lacks a semicolon; the court could continue to construe the clause as all courts have before it. If, however, a court chose to construe the version that contains a semicolon, the court would face a difficult problem: the court would either modify the meaning of the text, or change long-standing jurisprudence. Perhaps that problem would be reason enough to choose to construe the version of the Texas double jeopardy clause that lacks a semicolon, regardless of whether that version, or the other one, satisfied the requirements for becoming law. However, that would also be a problem because it would involve ignoring, or replacing, the wishes of the people who framed or ratified the Texas constitution.

V. CONCLUSION

Thus, if a court decided that the version of the Texas constitution that the people ratified is in effect today, the court would be marginalizing the influence of the delegates to the Constitutional Convention—the people legally required to choose which words the voters could ratify or reject. If a court decided that one of the texts that the framers wrote is the law today, the court would be dismissing the will of the voters—the source of all government power and those who were legally required to determine whether the framed text would become law. If a court decided that only the text that the framers and the

139. Sw. Travis Cnty. Water Dist. v. City of Austin, 64 S.W.3d 25, 30 (Tex. App.—Austin 2000) (citing Purcell v. Lindsey, 314 S.W.2d 283, 284 (Tex. 1958)).

voters approved could be in effect, there might not be an original text of the current Texas constitution at all. This would be defensible as a matter of law, but indefensible as a practical matter, and unlikely according to common sense.

A logical solution would be to submit a version of the entire Texas constitution to the legislature, then submit the approved text to voters for ratification.[140] That way, the senators and representatives chosen by the people of Texas, and then the people themselves, could make the practical and political choices that courts have not made, and possibly cannot make, regarding what is and is not the genuine text of the Texas constitution. The people and their delegates could resolve all uncertainty about the content of the Texas constitution. This would help courts construe the constitution more predictably and accurately because the courts would then be construing a single text, rather than several. Re-framing and re-ratifying the Constitution of 1876 would not require a new constitutional convention or the time and other resources that a convention would require.[141] The legislature could frame the text like it frames all other joint resolutions. The summary of the proposed amendment on the ratification election ballot could simply and truthfully explain that it is intended to be a non-substantive re-ratification of the existing Texas constitution. Ratification would almost certainly create no debt, require no new spending, benefit no special interest, and harm no one. Therefore, voters might approve the new, old Texas constitution. If they did not, the state would be no worse off than it is today, but if they did, the state would probably be considerably better off.

Until or unless a single version of the Texas constitution is conclusively identified, though, the people who use it should be aware that ostensibly small differences among the original versions of the Constitution of the State of Texas can create large and important differences in meaning. They should know that predicting which criteria a court might use to determine which version is the law would be difficult, perhaps even impossible, because any choice would be fundamentally flawed, and none

140. *See* TEX. CONST. art. XVII, § 1 (listing the requirements for amending the Texas constitution).

141. *See* MAY, *supra* note 6, at 2–4 (describing the amount of time and tax money devoted to the 1972 Texas Constitutional Convention).

would be clearly better or worse than the others. Therefore, people who use the Texas constitution should be advised that correctly interpreting the current constitution might be impossible without first determining what the text is. And determining what the text is might be impossible, too.

MEXICO'S GUN-CONTROL LAWS: A MODEL FOR THE UNITED STATES?

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The author completed all Spanish-English translations.

I. INTRODUCTION

The United States of America and the United Mexican States (Mexico) are the two largest nations with an explicit constitutional right to arms. In practice, the right is much weaker in Mexico than in the United States. President Obama is among the many U.S. gun-control advocates who have offered proposals that would make U.S. gun laws more like Mexico's gun laws.

Like President Obama, former Mexican President Felipe Calderón claims to have "a great deal of respect for the U.S. legislation, especially the Second Amendment."[1] In an address to a joint session of Congress, President Calderón proclaimed: "I fully respect, I admire the American Constitution. And I understand that the purpose of the Second Amendment is to guarantee good American citizens the ability to defend themselves and their nation."[2] Both President Obama and President Calderón also seem to view changing U.S. gun laws so that they more closely resemble Mexican gun laws as being consistent with the Second Amendment.

This article explicates Mexico's constitutional right to arms and Mexico's main gun-control statute, the Federal Law of Firearms and Explosives (*Ley Federal de Armas de Fuego y Explosivos*). Along the way, the article notes various proposals to move U.S. gun laws in a Mexican direction.

Part II of this article is an English translation of the Mexican constitution's guarantee of the right to arms, as well as predecessor versions of the guarantee.

Part III explains the operation of Mexico's gun-control system and provides some historical and statistical information about gun ownership and gun smuggling in Mexico.

Part IV describes some of the past and present cross-border trade in arms between the United States and Mexico and potential legal ramifications.

The Appendix provides a translation of the Mexican federal

1. Felipe Calderón, President of Mexico, Joint Press Conference by President Obama, President Calderón of Mexico, and Prime Minister Harper of Canada (Apr. 2, 2012).

2. Justin Sink, *Mexican President: US Should Reconsider 'Mistaken' Gun Laws*, THE HILL (July 22, 2012, 6:18 PM), http://thehill.com/blogs/twitter-room/other-news/239369-calderon-us-should-reconsider-mistaken-gun-laws-after-tragedy [http://perma.cc/386U-QFSN].

government's current gun-control statute. The Appendix also offers some explanatory footnotes to the statute when appropriate for better understanding.

II. CONSTITUTION OF MEXICO

Like three other nations in the region,[3] Mexico's constitution guarantees the personal right to arms:

> Article 10. The inhabitants of the United Mexican States have a right to arms in their homes, for security and legitimate defense, with the exception of arms prohibited by federal law and those reserved for the exclusive use of the Army, Navy, Air Force, and National Guard. Federal law will determine the cases, conditions, requirements, and places in which the carrying of arms will be authorized to the inhabitants.[4]

The above language is a revision of the 1917 constitution, which stated:

> Article 10. The inhabitants of the United Mexican States are entitled to have arms of any kind in their possession for their protection and legitimate defense, except such as are expressly

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3. For other nations, see CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 38:

> Possession and carrying of arms. The right of possession of arms for personal use is recognized, not prohibited by the law, in the home. There will be no obligation to surrender them, save in cases that are ordered by a competent judge. The right of carrying of arms is recognized, and regulated by the law.

The official text reads:

> Tenencia y portación de armas. Se reconoce el derecho de tenencia de armas de uso personal, no prohibidas por la ley, en el lugar de habitación. No habrá obligación de entregarlas, salvo en los casos que fuera ordenado por el juez competente. Se reconoce el derecho de portación de armas, regulado por la ley.

See also LA CONSTITUTION DE LA RÉPUBLIQUE D'HAÏTI art. 268-1: ("Every citizen has the right to armed self defense, within the bounds of his domicile, but has no right to bear arms without express well-founded authorization from the Chief of Police." The official text reads: "*Tout citoyen a droit à l'auto-défense armée, dans les limites de son domicile mais n'a pas droit au port d'armes sans l'autorisation expresse et motivée du Chef de la Police.*"); U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

4. The official text in Spanish reads:

> Artículo 10. Los habitantes de los Estados Unidos Mexicanos tienen derecho a poseer armas en su domicilio, para su seguridad y legítima defensa, con excepción de las prohibidas por la Ley Federal y de las reservadas para el uso exclusivo del Ejército, Armada, Fuerza Aérea y Guardia Nacional. La ley federal determinará los casos, condiciones, requisitos y lugares en que se podrá autorizar a los habitantes la portación de armas.

Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 10, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

> forbidden by law, or which the nation may reserve for the exclusive use of the army, navy, or national guard; but they may not carry arms within inhabited places without complying with police regulations.[5]

The current version replaced "are entitled" with "have a right," but the right is now limited to the home.

In the 1857 constitution, there was an explicit right to carry: "Article 10. Every man has the right to have and to carry arms for his security and legitimate defense. The law will indicate which arms are prohibited and the penalty for those that will carry prohibited arms."[6] The later versions, besides eliminating the right to carry, phrased the right in gender-neutral language.

In the United States, some courts have read the Second Amendment as if it were Mexico's article 10—a right confined solely to the home.[7] Today, a law-abiding adult in all 50 states can obtain a permit to carry a concealed firearm for lawful protection,[8] or even carry without a permit in some states.[9] When running for U.S. Senate in 2004, Barack Obama endorsed a federal bill "banning concealed carried weapons except for law enforcement" that would have preempted all state laws.[10]

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5. As enacted in 1917, article 10 stated:

> Artículo 10: Los habitantes de los Estados Unidos Mexicanos tienen libertad de poseer armas de cualquiera clase, para su seguridad y legítima defensa, hecha excepción de las prohibidas expresamente por la ley y las que la nación reserve para el uso exclusivo del Ejército, Armada y Guardia Nacional; pero no podrán portarlas en las poblaciones sin sujetarse a los reglamentos de policía.

Constitución Política de los Estados Unidos Mexicanos [C.P.], art. 10, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.), *available at* http://www.ordenjuridico.gob.mx/Constitucion/1917.pdf [http://perma.cc/0ptLf58LzvV].

6. The 1857 version: "*Artículo 10: Todo hombre tiene derecho de poseer y portar armas para su seguridad y legítima defensa. La ley señalará cuales son las prohibidas y la pena en que incurren los que las portaren.*" Constitución Federal de los Estados Unidos Mexicanos [C.F.], art. 10, Diario Oficial de la Federación [DO], 5 de Febrero de 1857 (Mex.); *available at* http://www.ordenjuridico.gob.mx/Constitucion/1857.pdf [http://perma.cc/0Knezr227Pz].

7. *See, e.g.*, United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011) (finding no right to carry a handgun in a motor vehicle within a national park); Williams v. State, 10 A.3d 1167 (Md. 2011) (finding no right to carry a firearm for lawful self-defense outside one's home).

8. Charles C. W. Cooke, *All 50 States Now Enjoy Concealed-Carry*, NAT'L REV. ONLINE (July 10, 2013, 1:48 PM), http://www.nationalreview.com/corner/353094/all-50-states-now-enjoy-concealed-carry-charles-c-w-cooke [http://perma.cc/0hcK2MAdyux]. In eight states (or in some cities or counties of those eight), carry permit applications may be handled as they are in Mexico, with permits denied to everyone except special favorites of the issuing authority. Those states are California, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, and Rhode Island.

9. *See* STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK app. A (2012–2013 ed.).

10. Liam Ford, *Keyes Backs Law on Concealed Guns*, CHIC. TRIB., Aug. 25, 2004,

III. AN OVERVIEW OF MEXICAN GUN CONTROL

Despite the Mexican constitution guaranteeing the right to arms, Mexico has repressive statutory gun-control laws. These laws heavily regulate the ownership of guns and incorporate a strict permitting system.

A. Background and Summary of the Law

In the late 1960s and early 1970s, civil unrest in the United States and Mexico led to important restrictions on firearms.[11] Before then, many types of rifles and handguns were freely available in Mexico.[12] Anti-government student movements scared the Mexican government into closing firearms stores and registering all weapons.[13] Mexico's Federal Law of Firearms and Explosives, enacted in 1972, established a Federal Arms Registry controlled by the Ministry of National Defense.[14]

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http://articles.chicagotribune.com/2004-08-25/news/0408250096_1_concealed-gun-ownership-people [http://perma.cc/0bbysVZwVvC].

11. For the United States, see The Gun Control Act of 1968, 18 U.S.C. §§ 921–931 (2012). *See also* David B. Kopel, *The Great Gun Control War of the Twentieth Century—And Its Lessons for Gun Laws Today*, 39 FORDHAM URB. L.J. 1527, 1542–50 (2012). For Mexico, see Robert Farago, *Fewer Firearms, More Crime*, WASH. TIMES, Oct. 1, 2010, http://www.washingtontimes.com/news/2010/oct/1/fewer-firearms-more-crime/ [http://perma.cc/0DFJJvRM2By].

12. Marlise Simons, *Mexico Imposes Tough New Controls on Guns*, WASH. POST, June 6, 1972, at A3. In the middle of the twentieth century, Mexico had been a popular hunting destination for Americans. In 1948, Mexican hunters invented a new shooting sport called silhouette shooting—shooting at metal silhouette targets in the shape of game animals. *History of IMSSU*, INTERNATIONAL METALLIC SILHOUETTE SHOOTING UNION, http://www.imssu.org/history.aspx [http://perma.cc/0tYgpbi4msn] (last visited Jan. 7, 2014). The sport was created because Mexican hunters were looking for ways to sharpen their eyes between hunting seasons, so they began shooting at live animals who had been tied in place on a high ridgeline, visible in silhouette from hundreds of yards away. Whoever shot the animal would win a prize. American hunters near the Mexican border—most notably the Tucson Rifle Club—adopted the sport, but used life-sized metal targets instead; hence the sport's name of *Siluetas Metalicas. Metallic Silhouettes*, TUCSON RIFLE CLUB, http://www.tucsonrifleclub.org/Silhouette_Intro.shtml [http://perma.cc/0UMpa5LdkVT] (last updated June 27, 2008). The sport originally used high-power rifles to shoot at metal silhouettes of wild chickens, javelinas, turkeys, sheep, and other game. *Id.* In the 1970s, the National Rifle Association put silhouette shooting into its competition schedule. *History of IMSSU*, *supra.* Since then, the sport has spread worldwide, and many competitive shooters specialize in silhouette competition. *Id.* The NRA created separate classes for small-bore rifles, air rifles, and pistols. NRA SILHOUETTE COMPETITION 2 (National Rifle Association ed., May 2011). This allowed the competitions to take place on much smaller ranges than the 500-meter ranges which had been standard for the high-power event. *Id. Siluetas Metalicas* remains the proper name for silhouette shooting with high-power rifles (6mm and up). *Id.*

13. Chris Hawley, *Mired in Violence, Gun-Strict Mexico Points to U.S.*, ARIZ. REPUBLIC, Apr. 1, 2009, http://www.azcentral.com/news/articles/2009/04/01/20090401onegunstore0401.html [http://perma.cc/04tkrZWWdgn].

14. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended*, art. 7, Diario Oficial de la Federación [DO], 11 de Enero de

Mexican compliance with registration has been low. The Small Arms Survey, an international gun-control think tank, guesstimates that there are about 15.5 million total firearms in civilian hands in Mexico,[15] but acknowledges that the size of the civilian gun stock is very murky.[16] About 4.5 million of these firearms are legally registered.[17] A study conducted using polling techniques designed to elicit indirect disclosures of gun ownership estimated that 5.6 million Mexican homes, comprising 14% of Mexican households, have a firearm.[18] In high violence areas, 50% of poor households have a gun.[19] Generally speaking, firearms are readily available on the black market to Mexicans who want to obtain guns for self-defense or for criminal purposes.[20]

In early 2013, residents of communities in Tierra Caliente formed self-defense groups for protection against the cartels.[21]

1972 (Mex.).

15. SMALL ARMS SURVEY 2007: GUNS AND THE CITY 47 (Graduate Institute of International Studies ed., 2007), *available at* http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2007/en/full/Small-Arms-Survey-2007-Chapter-02-EN.pdf [http://perma.cc/0Z96KfCV2FZ]. The Small Arms Survey is a research institution at the Graduate Institute of International Studies in Geneva, Switzerland. *About the Small Arms Survey*, SMALL ARMS SURVEY, http://www.smallarmssurvey.org/about-us/mission.html [http://perma.cc/0YAo5PKU2mP] (last visited Nov. 15, 2013).

16. SMALL ARMS SURVEY 2003: DEVELOPMENT DENIED 87 (Graduate Institute of International Studies ed., 2003), *available at* http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2003/en/Small-Arms-Survey-2003-Chapter-02-EN.pdf [http://perma.cc/0WpcYRPhuQ6] ("Even though [Brazil] may have the largest public firearms stockpiles in all of Latin America, anything beyond informed speculation about the national total remains impossible. The same may be true of Mexico, but even less is known about the situation there.").

17. SMALL ARMS SURVEY 2007: GUNS AND THE CITY app. 3 (Graduate Institute of International Studies ed., 2007), *available at* http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2007/en/Small-Arms-Survey-2007-Chapter-02-annexe-3-EN.pdf [http://perma.cc/0yRaSg8aUQ8].

18. ALBERTO DÍAZ-CAYEROS, BEATRIZ MAGALONI, AILA MATANOCK & VIDAL ROMERO, LIVING IN FEAR: MAPPING THE SOCIAL EMBEDDEDNESS OF DRUG GANGS AND VIOLENCE IN MEXICO 31–33 (2011), *available at* http://irps.ucsd.edu/assets/001/502978.pdf [http://perma.cc/0MYSK85zAsK].

19. *Id.* at 37. The authors explain that one reason for gun ownership is that:

> [C]itizens in Mexico are trapped in between two illegitimate forces—the drug cartels and the police who are in charge of protecting them. Our results demonstrate the extent to which both sides prey on ordinary citizens, asking them for money in exchange for protection. Although the [cartels] extort citizens the most in high violence regions and the police in low violence ones, both forms of extortion are present everywhere in Mexico.

Id. at 47.

20. John Burnett, *Law-Abiding Mexicans Taking Up Illegal Guns*, NPR (Jan. 28, 2012, 6:16 AM), http://www.npr.org/2012/01/28/145996427/mexican-community-takes-taboo-stance-on-guns [http://perma.cc/0z5rk5DCXYg].

21. Katherine Corcoran, *Local Fight with Mexican Cartel Provides Small Victory*, DAILY CAMERA (Boulder), Nov. 8, 2013, at 8A, *available at* http://www.dailycamera.com/nation-

These groups now have several thousand members and have succeeded at liberating some areas from cartel control.[22] Although the members carry firearms that are normally forbidden for citizens, the government has sometimes worked cooperatively with them.[23] However, in early 2014, the government began taking a harsher stance and has even shot members of the peasant self-defense groups.[24]

President Calderón has called for gun registration in America,[25] as has President Obama, although the Obama Administration prefers to talk about creating a national database for guns rather than invoking the words "gun registration."[26] The Mexican Senate has also asked the United States to create a registry of all commercial firearms sales in the four southwest border states.[27] Based on experience with gun registration in Mexico and in U.S. states with gun registration laws,[28] voluntary compliance with federal gun registration in the United States might also be low. An attempt to impose universal gun registration in Canada was such a fiasco that the registration law was repealed in 2012 after costing over one hundred times more than promised, resulting in massive disobedience, and

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world-news/ci_24487150/local-fight-mexican-cartel-provides-small-victory?IADID=Search-www.dailycamera.com-www.dailycamera.com [http://perma.cc/8FFH-CUWY].

22. *Id.*

23. *Id.*

24. Nathaniel Parish Flannery, *Mexican Soldiers Kill Citizen Militia Members*, FORBES, Jan. 15, 2014, http://www.forbes.com/sites/nathanielparishflannery/2014/01/15/mexican-soldiers-kill-citizen-militia-members/ [http://perma.cc/39AF-7DJ3]; Lydiette Carrión, *Refuerzan Resistencia en Torno a Apatzingán*, EL UNIVERSAL, Jan. 10, 2014, http://www.eluniversal.com.mx/estados/2014/impreso/refuerzan-resistencia-en-torno-a-apatzingan-93426.html [http://perma.cc/4XSS-HKL6]; *Self-Defence Militias on the Rise in Mexico*, BUENOS AIRES HERALD, Jan. 6, 2014, http://www.buenosairesherald.com/article/149002/selfdefence-militias-on-the-rise-in-mexico [http://perma.cc/TE43-JTMP] (militias in ten Mexican states, with the largest numbers in Michoacán and Guerrero, with 7,000 members in the latter).

25. Calderón, *supra* note 1.

26. Philip Rucker, *White House Weighs Broad Gun-Control Agenda in Wake of Newtown Shootings*, WASH. POST, Jan. 5, 2013, http://articles.washingtonpost.com/2013-01-05/politics/36208875_1_gun-issue-brady-campaign-assault-weapons-ban [http://perma.cc/0aS6aPxNmoU].

27. Elyssa Pachico, *Mexico to Ask US Senate to Create Gun Registry in Border States*, INSIGHT CRIME (Jan. 10, 2013), http://www.insightcrime.org/news-briefs/mexico-to-ask-us-senate-to-create-gun-registry [http://perma.cc/0bTtTev2eVf].

28. David B. Kopel, *Assault Weapons*, *in* GUNS: WHO SHOULD HAVE THEM? 159, 186 (David B. Kopel ed., 1995); David T. Hardy & Kenneth L. Chotiner, *The Potential for Civil Liberties Violations in the Enforcement of Handgun Prohibition*, *in* RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 194, 201 (Don B. Kates, Jr. ed., 1979); Nicholas J. Johnson, *Imagining Gun Control In America: Understanding The Remainder Problem*, 43 WAKE FOREST L. REV. 837, 853 (2008).

producing very little of value for public safety.[29]

B. Regulated Guns

The Second Title of Mexico's Federal Law of Firearms and Explosives allows possession of 12-gauge or smaller shotguns (*escopetas*) with barrels longer than twenty-five inches.[30] The impact of the gauge restriction is relatively minor. Although larger 10-gauge and 8-gauge shotguns were popular in the late nineteenth and early twentieth centuries, they are much less popular now.[31] But the law does limit waterfowl hunting, a sport that still involves 10-gauge shotguns in the United States.[32]

The minimum barrel length requirement has a much greater practical effect. In the United States, shotguns with barrels as short as eighteen inches are common.[33] Longer barrels are better for longer shots involved with bird-hunting or shooting skeet and trap.[34] Short barrels make the gun more maneuverable and easier to control, especially in a confined setting such as a home; thus, many American shotguns possessed primarily for self-defense have barrels well under twenty-five inches.[35] The Mexican twenty-five-inch minimum barrel length requirement significantly impairs shotgun utility for home defense.

As for rifles (the same word in English and Spanish), the Mexican statute prohibits any greater than .30 caliber.[36] By

29. Gary Mauser, *Why the Long-Gun Registry Doesn't Work—And Never Did*, NAT'L POST, Dec. 11, 2012, http://fullcomment.nationalpost.com/2012/12/11/gary-mauser-why-the-long-gun-registry-doesnt-work-and-never-did/ [http://perma.cc/0DVUb6w6ie9].

30. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended*, art. 10(III), Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.) (indicating that the higher the gauge number, the smaller the diameter of the barrel of the shotgun).

31. Chuck Hawks, *Introduction to Shotgun Gauges and Shells*, CHUCK HAWKS, http://www.chuckhawks.com/intro_gauges.htm [http://perma.cc/0Kh9troHWLL] (last visited Jan. 7, 2014).

32. *See, e.g.*, John M. Taylor, *5 Best Shotguns for Goose Hunting*, OUTDOOR LIFE, http://www.outdoorlife.com/photos/gallery/hunting/turkey-waterfowl/waterfowl-techniques/2011/09/best-goose-guns [http://perma.cc/0bsCUJfLjX3] (last visited Jan. 7, 2014).

33. Shotguns with barrels shorter than eighteen inches fall under the highly restrictive procedures of the National Firearms Act, requiring a $200 tax, federal registration, and months of paperwork to acquire. 26 U.S.C. §§ 5812, 5845(a)(1) (2012).

34. Chuck Hawks, *Shotgun Barrel Length*, CHUCK HAWKS, http://www.chuckhawks.com/shotgun_barrel_length.htm [http://perma.cc/XJ3P-NQMB] (last visited Jan. 7, 2014).

35. Jacob Herman, *Home Defense Shotgun: Myths and Reality*, THE DAILY CALLER (Oct. 14, 2013), http://dailycaller.com/2013/10/14/home-defense-shotgun-myths-and-reality/ [http://perma.cc/7G2B-5UFD].

36. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended*, art. 10(V), Diario Oficial de la Federación [DO], 11 de

American standards, the .30-caliber maximum forbids approximately half of the common calibers.[37] Caliber-based rifle bans are rare in the United States, but a few jurisdictions outlaw .50-caliber rifles and handguns.[38]

Handguns (*pistolas*) are permissible in calibers of .380 or less in Mexico, although some calibers are excluded—most notably .357 magnum and 9mm parabellum.[39] Allowing .380 while banning 9mm makes no sense in terms of physics: the two calibers are nearly identical in size.[40] Both are mid-sized handgun calibers. In 1993–1994, in the spirit of Mexico's disparate treatment of 9mm and .380, U.S. Senator Pat Moynihan—a Democratic Senator from New York—sponsored legislation to impose a prohibitive tax on 9mm ammunition.[41] Barack Obama, as a candidate for Illinois State Senate in 1996, endorsed the prohibition of handguns and later supported handgun bans in Chicago and the District of Columbia.[42]

C. The Permitting System

Mexican gun permits are for a one-year term.[43] The vast majority of American states do not require a permit for gun ownership, and most of those that do only require a permit for handguns.[44] American permits are valid for a term of several years or for life, depending on the state.[45] Permits to *carry* a

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Enero de 1972 (Mex.).

37. *See, e.g.*, *Centerfire Rifle by Caliber*, REMINGTON, http://www.remington.com/pages/news-and-resources/centerfirebycaliber.aspx [http://perma.cc/0nF847vgS6v] (last visited Jan. 7, 2014).

38. *Fifty Caliber Rifles Policy Summary*, L. CTR. TO PREVENT GUN VIOLENCE (May 21, 2012), http://smartgunlaws.org/fifty-caliber-rifles-policy-summary/ [http://perma.cc/0Ez7bZa8ouc].

39. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended*, art. 9(II), Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.).

40. METRIC CONVERSIONS, http://www.metric-conversions.org/length/inches-to-millimeters.htm [http://perma.cc/F8N5-6FGF] (calculating that 0.380 inches is equal to 9.652 millimeters).

41. Adam Clymer, *Moynihan Asks Big Tax Increase on Ammunition*, N.Y. TIMES, Nov. 4, 1993, http://www.nytimes.com/1993/11/04/us/moynihan-asks-big-tax-increase-on-ammunition.html [http://perma.cc/0JzyqFA3V64].

42. *Barack Obama on Gun Control*, ON THE ISSUES, http://www.ontheissues.org/2012/Barack_Obama_Gun_Control.htm [http://perma.cc/0htjANZgq7R] (last updated Jan. 22, 2013).

43. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended*, art. 44, Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.).

44. *See* HALBROOK, *supra* note 9.

45. *Id.*

concealed handgun are required in the large majority of U.S. states, and typical permit terms are three to five years.[46] Annual re-authorization for carry permits exists in only a few states.[47] In 2000, Democratic presidential nominee Al Gore proposed a national licensing system for ownership of handguns;[48] his advocacy for gun control was seen as an important cause of his narrow defeat.[49]

In Mexico, the military plays a leading role in domestic law enforcement.[50] The department of defense, SEDENA (*Secretaría de la Defensa Nacional*), issues Mexican gun permits.[51] The SEDENA subdivision in charge of gun licensing is the *Dirección General del Registro Federal de Armas de Fuego y Control de Explosivos.*[52] The idea of military enforcement of domestic civil laws, including gun permitting, is anathema to many Americans. The Posse Comitatus Act generally forbids use of the U.S. military for domestic law enforcement.[53]

A Mexican applicant must belong to a shooting club in order to obtain a permit.[54] This is similar to a proposal from the group now known as the Brady Campaign to ban handgun ownership "except for the military, policemen, licensed security guards, licensed sporting clubs, and licensed gun collectors."[55] If a

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46. *Id.*

47. *Id.*

48. *James Dao, As Political Stage Changed, Gore Shifted on Gun Control,* N.Y. TIMES, July 6, 2000, http://www.nytimes.com/2000/07/06/us/as-political-stage-changed-gore-shifted-on-gun-control.html?pagewanted=all&src=pm [http://perma.cc/0rEenKPGPWz].

49. BILL CLINTON, MY LIFE 928 (2004).

50. *Mission,* SECRETARÍA DE LA DEFENSA NACIONAL, http://www.sedena.gob.mx/en/index.php/get-to-know-sedena/mission [http://perma.cc/0t9YSti1CRs] (last updated Jan. 8, 2013).

51. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended,* art. 30, Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.).

52. *See General Directorate for Federal Registry of Firearms and Explosive Control,* SECRETARÍA DE LA DEFENSA NACIONAL, http://www.sedena.gob.mx/en/index.php/get-to-know-sedena/organic-structure/49-general-directorate-for-federal-registry-of-firearms-and-explosive-control [http://perma.cc/0G9f32JyRYM] (last updated July 20, 2012).

53. 18 U.S.C. § 1385 (2012). Since the early 1980s, "drug war" exceptions to the Posse Comitatus Act have led to military involvement in domestic law enforcement, sometimes with terrible consequences. *See* David B. Kopel & Paul H. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of American Law Enforcement,* 30 AKRON L. REV. 619 (1997); David B. Kopel, *Militarized Law Enforcement: The Drug War's Deadly Fruit, in* AFTER PROHIBITION: AN ADULT APPROACH TO DRUG POLICIES IN THE 21ST CENTURY 61, 68–70 (Timothy Lynch ed., 2000).

54. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended,* art. 26(I), Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.).

55. Richard Harris, *A Reporter at Large: Handguns,* THE NEW YORKER, July 26, 1976, at 58. At the time of the interview, the group called itself the National Council to Control

Mexican belongs to a target-shooting club, it is straightforward to obtain a permit to own a handgun for home protection.[56] The Brady Campaign, on the other hand, has opposed allowing ordinary citizens to own firearms for self-defense.[57]

A Mexican member of a gun club may in theory register up to nine long guns and one .22 caliber handgun.[58] Mexicans who do not belong to a club may register only one gun: a handgun for home defense.[59] All guns must be registered with the Ministry of National Defense within thirty days of acquisition.[60] Licensees may only buy ammunition for the caliber of gun for which they are licensed.[61] On the other hand, gun registration in the United States varies from state to state, but it is rare in general—where it exists, it usually only applies to handguns.[62] Only California and Hawaii require all guns to be registered.[63] California's registration is simply accomplished by harvesting dealer records of sale.[64] Hawaii requires citizens to report all their guns to the government.[65]

To apply for a permit in Mexico, a person must go to the

Handguns. *See Our History*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, http://www.bradycampaign.org/?q=our-history [http://perma.cc/07A7k7FAbhc] (last visited Jan. 7, 2014). Later, the name was changed to Handgun Control, Inc. *Id.* Later still, the name became the Brady Campaign. *Id.*

56. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended*, art. 26(I), Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.).

57. As James Brady put it, "For target shooting, that's okay . . . Get a license and go to the range. For defense of the home, that's why we have police departments." *In Step With: James Brady*, PARADE MAG., June 26, 1994, at 18.

58. *¿Qué cantidad de armas puedo tener registradas? (How many guns can I register?)*, SECRETARÍA DE LA DEFENSA NACIONAL, http://www.sedena.gob.mx/index.php/component/content/article/661-preguntas-frecuentes-rfafyce/2190-ique-cantidad-de-armas-puedo-tener-registradas [http://perma.cc/0xFPYy1eRC1] (last updated Nov. 4, 2010, 1:07 PM).

59. *Id.*

60. *See* Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended*, art. 17, Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.).

61. *Id.* art. 10.

62. *See* HALBROOK, *supra* note 9.

63. CAL. PENAL CODE § 11106 (West 2013); HAW. REV. STAT. § 134-3 (2013).

64. Pursuant to California Assembly Bill 809, which was enacted in 2011, the state government will begin registration of long gun sales and of long guns brought into the state on January 1, 2014. Cal. Assemb. 809, 2011 Cal. Leg., Reg. Sess. (Cal. 2011), *available at* http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0801-0850/ab_809_bill_20110920_enrolled.pdf [http://perma.cc/88FT-PBYJ]; CAL. PENAL CODE § 11106 (West 2013) (requiring the Attorney General to retain all "dealers' records of sales of firearms.").

65. HAW. REV. STAT. § 134-3 (specifying that every firearm must be registered with the chief of police).

nearest military base.[66] The military is legally required to issue or reject a license within fifty days of the application.[67] A license applicant must be at least eighteen years old, must have fulfilled any obligation of military service, must have the physical and mental capacity to use firearms safely, must have no criminal convictions involving firearms, must not be a consumer of drugs, and must have an "honest living."[68]

There is only one firearms store in Mexico, the UCAM (*Unidad de Comercialización de Armamento y Municiones*).[69] Located in Mexico City, it is owned and operated by the military.[70] Barack Obama, running for the U.S. House of Representatives in 2000, proposed banning all gun stores within five miles of a school or park.[71] This would eliminate all firearms stores in the inhabited portion of the United States.[72] Private sales of guns in Mexico are legal, but the buyer must register the gun within thirty days with the military's arms registry.[73] President Obama would go further, outlawing genuinely private sales entirely, by requiring background checks on person-to-person sales and requiring

66. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended*, art. 7, Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.) (requiring all firearms to be registered with the ministry of defense); *see also* Tkila, *Registro Federal de Armas de Fuego*, MÉXICO ARMADO (July 26, 2010, 1:35 AM) http://www.mexicoarmado.com/content/401-registro-federal-de-armas-de-fuego.html [http://perma.cc/0hzHqh8DHpq] (listing the military bases where a person may register a gun).

67. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended*, art. 26, Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.).

68. *Id.* art. 26(I). *See Military Service Law*, SECRETARÍA DE LA DEFENSA NACIONAL, http://www.sedena.gob.mx/en/index.php/national-military-service/legal-framework/614-military-service-law [http://perma.cc/0CxE7AzPRZE] (last updated July 22, 2013) (noting that military service obligations arise at age eighteen).

69. Damien Cave, *At a Nation's Only Gun Shop, Looking North in Disbelief*, N.Y. TIMES, July 24, 2012, http://www.nytimes.com/2012/07/25/world/americas/in-mexico-a-restrictive-approach-to-gun-laws.html [http://perma.cc/07YYpDgJbtA].

70. *Id.*

71. Chinta Strausberg, *Obama Unveils Federal Gun Bill*, CHI. DEFENDER, Dec. 13, 1999, at 3.

72. This is so because almost every small town has a park or school, and because there are essentially no urban areas more than five miles from at least one school or park. *See, e.g.*, *Obama Exclusion Zone: King County*, BACON, ALCOHOL, TOBACCO, FIREARMS, EXPLOSIVES (Feb. 23, 2008), http://blog.ryjones.org/2008/02/23/obama-exclusion-zone-king-county/ [http://perma.cc/Y2K9-NCNT] (providing a map of King County—the Washington State county containing Seattle—smaller towns, and uninhabited areas).

73. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended*, art. 17, Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.); *see also RFA-RA-002: Cambio de Propietario de Arma de Fuego*, SECRETARÍA DE LA DEFENSA NACIONAL, http://www.sedena.gob.mx/index.php/tramites-y-servicios/registro-federal-de-armas-de-fuego/registro-de-armas/8012-cambio-de-propietario-de-arma-de-fuego [http://perma.cc/0qZVzVgewHC] (last updated July 27, 2012).

them to be routed through federally-licensed firearms dealers who must keep records of all their transactions.[74]

A separate license is necessary for the transportation of firearms in Mexico.[75] A special permit for collectors allows the possession of more guns, including military-caliber firearms.[76] The military police may inspect the homes of gun collectors.[77] In the United States, the Brady Campaign has offered a similar proposal, "Brady II," which would subject the homes of gun collectors to unannounced, warrantless inspections.[78] This proposal is a weaker version of Canadian law, which makes all homes of gun owners subject to police inspection without requiring a showing of probable cause that the law has been violated.[79]

In Mexico, the grounds for issuing a carry permit are: a need due to occupation or employment, special circumstances related to one's place of residence, or other reasonable grounds.[80]

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74. NOW IS THE TIME: THE PRESIDENT'S PLAN TO PROTECT OUR CHILDREN AND OUR COMMUNITIES BY REDUCING GUN VIOLENCE 3 (Jan. 16, 2013), *available at* http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf [http://perma.cc/0m43MUo59v2].

75. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended*, arts. 24–26, 61, Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.). Although transport would seem to be covered by article 61, the government relies on article 26 for its policy of requiring a permit to carry a gun to a target range or to hunt. *Preguntas Frecuentes*, SECRETARÍA DE LA DEFENSA NACIONAL, http://www.sedena.gob.mx/index.php/tramites-y-servicios/registro-federal-de-armas-de-fuego/preguntas-frecuentes [http://perma.cc/0uRtBeEj8Xn] (last updated July 19, 2012) (discussing the question, "¿Para obtener un permiso de transportación de armas para eventos de tiro al blanco y cacería se debe de estar inscrito a un club de caza y tiro?" (Must you be registered with a hunting or shooting club to obtain a permit for transportation of firearms for hunting or target shooting events?)).

76. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended*, arts. 21–23, Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.).

77. *RFA-LC-021: Visita de Inspección a Coleccionista de Armas de Fuego*, SECRETARÍA DE LA DEFENSA NACIONAL, http://sedena.gob.mx/index.php/tramites-y-servicios/registro-federal-de-armas-de-fuego/licencias-clubes-y-colecciones/colecciones/7559-visita-de-inspeccion-a-coleccionista-de-armas-de-fuego [http://perma.cc/0TFsGiRnpYr] (last updated July 18, 2012).

78. Gun Violence Prevention Act of 1994, S. 1878, 103d Cong. § 204(b)(2) (1994) ("The holder of an arsenal license shall be subject to all obligations and requirements pertaining to licensed dealers under this chapter."); 18 U.S.C. § 923(g)(1)(B) (2012) ("The Attorney General may inspect or examine the inventory and records of a licensed importer, licensed manufacturer, or licensed dealer without such reasonable cause or warrant . . . for ensuring compliance with the record keeping requirements of this chapter . . . not more than once during any 12-month period . . . .").

79. Firearms Act, S.C. 1995, c. 39, §§ 102–104 (Can.).

80. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended*, art. 26(I)(F), Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.).

Members of agricultural collectives and other rural workers are allowed (in theory at least) to carry legal handguns, .22 rifles, and shotguns, as long as they stay outside of urban areas and obtain a carry license.[81] "In a nation of 112 million people, there are only 4,300 carry licenses."[82] Obama would like a similar result in the United States and has supported national legislation to "prevent other states' laws [allowing citizens to conceal their guns] from threatening the safety of Illinois residents."[83]

The Mexican government may issue tourists temporary gun licenses for sporting purposes.[84] Mexican law provides penalties of five to thirty years in prison for people who attempt to bring a firearm, or even a single round of ammunition, into Mexico without prior permission.[85] In the past, the law was enforced stringently, even in cases where the violation was accidental—such as a Texan who drove across the border for dinner and forgot that there was some ammunition in his car.[86] In December 1998, however, the Mexican Congress enacted legislation relaxing the law for first-time, unintentional violations involving only a single gun.[87] Now, first-time violators will be fined "two

81. *Id.* art. 9(II).

82. Bryan Llenas, *Mexico Jumps into the U.S. Gun Control Debate*, FOXNEWS.COM, Jan. 15, 2013, http://latino.foxnews.com/latino/news/2013/01/15/mexico-jumps-into-us-gun-control-debate/ [http://perma.cc/0Njt7xazmTV].

83. John Chase, *Keyes, Obama Are Far Apart on Guns*, CHI. TRIB., Sept. 15, 2004, http://articles.chicagotribune.com/2004-09-15/news/0409150153_1_concealed-gun-control-responsible-gun-ownership [http://perma.cc/0CMvXKUQDQg].

84. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended*, art. 27, Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.).

85. *Id.* art. 84(I).

86. *See, e.g.*, United States v. Bean, 537 U.S. 71 (2002) (exemplifying the stringent application of the law, even in accidental cases). In this case, a licensed American firearms dealer, who resided in Laredo, Texas, spent the day working at a gun show, and later drove to dinner in Nuevo Laredo, Mexico. *Id.* at 72–73. He had told his employees to remove all arms and ammunition from his car, but the employees missed one box of shotgun shells. *Id.* at 73. Bean was convicted of a felony and served prison time in Mexico. *Id.* At the time, United States law was interpreted to prohibit arms possession by persons convicted in foreign courts of felonies. *Id.* Federal law also provided an administrative procedure for the restoration of firearms rights by persons whom the Bureau of Alcohol, Tobacco and Firearms deemed to be suitable to possess arms. 18 U.S.C. § 925(c) (2012). However, since 1992, Congress has prohibited ATF from expending appropriations to make determinations on restoration of rights. *Bean*, 537 U.S. at 74. In *Bean*, the Supreme Court majority held that ATF's refusal to process Bean's application for a restoration of rights did not amount to a "denial" which would allow a federal court to review ATF's decision, and to decide that Bean's rights should be restored. *Id.* at 78. Several years later, the Supreme Court ruled that the federal ban on arms possession by a person convicted of a felony in "any court" should not be read as encompassing foreign courts. Small v. United States, 544 U.S. 385, 394 (2005).

87. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended*, art. 84 bis, Diario Oficial de la Federación [DO], 11 de

hundred days of fines" but not imprisoned.[88] The exemption does not apply for military weapons or prohibited calibers.[89]

In Mexico, there are no shooting ranges open to the general public.[90] The Chicago City Council once passed a similar law outlawing public ranges, but the Seventh Circuit declared that the ban violated the Second Amendment.[91] Nor is there any public land for hunting in Mexico.[92] As a result, the only persons who can hunt are those who can afford to pay an outfitter or are friends with a landowner. The situation is quite different in the United States, where vast amounts of public land are open to hunters.[93]

IV. THE CROSS-BORDER TRADE IN ARMS

According to Mexico's ambassador to the United States, American gun stores could be described as "providers of material support to terrorists."[94] The flow of arms from the United States into Mexico has become a major political issue in both nations. Part IV provides historical and contemporary analysis of the trade and some of the legal implications.

A. American Arms for Mexican Independence

Mexican independence—like American independence—might not have been possible without American guns. After assuming dictatorial powers in France, Emperor Napoleon III

Enero de 1972 (Mex.).

88. *Id.* art. 91. Article 91 of the Federal Law of Firearms and Explosives cross-references article 29 of the Federal Criminal Code, which provides methods for calculating "days of fines." *Id.* The basic rule is that one "day of fines" is equal to one day of a person's income. Código Penal Federal [CPF] [Federal Criminal Code], *as amended*, art. 29, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.).

89. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended*, art. 84 bis, Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.).

90. *See id.* art. 26. (limiting the issuance of special carry licenses for shooting and hunting activities to members of registered hunting and shooting clubs).

91. Ezell v. Chicago, 651 F.3d 684, 711 (7th Cir. 2011).

92. Semarnat-08-044: Licencia de Caza Deportiva [Hunting License], Diario Oficial de La Federación [DO], 30 de Septiembre de 2005 (Mex.) (requiring hunters to indicate which hunting club owns the property on which they will hunt).

93. *The Forest Service Welcomes Hunters to the Nation's Forests and Grasslands*, U.S. FOREST SERVICE, http://www.fs.fed.us/biology/wildlife/hunters.html [http://perma.cc/0BKEnB6iUkm] (last visited Jan. 7, 2014).

94. *Letter to the Editor: On Mexico and Violence*, DALL. NEWS (Apr. 11, 2011, 5:37 PM), http://letterstotheeditorblog.dallasnews.com/2011/04/on-mexico-and-v.html/ [http://perma.cc/0rWFvnrE4yZ] (discussing the ambassador's argument against the claim that Mexican cartels were "terrorists" and his claim that if they were, then American gun stores were terrorist supporters).

began looking for more nations to rule. In 1863, he deposed Mexico's President Benito Juárez.[95] Napoleon III then installed Maximilian as Emperor of Mexico.[96] In northern Mexico, Juárez gathered an army of resistance.[97] The United States was a crucial source of arms for the Mexican nationalists.[98] They procured one thousand .44-caliber short rifles (Winchester Model 1866 carbines) as well as 500 rounds of ammunition for every gun.[99] The Winchesters were inscribed with the initials "R.M." (*República de México*) and are now valuable collector's items.[100] They helped the Mexican people win the war, remove Maximilian, and reestablish the Mexican republic.[101]

B. The Calderón Drug War and the Murder Escalation

Today, however, some American guns play a harmful role in Mexico. Before the election of President Calderón in December 2006, the Mexican government took a "passive approach to the illicit drug trade."[102] Thanks to corruption and payoffs to various levels of government, the drug cartels could usually go about their business of drug smuggling while keeping their violence at a relatively low level.[103]

All that changed once Calderón took office. The new President unleashed the Mexican army on the drug cartels, deploying 30,000 soldiers and federal police.[104] This push against drug cartels led to a counteroffensive by the drug lords, as well as more turf wars in areas where old gang territories were

95. MEXICO: A COUNTRY STUDY 30 (Tim L. Merrill & Ramón Miró eds., 4th ed. 1998).

96. DEAN K. BOORMAN, THE HISTORY OF WINCHESTER FIREARMS 31 (First Lyons Press ed., 2001).

97. *See id.*

98. *Id.*

99. *Id.*

100. *See Cinco de Mayo & The Juarez Winchester*, THE WINE COMMONSEWER (May 5, 2013, 8:03 PM), http://www.winecommonsewer.com/the_wine_commonsewer/2013/05/cinco-de-mayo-the-juarez-winchester.html [http://perma.cc/0L9YYjsqmHq].

101. MEXICO, A COUNTRY STUDY, *supra* note 95, at 31.

102. Colin Gray, *The Hidden Cost of the War on Drugs*, STANFORD PROGRESSIVE, May 2010, http://www.stanford.edu/group/progressive/cgi-bin/?p=521 [http://perma.cc/0jueQ2EDWva].

103. *See* HAL BRANDS, MEXICO'S NARCO-INSURGENCY AND U.S. COUNTERDRUG POLICY 6 (2009). To be precise, the Mexican drug gangs do not always function as "cartels," in the sense of being oligopolists who have cooperatively divided the market. "Drug trafficking organization" (DTO) may be a more accurate term.

104. Sara Miller Llana, *Escalating Drug War Grips Mexico*, THE CHRISTIAN SCIENCE MONITOR, May 23, 2007, http://www.csmonitor.com/2007/0523/p01s01-woam.html [http://perma.cc/0GQjZzT4why].

destabilized.[105] The drug war quickly became as deadly as conventional war. From 2007 to 2008, drug war homicides rose over 100% to 6,844.[106] The overall Mexican homicide rate rose 57% from 2007 to 2008 (to 12.7 per 100,000 population).[107] After doubling in 2008, the drug war homicide rate rose another 41% in 2009.[108] By 2009, the overall homicide rate had risen to the level of 17.7 per 100,000 population.[109] A U.S. Congressional Research Service report explained: "the [Mexican] government's crackdown on the cartels, as well as rivalries and turf wars among Mexico's drug cartels fueled an escalation in violence throughout the country, including northern states along the United States–Mexico border."[110]

With homicide surging, Calderón claimed that 95% of the drug war deaths had been drug gangsters killed by other drug gangsters.[111] Even if that was true, it still meant that many innocent civilians and police had also been killed. President Calderón also attempted to blame the surge in Mexican murders on the September 2004 sunset of the U.S. federal ban on sales of new "assault weapons." He told a joint session of the U.S. Congress: "If you look carefully, you will notice that the violence in Mexico started to grow a couple of years before I took office in 2006. . . . This coincides, at least, with the lifting of the [U.S.] assault weapons ban in 2004."[112]

Not so. The American gun ban expired in September 2004,[113] yet the total number of homicides in Mexico declined from

105. *See id.* (noting that the violence escalated after the initial troop deployment and implying that the Zeta and Sianola cartels' fight over smuggling routes was, in part, caused by the troop deployment).

106. *Mexico Drug War Fast Facts,* CNN, Sept. 2, 2013, http://www.cnn.com/2013/09/02/world/americas/mexico-drug-war-fast-facts/index.html [http://perma.cc/0yMLN6ASYAa].

107. U.N. OFFICE ON DRUGS AND CRIME, 2011 GLOBAL STUDY ON HOMICIDE 107 (2011), *available at* http://www.unodc.org/documents/data-and-analysis/statistics/Homicide/Globa_study_on_homicide_2011_web.pdf [http://perma.cc/04pGcWpSbsR].

108. *Mexico Drug War Fast Facts, supra* note 106.

109. U.N. OFFICE ON DRUGS AND CRIME, *supra* note 107.

110. CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., R40135, MÉRIDA INITIATIVE FOR MEXICO AND CENTRAL AMERICA: FUNDING AND POLICY ISSUES 2 (2009).

111. Susana Hayward, *A Report from Juarez, the Bleeding Front Line of the War on Drugs,* DALL. OBSERVER (Apr. 29, 2010), http://www.dallasobserver.com/2010-04-29/news/a-report-from-juarez-the-bleeding-front-line-of-the-war-on-drugs/7/ [http://perma.cc/0xo54phqjkt].

112. Felipe Calderón, President of Mexico, Address at Joint Meeting of Cong. (May 20, 2010).

113. *Congress Lets Assault Weapons Ban Expire,* NBCNEWS.COM, Sept. 13, 2004, http://www.nbcnews.com/id/5946127/ns/politics/t/congress-lets-assault-weapons-ban-expire [http://perma.cc/0hZySMJm83n].

10,087 in 2003 to 9,329 in 2004.[114] They fluctuated to 9,921 in 2005 and 10,452 in 2006, and then declined to 8,867 in 2007.[115] This low figure in 2007 was far below earlier years' figures, when the 1994–2004 U.S. federal ban on some semi-automatic firearms was in full effect (13,552 homicides in 1997; 13,656 homicides in 1998; 12,249 homicides in 1999).[116] In summation, the homicide rates were much lower in the three years after the end of the U.S. ban than they were at the height of the ban in the previous decade.

C. Data About American Guns in Mexico

In 2010, President Calderón told the U.S. Congress:

> However, there is one issue where Mexico needs your cooperation, and that is stopping the flow of assault weapons and other deadly arms across the border. Let me be clear on this. I fully respect, I admire the American Constitution, and I understand that the purpose of the Second Amendment is to guarantee good American citizens the ability to defend themselves and their Nation. But believe me, many of these guns are not going to honest American hands. Instead, thousands are ending up in the hands of criminals. Just to give you an idea, we have seized 75,000 guns and assault weapons in Mexico in the last 3 years, and more than 80 percent of those we have been able to trace came from the U.S.[117]

President Calderón's "80 percent" claim was similar to the assertion in a report by New York City Mayor Michael Bloomberg's organization, Mayors Against Illegal Guns, that 90% of traced Mexican guns come from the United States, and 76% come from the four border states of Texas, Arizona, New Mexico and California.[118] Much of the media has repeated Bloomberg's 90% figure as fact.[119]

If, as President Calderón and Mayors Against Illegal Guns claim, many thousands of guns are being legally purchased in the United States and smuggled over the border to Mexican

114. U.N. OFFICE ON DRUGS AND CRIME, *supra* note 107.
115. *Id.*
116. *Id.*
117. Calderón, Address at Joint Meeting of Cong., *supra* note 112.
118. MAYORS AGAINST ILLEGAL GUNS, THE MOVEMENT OF ILLEGAL GUNS ACROSS THE U.S.–MEXICO BORDER 1–2 (2010).
119. *See, e.g., Guns and State Borders: Trekking North*, THE ECONOMIST, Sept. 30, 2010, http://www.economist.com/node/17151375?zid=312&ah=da4ed4425e74339883d473adf5773841 [http://perma.cc/0sF6JMEBTjM].

drug gangs, shouldn't there be thousands of ongoing prosecutions in border state courts? After all, making a straw purchase is a U.S. federal felony.[120]

In 2011, my research assistant called the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)[121] for data on cases being prosecuted concerning firearms sold in the United States and later being sent to Mexico. After getting shuttled from one person to another, he was finally able to talk to an ATF representative in Houston, who was unable or unwilling to tell him anything about what she called his "unusual" request. She told him, instead, to submit a Freedom of Information Act (FOIA) request. That FOIA request was promptly submitted, but years later there has still been no response.

1. Most Mexican Crime Guns Are Not Traced

One general problem of using trace data as a proxy for gun crime is that the guns chosen for tracing are not necessarily representative of all crime guns seized by the police.[122]

For years, the United States has been providing billions of dollars in anti-crime assistance to Mexico.[123] As part of that assistance, ATF has Mexican offices which will trace any gun that the Mexican authorities request.[124] Yet Mexican officials only request traces of a fraction of guns seized.[125]

For example, according to ATF, Mexico asked for 7,743 firearm traces in the fiscal year that ended October 1, 2008, and

120. If one were to make a straw purchase from a Federal Firearms Licensee (FFL), one would need to lie about the end user on ATF Form 4473. It is a federal felony to make false statements to an FFL about a material fact on such form. *See* 18 U.S.C. §§ 922(a)(6), 924(a)(1)(A) (2012).

121. The Bureau of Alcohol, Tobacco and Firearms (ATF) changed its name to the Bureau of Alcohol, Tobacco, Firearms and Explosives in 2003. *ATF's History*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, http://www.atf.gov/about/history/index.html [http://perma.cc/0nFHKCsaf9N] (last visited Jan. 7, 2014).

122. *See, e.g.*, David B. Kopel & Paul H. Blackman, *Firearms Tracing Data from the Bureau of Alcohol, Tobacco and Firearms: An Occasionally Useful Law Enforcement Tool, but a Poor Research Tool*, 11 CRIM. JUST. POL'Y REV. 44 (Mar. 2000); David B. Kopel, *Clueless: The Misuse of BATF Firearms Tracing Data*, 1999 L. REV. MICH. ST. U. DETROIT C. L. 171 (1999).

123. *Mérida Initiative*, U.S. DEP'T OF STATE, http://www.state.gov/j/inl/merida/ [http://perma.cc/09oZs1SMC5r] (last visited Jan. 7, 2014).

124. *International Offices*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, http://www.atf.gov/field/international.html [http://perma.cc/0GsAyNvkvys] (last visited Nov. 10, 2013).

125. D'Angelo Gore, *Counting Mexico's Guns*, FACTCHECK.ORG (Apr. 22, 2009), http://www.factcheck.org/2009/04/counting-mexicos-guns/ [http://perma.cc/02NzaCdF7KX].

for 3,312 traces in the fiscal year ending October 1, 2007.[126] This was only about 38% of all guns seized.[127] Of those 11,055 traces, approximately 10,347 were traced to the United States.[128]

Ever since the U.S. Gun Control Act of 1968, all manufacturers, wholesalers, importers, and retailers of firearms have been required to keep serial number records of all firearms that they produce, acquire, or sell.[129] So despite decades of American recordkeeping about the manufacture (or import), wholesale distribution, and retail sale of every American firearm, no records could be found for 708 of those guns. This suggests that those traced guns did not, in fact, originate in the United States.

Trace requests increased after 2008, so that from fiscal year 2007 to 2010, the Mexican government made 78,194 total trace requests to the United States. However, tens of thousands of these were duplicates; sometimes five different Mexican government entities requested a trace on the same gun.[130]

A successful trace means that the guns were manufactured in or imported into the United States.[131] It does not mean that the guns were necessarily sold in the civilian U.S. market. For example, a gun might have been lawfully sold to a Mexican police agency and then stolen. Or the gun might have been manufactured for U.S. Army use during the Vietnam War, later captured by the communist government that currently rules Vietnam, and then exported on the international black market.

Mexican law enforcement has several reasons for not asking ATF to trace all its seized firearms. First, many seized guns are plainly not American—such as guns that appear to be from China[132] or Eastern Europe[133]—and would be impossible for ATF

126. *Id.*
127. *Id.*
128. *Id.*
129. *See* 18 U.S.C. § 923 (2012); 27 C.F.R. § 478 (2013).
130. COLBY GOODMAN, UPDATE ON U.S. FIREARMS TRAFFICKING TO MEXICO REPORT 7 (2011), *available at* http://wilsoncenter.org/sites/default/files/update_us_firearms_trafficking_to_mex.pdf [http://perma.cc/97X2-6HZW].
131. William La Jeunesse & Maxim Lott, *The Myth of 90 Percent: Only a Small Fraction of Guns in Mexico Come From U.S.*, FOX NEWS (Apr. 2, 2009), http://www.foxnews.com/politics/2009/04/02/myth-percent-small-fraction-guns-mexico-come/ [http://perma.cc/0LCWsseGAdV].
132. Scott Stewart, *Mexico's Gun Supply and the 90 Percent Myth*, STRATFOR GLOBAL INTELLIGENCE (Feb. 10, 2011), http://www.stratfor.com/weekly/20110209-mexicos-gun-supply-and-90-percent-myth [http://perma.cc/0RhQPNX9SiV].
133. SYLVIA LONGMIRE, CARTEL: THE COMING INVASION OF MEXICO'S DRUG WARS 75 (2011).

to trace. The Chinese guns may be impossible for anyone to trace since they may be manufactured without serial numbers.[134]

Sylvia Longmire, a retired counterintelligence officer who runs the website Mexico's Drug War,[135] asked an ATF official why so many Mexican guns are not traced.[136] Speaking anonymously, the officer explained that some guns are not traced because the serial number has been filed off.[137] Such numbers can often be recovered, but it is an arduous process. In addition, "[o]ther guns are stolen or 'misplaced' by corrupt law enforcement officials, either for personal use or for passing on to Mexican drug trafficking cartels. Some are never submitted for tracing because corrupt officials are attempting to protect the cartel-sponsored purchasers. And finally, some are simply destroyed without being traced in any fashion."[138]

Longmire acknowledges that "America remains the cheapest and easiest way to obtain the drug traffickers' weapons of choice," but she points out that "[m]any guns, grenades, and other high-powered weapons that are used by Mexican drug trafficking organizations come from Central America, South Korea, and former-Eastern Bloc countries.[139] Some are remnants from civil wars and other conflicts in Latin America, and some are sold to cartels on the black market."[140]

Further, according to a 2009 report from public-intelligence-analysis organization Stratfor:

> Mexican authorities are also unlikely to ask the ATF to trace

134. By U.S. federal law, any firearm manufactured in the United States for sale or imported into the United States has a serial number. 18 U.S.C. § 923(i) (2012). In China, however, firearms manufacturing companies produce many guns using only simple geometric symbols but no serial numbers or manufacturer name. *See* WAYNE LAPIERRE, THE GLOBAL WAR ON YOUR GUNS: INSIDE THE UN PLAN TO DESTROY THE BILL OF RIGHTS 36 (2006). The non-binding international agreement on standards for firearms marking has an exemption that legitimizes the Chinese omission of serial numbers and manufacturer. International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, G.A. Res. 60/519, U.N. GAOR, 60th Sess., Supp. No. 49 (Vol II), U.N. Doc. A/60/88, at 8 (Dec. 8, 2005). These guns show up in very large quantities in the international black market that supplies warlords, dictators, drug gangs, and other international rogues. *See* LAPIERRE, *supra*, at 36.

135. MEXICO'S DRUG WAR, http://www.mexicosdrugwar.com/ [http://perma.cc/92C2-HWZJ] (last visited Jan. 7, 2014).

136. LONGMIRE, *supra* note 133, at 74.

137. *Id.* at 74–75.

138. *Id.* at 75.

139. *Id.*

140. *Id.*

> weapons that can be tracked through the Mexican government's own databases such as the one maintained by the Mexican Defense Department's Arms and Ammunition Marketing Division (UCAM), which is the only outlet through which Mexican citizens can legally buy guns. If they can trace a gun through UCAM there is simply no need to submit it to ATF.[141]

Since the government owns the only gun store in Mexico, tracing Mexican-origin guns is easy. But the decision not to ask ATF to trace the guns that have been lawfully sold in Mexico obviously means that guns ATF does trace will be a skewed, unrepresentative sample of Mexican crime guns.

Thus, U.S. Department of Homeland Security officials believe that:

> [T]he 87 percent statistic[142] is misleading as the reference should include the number of weapons that could not be traced (i.e., out of approximately 30,000 weapons seized in Mexico, approximately 4,000 could be traced and 87 percent of those—3,480—originated in the United States). Numerous problems with the data collection and sample population render this assertion as unreliable.[143]

Research from Stratfor reveals that only 12% of Mexican crime guns were traced to U.S retail gun stores in 2008.[144] Alternatively, Jorge G. Castañeda, who served as Foreign Minister of Mexico from 2000 to 2003, and Rubén Aguilar, who served as the Press Secretary for the President of Mexico from 2000 to 2006, estimate that 18% of Mexican crime guns can be conclusively determined to have come from the United States.[145]

Some firearms researchers believe that the shorter the "time to crime," the greater the possibility that the original sale of the gun was to a person acting on behalf of a criminal.[146] For

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141. Scott Stewart & Fred Burton, *Mexico: Economics and the Arms Trade*, STRATFOR GLOBAL INTELLIGENCE (July 9, 2009), http://www.stratfor.com/weekly/20090708_mexico_economics_and_arms_trade [http://perma.cc/0dxbWb1iYpE].

142. A variety of figures in the 80–90% range have been bandied at various times as the supposed percentage of Mexican crime guns that come from U.S. gun stores.

143. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-709, FIREARMS TRAFFICKING: U.S. EFFORTS TO COMBAT ARMS TRAFFICKING TO MEXICO FACE PLANNING AND COORDINATION CHALLENGES 69 (2009) [hereinafter GAO FIREARMS TRAFFICKING].

144. Stewart, *supra* note 132.

145. RUBÉN AGUILAR V. & JORGE G. CASTAÑEDA, EL NARCO: LA GUERRA FALLIDA 68 (2009).

146. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, CRIME GUN TRACE ANALYSIS REPORT: THE ILLEGAL YOUTH FIREARMS MARKET IN JERSEY CITY 8 (1999).

example, if a gun is sold at a store in May and found at a crime scene in July, this suggests that the May purchaser was working on behalf of the July criminal. Under the time-to-crime theory, a long period between the gun's sale and its recovery at a crime scene suggests that the gun was stolen from its lawful owner and then sold into the black market. Of the Mexican guns that are successfully traced, the average weapon age is fifteen years, indicating that they were legal American guns that were stolen and then sold into the black market.[147]

2. The Mexican Government Sometimes Blocks Traces

Another problem with Mexican trace data is that sometimes the Mexican government refuses to allow ATF to trace guns. In 2008, Mexican police in Reynosa (a border town near the southern tip of Texas) made the largest weapons seizure in Mexican history: 288 assault rifles, 428,000 rounds of ammunition, 287 grenades, 126 pistols, and a grenade launcher.[148] ATF asked to see the serial numbers on the guns in order to trace them, but the Mexican government refused.[149]

At other times, an initial trace may be successful, but further investigation is thwarted. For instance, February 15, 2007, was labeled "Black Thursday" in Mexico when drug gangsters in central Mexico murdered four law enforcement officers.[150] ATF traced the murder weapons to a gun store in Laredo, Texas, and found the man who had lawfully purchased the guns.[151] He asserted that he had sold them to a total stranger whom he met at a shooting range.[152] Although ATF wanted to continue the

147. Administrative Record at 54, Nat'l Shooting Sports Found. v. Jones, 840 F. Supp. 2d 310 (D.D.C. 2012) (No. 11-1401), *aff'd*, 716 F.3d 200 (D.C. Cir. 2013). The record included a report from the Bureau of Alcohol, Tobacco, Firearms and Explosives on the average time-to-crime rates for U.S.-sourced firearms recovered and traced in Mexico between December 1, 2006, and August 31, 2010. *Id.* The average age of firearms recovered in Mexico was 15.08 years; the average age of firearms recovered in the United States was 10.55 years for the same period. *Id.* Out of 20,023 traces conducted, the time-to-crime figures were: 546 under three months, 451 between three and seven months, 547 between seven months and one year, 1,167 between one year and two years, 894 between two years and three years, 15,995 three years or older, and 423 unknown. *Id.*

148. Jo Tuckman, *Mexico Considers Banning Toy Guns to Cut Child Aggression*, THE GUARDIAN, Jan. 11, 2009, http://www.guardian.co.uk/world/2009/jan/12/mexico-toy-guns [http://perma.cc/0teS12sTkF4].

149. Todd Bensman, *Gunrunners' Land of Plenty*, SAN ANTONIO EXPRESS-NEWS, Nov. 30, 2008, http://www2.mysanantonio.com/gun_run/index.html [http://perma.cc/0n7X6rWaNew].

150. *Id.*

151. *Id.*

152. *Id.*

investigation in order to discover which gun trafficking network had delivered the guns to the murderers, the Mexican government blocked the investigation.[153] According to the *San Antonio Express-News*:

> [T]he ATF wouldn't get much from their Mexican counterparts, who imposed an almost total information blackout about the arrests of 14 suspects, including the alleged shooters.
>
> Not even the four widows know what happened to their husbands' alleged killers. The mystery extends to local journalists and municipal police, who are told only the arrested are still in prison but not tried. And, federal authorities have so far refused *Express-News* interview requests to discuss the case.
>
> The ATF's Elias Bazan, who oversaw the Laredo office at the time, said Mexico's investigators squandered an opportunity to provide the results of their interrogations and any evidence, outside of the guns' serial numbers, that would point to how the weapons were smuggled from the Laredo side.
>
> "We don't have anything from the Mexican government, so we're screwed," Bazan said of his Laredo investigation, which was shut down as a result.[154]

3. Additional Sources of Mexican Criminal Arms

The Mexican drug cartels have set up gangs in the United States to steal American guns and smuggle them into Mexico.[155] The Zetitas (little Zetas) gang has cells in Houston, Laredo, and San Antonio and is believed to be carrying out many gun-store robberies.[156] A gun stolen from Houston by a Mexican gang in 2007 might well end up being seized by Mexican police in 2010 and then traced to the United States. But that does not prove that American gun laws are to blame for Mexican crime.

Another key source of American crime guns in Mexico is the Mexican government. The United States sells large quantities of guns to the federal, state, and local Mexican governments.[157] These Mexican government purchases may themselves be a major source of Mexican crime guns. According to CNN, there

153. *Id.*

154. *Id.*

155. Fred Burton & Scott Stewart, *Mexico: Dynamics of the Gun Trade*, STRATFOR GLOBAL INTELLIGENCE (Oct. 24, 2007), http://www.stratfor.com/weekly/mexico_dynamics_gun_trade [http://perma.cc/0sZ6ebJikTB].

156. *Id.*

157. *See, e.g.*, U.S. DEP'T OF STATE, 2012 SECTION 655 REPORT 23 (2012).

were approximately 150,000 desertions from the Mexican army from 2003 to 2009.[158] Stated another way, about one-eighth of the Mexican army deserts annually.[159] Many of these deserters take their government-issued automatic rifles, some with U.S. origins, with them.[160]

As CNN reported, many of these deserters go to work for higher-paying drug cartels.[161] Indeed, the Zetas, an especially violent gang even by Mexican standards, was founded by Mexican Special Forces deserters.[162] The Zetas, who also recruit from Guatemalan army special forces (Kaibiles),[163] have used counterinsurgency tactics to take over various regions from other drug cartels.[164] They have frequently launched grenade attacks on police stations, and they deploy weaponry that even includes .50-caliber anti-aircraft machine guns.[165]

So the fact that a Mexican army deserter is later caught with his M-16 does not mean that the U.S. civilian gun market is somehow at fault. The same is true for M-16s and other U.S. military weapons that come to the Mexican drug cartels after first being legally sold to governments such as Guatemala or South Korea. Marlene Blanco Lapola, chief of the Guatemala National Police, says that the police have "lost" at least 2,000 guns, including automatic UZIs and AK-47s.[166] Likewise, many U.S. Army M-16 rifles were left behind in Vietnam and many of them have been sold into the global black market.[167]

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158. Rey Rodriguez, *Army Desertions Hurting Mexico's War on Drugs*, CNN, Mar. 11, 2009, http://www.cnn.com/2009/WORLD/americas/03/11/mexico.desertions/index.html [http://perma.cc/0MjVXFgVBRF].

159. Hector Tobar, *A Cartel Army's War Within*, L.A. TIMES, May 20, 2007, http://articles.latimes.com/2007/may/20/world/fg-zetas20 [http://perma.cc/0jxXW1CDrpF].

160. Stewart, *supra* note 132.

161. Rodriguez, *supra* note 158.

162. Samuel Logan, *A Profile of Los Zetas: Mexico's Second Most Powerful Drug Cartel*, CTC SENTINEL, Feb. 2012, at 5.

163. *Id.* at 6.

164. Tracy Wilkinson, *Sinoloa Cartel, Zetas Push Mexico's Drug Violence to New Depths*, L.A. TIMES, May 27, 2012, http://articles.latimes.com/2012/may/27/world/la-fg-mexico-cartel-war-20120528 [http://perma.cc/0JhdsfDisYq].

165. Tobar, *supra* note 159.

166. *Autoridades Admiten Debilidades de Inteligencia Civil*, PRENSALIBRE.COM, Dec. 9, 2008), https://web.archive.org/web/20081231102457/http://www.prensalibre.com/pl/2008/diciembre/09/282231.html [http://perma.cc/MW67-8FNG] ("También reconoció que en la institución hay un faltante de 2 mil armas de fuego, donde han desaparecido fusiles AK 47 y subametralladoras mini uzis.").

167. Jack Anderson, *U.S. Weapons Left in Vietnam Turning Up Around the World*, DAILY REPORTER (Spencer, Iowa), Aug. 23, 1979, at 4, *available at* http://news.google.com/newspapers?nid=1926&dat=19790821&id=9VcrAAAAIBAJ&sjid=pNkEAAAAIBAJ&pg=3095,3226404 [http://perma.cc/0PLnD3CCBKF].

According to Stratfor, besides the U.S. supply source for guns, "[t]he cartels also obtain weapons from contacts along their supply networks in South and Central America, where substantial quantities of military ordnance have been shipped over decades to supply insurgencies and counterinsurgencies. Explosives from domestic Mexican sources also are widely available and are generally less expensive than guns."[168]

The Mexico City newspaper *El Universal* reported on the weapons bazaars in Tepito, a Mexico City neighborhood notorious as a place where anyone can buy anything.[169] According to that report, anyone with 3,000 pesos—about $228 U.S. at the current exchange rate of about 13.18:1[170]—can buy a gun.[171] A new 9mm pistol costs 12,000 pesos.[172] Hand grenades and "assault rifles" (15,000 pesos) are available "on request."[173] The Tepito black marketers reported receiving wholesale monthly or bimonthly shipments of "revolvers, submachine guns, rifles and grenade launchers."[174] Significantly, "[a] percentage of the weapons, the seller said, come from Mexico via Ministry of Defense personnel who provide [them] in part from weapons seized in raids, or stolen from the ministry's own arsenal."[175]

There is no doubt that the drug cartels have plentiful supplies of grenades, rocket launchers, machine guns, and other military weapons. A 2009 Mexican federal government document reported that the government seized 2,804 grenades in the previous three years alone.[176] According to the government report, the types of arms seized among "the highest quantity" were "anti-tank rockets M72 and AT-4, rocket launchers RPG-7,

168. Burton & Stewart, *supra* note 155.

169. *Rentan Armas para Matar*, EL UNIVERSAL (Mex.), May 4, 2010, http://www.eluniversal.com.mx/notas/677658.html [http://perma.cc/0ZMm1DXJxYn].

170. *US Dollar–Mexican Peso Exchange Rate*, BLOOMBERG, http://www.bloomberg.com/quote/USDMXN:CUR [http://perma.cc/07mFv6LvKCd] (last visited Jan. 7, 2014).

171. *Rentan Armas para Matar*, *supra* note 169.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. PROCURADURÍA GENERAL DE LA REPÚBLICA, TRÁFICO DE ARMAS MÉXICO–USA (MEXICO–USA FIREARMS SMUGGLING) (2009), *available at* http://www.pgr.gob.mx/prensa/2007/docs08/trafico%20de%20armas%2030%20abril%202009.pdf [http://perma.cc/8QRJ-P9VN]. *See also* Stewart M. Powell & Dudley Althaus, *Obama Vows Action of Flow of Guns Into Mexico*, HOUS. CHRON., Jan. 11, 2009, http://www.chron.com/news/nation-world/article/Obama-vows-action-on-flow-of-guns-into-Mexico-1601044.php [http://perma.cc/0AMXqCCo7H2].

grenade launchers MGL Caliber 37 mm, grenade launcher additional devices caliber 37 and 40 mm, 37 and 40 mm grenades, [and] fragmenting grenades."[177] Arms in "second place" for highest quantity seized included "rocket launchers and submachine guns."[178]

The prevalence of grenades, grenade launchers, submachine guns, and other such weapons in Mexico shows that the Mexican drug cartels have important sources of weapons other than the law-abiding U.S. retail market. An individual cannot buy grenades or machine guns over the counter at a gun store in Tucson or at a gun show in San Antonio.[179]

Testifying before the U.S. House Subcommittee on Border, Maritime, and Global Counterterrorism on July 16, 2009, ATF stated that the grenades and other military-grade weaponry were coming into Mexico via the southern border with Guatemala.[180] After investigating the Mexican black market in arms, reporters William La Jeunesse and Maxim Lott summarized some sources of drug cartel weapons:

> The Black Market. Mexico is a virtual arms bazaar, with fragmentation grenades from South Korea, AK-47s from China, and shoulder-fired rocket launchers from Spain, Israel and former Soviet bloc manufacturers.
>
> Russian crime organizations. Interpol says Russian Mafia groups such as Poldolskaya and Moscow-based Solntsevskaya are actively trafficking drugs and arms in Mexico.
>
> South America. During the late 1990s, the Revolutionary Armed Forces of Colombia (FARC) established a clandestine arms smuggling and drug trafficking partnership with the Tijuana cartel, according to the Federal Research Division report from the Library of Congress.
>
> Asia. According to a 2006 Amnesty International Report, China has provided arms to countries in Asia, Africa, and Latin America. Chinese assault weapons and Korean explosives have been recovered in Mexico.
>
> The Mexican Army. More than 150,000 soldiers deserted in the last six years, according to Mexican Congressman Robert Badillo. Many took their weapons with them, including the

177. PROCURADURÍA GENERAL DE LA REPÚBLICA, *supra* note 176.

178. *Id.*

179. 18 U.S.C. § 922(b)(4) (2012).

180. *Combating Border Violence: The Role of Interagency Coordination in Investigations: Hearing Before the Subcomm. on Border, Mar., and Global Counterterrorism of the H. Comm. on Homeland Sec.*, 111th Cong. 28 (2009) (statement of Bill McMahon, Deputy Assistant Dir., Bureau of Alcohol, Tobacco, Firearms and Explosives, Dep't of Justice).

> standard issue M-16 assault rifle made in Belgium.
>
> Guatemala. U.S. intelligence agencies say traffickers move immigrants, stolen cars, guns, and drugs, including most of America's cocaine, along the porous Mexican-Guatemalan border. On March 27, La Hora, a Guatemalan newspaper, reported that police seized 500 grenades and a load of AK-47s on the border. Police say the cache was transported by a Mexican drug cartel operating out of Ixcan, a border town.[181]

"Professor George W. Grayson, author of [the book] '*Mexico's Struggle with "Drugs and Thugs,"*' calls the 90 percent factoid a 'wildly exaggerated percentage,'" which was being pushed by President Calderón for purposes of domestic Mexican politics.[182]

In any case, the profits of the Mexican drug cartels are estimated to be between $15 and $25 billion a year—or about 2% of Mexico's gross domestic product.[183] The Mexican government estimates that the gross revenues of weapons trafficking into Mexico are $22 million per year.[184] In other words, weapon acquisitions cost the drug cartels only about 1% of annual profits and a tiny fraction of gross revenues. Accordingly, the cartels appear to have substantial extra revenue to spend on weapons should law enforcement successes result in an increase in the black-market price of weapons.

D. American Efforts to Thwart Trafficking to Mexico

The first attempt to ban arms exports to Mexico took place during the Mexican-American War. On March 30, 1847, the U.S. Treasury Department forbade the export to Mexico of "cannon[s], swords, dirks, lances, spears, bowie knives, rifles,

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181. La Jeunesse & Lott, *supra* note 131.

182. Seth McLaughlin, *Mexico Wages All-Out War On Drugs, Flu, Misperceptions*, WASH. DIPLOMAT, June 2009, http://www.washdiplomat.com/index.php?option=com_content&view=article&id=6211:mexico-wages-all-out-war-on-drugs-flu-misperceptions-&catid=978:june-2009&Itemid=255 [http://perma.cc/0HjcAc9jTx5]. A report by the U.S. Government Accountability Office suggested that the 90% figure might be correct. GAO FIREARMS TRAFFICKING, *supra* note 143, at 16. However, the report simply theorized that because most gun seizures take place in northern Mexico, most of the guns must come from the United States. *Id.* The hypothesis overlooks the possibility that the gangsters moved the guns, coming from a variety of sources, to northern Mexico because they are very active in this region and it is the launching point for the trafficking of drugs and persons into the United States.

183. WOODROW WILSON CENTER, MEXICO INSTITUTE, THE UNITED STATES AND MEXICO: TOWARDS A STRATEGIC PARTNERSHIP 11 (2009).

184. Dudley Althaus, *Obama to Help Mexico Cut Drug Violence*, SAN ANTONIO EXPRESS-NEWS, Jan. 13, 2009, http://www.freerepublic.com/focus/f-news/2163877/posts [http://perma.cc/0VvKt6GuYWN].

muskets, sidearms, and firearms and all other arms and munitions of war."[185] During the George H.W. Bush administration, the U.S. Bureau of Alcohol, Tobacco and Firearms initiated a program called Operation Forward Trace.[186] U.S. law requires that licensed firearms dealers keep registration forms (Federal Form 4473) about their customers.[187] Especially targeting gun buyers with Hispanic names, ATF examined the 4473 forms for federally-licensed firearms dealers in southwestern states and then investigated the customers.[188] In July 2011, ATF issued "demand letters" to all licensed firearms dealers in the four southwest border states.[189] The letters ordered the dealers to report the names and purchases of all customers who purchase more than two semi-automatic rifles (including .22 caliber) within a five-day period.[190]

ATF and the Mexican government initiated Project Gunrunner in 2005.[191] It allows Mexican law enforcement officials to ask ATF to conduct computerized traces of guns that have been seized by Mexican law enforcement.[192] Project Gunrunner is operated by American law enforcement officials in Mexico and in American border states.[193] Project Gunrunner became part of the Mérida Initiative, by which the U.S. government provides extensive financial support to law enforcement organizations in Central America, with the bulk of the funds going to Mexico.[194] Most of the Mérida money is used

185. NORM FLAYDERMAN, THE BOWIE KNIFE: UNSHEATHING AN AMERICAN LEGEND 82 (2004).

186. *See Open Letter To Licensed Firearms Dealers*, AM. RIFLEMAN, Dec. 1991, at 43; Dick Riley, *When Rights Are Wronged*, AM. RIFLEMAN, Nov. 1991, at 64. For a case challenging the program, see Carney v. Magaw, No. C-3-89-446 (S.D. Ohio Feb. 8, 2000) (dismissing case because plaintiff was no longer engaged in the business of selling firearms). In 2003, ATF moved from the Department of the Treasury to the Department of Justice. *ATF's History*, *supra* note 121.

187. 27 C.F.R. § 478.129 (2013).

188. *See* James Jay Baker, *Clinton–Gore 2000 Legacy: Abuse & Corruption*, AM. RIFLEMAN, Nov. 2000, at 50 ("Edgar Morales, owner of Mirage 2000, a small Houston gun shop, says he was called by a compliance inspector who asked for the names of any Hispanic customers who were buying .38 Super ammo.").

189. *See* 10 Ring Precision, Inc. v. Jones, 722 F.3d 711, 714 (5th Cir. 2013); Nat'l Shooting Sports Found., Inc. v. Jones, 716 F.3d 200, 202 (D.C. Cir. 2013) (both cases upholding ATF's demands).

190. *See 10 Ring Precision*, 722 F.3d at 716; *Nat'l Shooting Sports Found.*, 716 F.3d at 202.

191. GAO FIREARMS TRAFFICKING, *supra* note 143, at 11.

192. *Id.*

193. *Id.*

194. CLARE RIBANDO SEELKE & KRISTIN M. FINKLEA, CONG. RESEARCH SERV., R41349, U.S.–MEXICAN SECURITY COOPERATION: THE MÉRIDA INITIATIVE AND BEYOND 6 (2013).

to purchase equipment.[195]

Another joint Mexican-American project is Operation *Armas Cruzadas*, in which several American law enforcement agencies work with their Mexican counterparts to thwart arms smugglers.[196] In addition, U.S. anti-drug programs are also tasked with preventing gunrunning into Mexico.[197]

One more program is a joint project of the federal ATF and the National Shooting Sports Foundation—the trade association for the American firearms industry.[198] "Don't Lie for the Other Guy" trains firearms store owners and employees how to spot "straw purchasers."[199] A straw purchaser is someone with a clean record who can legally buy guns but is illegally buying the gun on behalf of an ineligible person, such as a boyfriend with a felony conviction, or an arms smuggler.[200]

E. American Efforts to Promote Gun Trafficking

From 2006 to 2007, the Phoenix ATF office operated a program called "Wide Receiver," which supplied more than 300 guns to Mexican drug trafficking organizations.[201] Firearms dealers in Arizona were told to sell guns to people who were obviously straw purchasers.[202] ATF agents assured the gun stores that undercover agents would follow the guns once they left the

195. *Id.* at 8–9.

196. *Border Enforcement Security Task Force: Hearing Before the Subcomm. On Homeland Sec. of the H. Appropriations Comm.*, 111th Cong. 4–6 (2009) (statement of Marcy Forman, Dir. of Investigations, U.S. Immigrations and Customs Enforcement Dep't of Homeland Sec.) (noting that Immigration and Customs Enforcement initiated a joint project of Customs and Border Protection, ATF, and the Drug Enforcement Administration).

197. Press Release, Office of the U.S. Dep't of State Spokesman, Joint Statement on the Mérida Initiative: A New Paradigm for Security Cooperation (Oct. 22, 2007), *available at* http://2001-2009.state.gov/r/pa/prs/ps/2007/oct/93817.htm [http://perma.cc/0X4PgpqVETw] (including the 2007 Southwest Border Counternarcotics Strategy, the 2008 National Drug Control Strategy, and the 2007 U.S. Strategy for Combating Criminal Gangs from Central America and Mexico).

198. *"Don't Lie for the Other Guy" Campaign*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, http://www.atf.gov/publications/factsheets/factsheet-dont-lie-campaign.html [http://perma.cc/0vEjypmzNXi] (last visited Jan. 7, 2014).

199. *Id.*

200. *Id.*; *see also* 18 U.S.C. § 922(d) (2012).

201. STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM & S. COMM. ON THE JUDICIARY, 112TH CONG., FAST AND FURIOUS: ANATOMY OF A FAILED OPERATION: PART II OF III 26–29 (2012). *See also* MIKE DETTY, GUNS ACROSS THE BORDER: HOW AND WHY THE U.S. GOVERNMENT SMUGGLED GUNS INTO MEXICO (2013) (telling the story of one licensed gun dealer and his participation in Wide Receiver).

202. STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM & S. COMM. ON THE JUDICIARY, 112TH CONG., FAST AND FURIOUS: ANATOMY OF A FAILED OPERATION: PART I OF III 92 (2012).

store so that they would never be used in crime.[203] This was a flat-out lie. ATF headquarters in Washington, D.C., eventually got wind of what was going on and began asking questions.[204] The Phoenix ATF office immediately shut down Wide Receiver.[205]

William Newell, a gun-control enthusiast and the ATF Special Agent in Charge of the Phoenix office, orchestrated Wide Receiver.[206] After President Obama took office and the administration began using Mexican gun crime as an argument for American gun control, Newell initiated a new, much larger version of Wide Receiver.[207] This operation's name was "Fast & Furious," and this time the operation received enthusiastic support from ATF headquarters and many other parts of the U.S. Department of Justice.[208]

From late 2009 until early 2011, Fast & Furious orchestrated the delivery of more than 2,000 firearms to Mexican drug cartels.[209] According to Mexico's attorney general, those firearms have been used in 200 homicides in Mexico.[210] One victim was U.S. Border Patrol Agent Brian Terry, killed in December 2010.[211] In 2013, a Mexican police chief was also murdered with a Fast & Furious gun.[212]

After Fast & Furious was exposed, some ATF employees received lateral transfers and demotions.[213] The U.S. Attorney for

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203. *Id.*

204. Jason Ryan, *Documents Highlight Bush-Era Incident Pre-Dating 'Fast and Furious,'* ABC NEWS (Oct. 14, 2011, 7:18 PM), http://abcnews.go.com/blogs/politics/2011/10/new-documents-reveal-previous-problems-with-atf-phoenix-cases/ [http://perma.cc/0ZEtKPKhTs1].

205. *Id.*

206. Sharyl Attkisson, *A Primer on the "Fast and Furious" Scandal*, CBS NEWS, June 26, 2012, http://www.cbsnews.com/8301-31727_162-57461204-10391695/a-primer-on-the-fast-and-furious-scandal/ [http://perma.cc/04qXjhxZHva].

207. Sari Horwitz, *ATF Agent Who Started 'Fast and Furious' Defends Operation*, SEATTLE TIMES, June 28, 2012, http://seattletimes.com/html/nationworld/2018545824_guns28.html [http://perma.cc/0Hcj5wqtGGH].

208. *Id.*

209. OFFICE OF THE INSPECTOR GEN., A REVIEW OF ATF'S OPERATION FAST AND FURIOUS AND RELATED MATTERS 1 (2012). *See generally* JOHN DODSON, THE UNARMED TRUTH: MY FIGHT TO BLOW THE WHISTLE AND EXPOSE FAST AND FURIOUS (2013) (autobiograhy of the ATF whistleblower who participated in Fast & Furious).

210. Katie Pavlich, *Attorney General in Mexico: 200 Murders Result of Operation Fast and Furious*, TOWNHALL.COM, Sept. 20, 2011, http://townhall.com/tipsheet/katiepavlich/2011/09/20/attorney_general_in_mexico_200_murders_result_of_operation_fast_and_furious [http://perma.cc/0ZapKrwxovx].

211. OFFICE OF THE INSPECTOR GEN., *supra* note 209, at 2.

212. Richard A. Serrano, *Police Chief Killed With Rifle Lost in ATF Gun-Tracking Program*, L.A. TIMES, July 5, 2013, http://articles.latimes.com/2013/jul/05/nation/la-na-nn-atf-fast-furious-20130705 [http://perma.cc/0EwoBcYPjkA].

213. See, e.g., Laura Prabucki, *ATF Director Reassigned; U.S. Attorney Out Amid 'Fast and*

Arizona (who, like Newell, was a gun-control supporter) resigned,[214] as did the Assistant U.S. Attorney who had been the line attorney working on Fast & Furious.[215]

Assuming that Wide Receiver and Fast & Furious did not have written authorization from the U.S. State Department (and there is no evidence that they did), the participants in those operations perpetrated numerous felony violations of the federal Arms Control & Export Act (ACEA).[216] However, no prosecutions for these violations have been initiated.

F. A Mexican Lawsuit Against the United States

From a purely legal standpoint, the most intriguing legal issue of the cross-border trade is a possible lawsuit against the United States by the government of Mexico. On November 2, 2010, the Mexican government retained the law firm of Reid, Collins & Tsai.[217] Based in New York City and Austin, the boutique firm specializes in innovative cases.[218]

Some cases that would not require any legal innovation could be based on Fast & Furious. The United States has the legal authority to bring cases against people in foreign countries who organize conspiracies to smuggle illegal weapons into the United States with the intent that those weapons end up in the hands of gangsters.[219] Likewise, Mexico has the legal authority to file lawsuits—or even criminal charges—against Americans who intentionally conspire to promote illegal gun smuggling into

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Furious' Uproar, FOXNEWS.COM, Aug. 30, 2011, http://www.foxnews.com/politics/2011/08/30/sources-atf-director-to-be-reassigned-amid-fast-and-furious-uproar/ [http://perma.cc/0ULFadjfwfH].

214. Robert Anglen, *U.S. Attorney for Arizona Dennis Burke Resigns*, ARIZ. REPUBLIC, Aug. 31, 2011, http://www.azcentral.com/news/articles/2011/08/30/20110830us-attorney-arizona-burke-resigns30-ON.html [http://perma.cc/08ozENa2R8Z]; Dennis Wagner, *Burke of Fast and Furious Had Anti-gun History*, ARIZ. REPUBLIC, Jan. 28, 2012, http://www.azcentral.com/arizonarepublic/news/articles/2012/01/27/20120127dennis-burke-fast-furious-scandal-career.html [http://perma.cc/0zhFqiLobGj].

215. Prabucki, *supra* note 213.

216. *See* 22 U.S.C. § 2778(b)(2) (2012). The ACEA is currently used by federal prosecutors in serious cases of international arms smuggling because of the severity of the penalties. GOODMAN, *supra* note 130, at 10.

217. *Mexico Wants to Sue U.S. Gun Makers*, CBS NEWS, Apr. 21, 2011, http://www.cbsnews.com/8301-31727_162-20056210-10391695.html [http://perma.cc/0uGauwkPCSd].

218. *We Bring Cases Others Cannot*, REID, COLLINS & TSAI, http://www.rctlegal.com/why-us/we-bring-cases-others-cannot/ [http://perma.cc/0p8zzAwmuaQ] (last visited Jan. 7, 2014).

219. 18 U.S.C. § 922(a)(1) (2012).

Mexico.[220]

Of course, getting jurisdiction over persons in a foreign country is not easy. The United States has sometimes seized Mexican drug lords to bring them to trial in the United States.[221] Although the Mexican government has said that it wants to extradite the Fast & Furious perpetrators to Mexico for criminal trial,[222] the U.S. government has not turned any of the perpetrators over to Mexican authorities. Presumably, the U.S. government also will not grant permission to Mexican law enforcement to seize the perpetrators in the United States. The posting of ATF agent William Newell (ringleader of Fast & Furious) as ATF attaché to Mexico was cancelled for fear that, if he entered Mexico, he might be arrested and prosecuted for Fast & Furious.[223]

What about a case other than Fast & Furious? Could Mexico bring a civil suit against U.S. gun manufacturers or retailers? Mexico itself is one potential venue for such a suit. Some American gun manufacturers have voluntarily done business in Mexico by selling guns there, either to licensed Mexicans (via the one gun store in Mexico), or to various governmental entities there.[224] As for the American gun manufacturers who do not sell to Mexico, the Mexican government could allege that the American manufacturers knew, or should have known, that the manner in which they sell guns in the United States would inevitably have consequences in Mexico.

Following a (hypothetical) victory in a Mexican court—likely including an award of millions of dollars in damages—the Mexican government could then ask an American court to seize

220. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended*, art. 84(I), Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.).

221. *E.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

222. William La Jeunesse, *U.S. Officials Behind 'Fast and Furious' Gun Sales Should Be Tried in Mexico, Lawmaker Says*, FOXNEWS.COM, July 5, 2011, http://www.foxnews.com/world/2011/07/05/mexican-lawmakers-want-extradition-for-us-officials-responsible-for-botched/ [http://perma.cc/0eeWjdLu3qm].

223. Allan Lengel, *Fast and Furious Official No Longer Going to Mexico as Attache; Mexican Govt. Asks for Transcripts of His Testimony*, TICKLE THE WIRE (Aug. 4, 2011, 4:13 PM), http://www.ticklethewire.com/2011/08/04/fast-and-furious-official-no-longer-going-to-mexico-as-attache-mexican-govt-asks-for-transcripts-of-his-testimony/ [http://perma.cc/0P8gKJqYbuM].

224. *E.g.*, William Booth, *In Mexico, Only One Gun Store but No Dearth of Violence*, WASH. POST, Dec. 29, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/12/28/AR2010122803644_2.html [http://perma.cc/03kSVeVAm4E] (explaining that guns from American manufacturer Smith and Wesson are sold in the one store).

the money in the American gun manufacturers' bank accounts, or to seize their other assets, such as manufacturing equipment, buildings, or land. American courts are usually willing to enforce judgments from foreign courts unless there was some procedural irregularity in the foreign court.[225]

Another potential venue is the International Court of Justice (ICJ). Informally known as the "World Court," the ICJ is located in The Hague, Netherlands.[226] Although the Court long predates the United Nations, the Court is currently part of the United Nations system.[227] In April 2010, Chicago's then-Mayor Richard Daley held the sixth annual "Richard J. Daley Global Cities Forum" with mayors from around the world.[228] At the event, Daley announced the idea of suing American gun manufacturers in the World Court.[229] Philadelphia Mayor Michael Nutter and Mexico City Mayor Marcelo Ebrard Casaubón also endorsed the idea.[230]

The World Court can only issue binding decisions in nation-versus-nation suits.[231] Thus, a World Court case would have to be *United Mexican States v. United States of America.* Unlike some nations, the United States has not given blanket consent to World Court jurisdiction, so the World Court could only hear the case if the U.S. Presidential Administration allowed it.[232]

Perhaps the Administration might welcome such a suit, consent to jurisdiction, and put up a less than full-hearted defense in the World Court. The result could be a World Court order that the U.S. government impose major new restrictions on gun manufacturers and gun owners. Although World Court judgments are not self-executing in the United States,[233] such a judgment could be a powerful argument to aid an

225. RONALD A. BRAND, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS 1 (2012).

226. *The Court,* INT'L COURT OF JUSTICE, http://www.icj-cij.org/court/index.php?p1=1 [http://perma.cc/0q4uBMvVZk9] (last visited Jan. 7, 2014).

227. *Id.*

228. Neal Pierce, *Could Mayors' Fervor for Gun Curbs Trigger Global Legal Action?,* NATION'S CITIES WKLY., May 10, 2010, at 2.

229. *Id.*

230. *Id.*

231. Statute of the Int'l Court of Justice art. 34, para. 1, June 26, 1945, 59 Stat. 1031, 3 Bevans 1179.

232. U.S. DEP'T OF STATE, UNITED STATES: DEPARTMENT OF STATE LETTER AND STATEMENT CONCERNING TERMINATION OF ACCEPTANCE OF I.C.J. COMPULSORY JURISDICTION, 24 I.L.M. 1742, 1743 (1985).

233. *See, e.g.,* Medellín v. Texas, 552 U.S. 491 (2008).

Administration's push for gun control as being necessary to comply with international legal obligations.

The other possible international court for a Mexican government case would be the Inter-American Court of Human Rights located in Costa Rica.[234] This court is part of the Organization of American States (OAS), a group which is quite hostile to gun ownership.[235] In recent years, the OAS has veered sharply into the Chavezista camp, supporting rather than criticizing repressive governments in the Western Hemisphere.[236]

Again, the Obama Administration would have to cooperate in order for the Inter-American Court to hear the case.[237] The result could be the same as from the World Court: a non-binding international obligation for the U.S. federal government to impose severe regulations on gun owners and gun manufacturers.[238]

The Obama Administration has been attempting—so far unsuccessfully—to convince the Senate to adopt the OAS gun-control convention, known as CIFTA.[239] The Convention would obligate the U.S. government to impose drastic new gun controls.[240]

The final possibility for the Mexican suit is in an American federal court. The Mexican government could cherry-pick a court with the friendliest judges. The government could also follow the strategy of the anti-gun lawsuits that the Brady Center masterminded in 1998 and 1999: sue in many courts all over the United States to force the gun manufacturers to defend a

234. INTER-AMERICAN COURT OF HUMAN RIGHTS, http://www.corteidh.or.cr [http://perma.cc/0j6d4V2gsEr] (last visited Jan. 7, 2014).

235. *See* Inter-Am. Comm'n H.R. [IACHR], Annual Report of the IACHR 2006, OEA/Ser.L/V/II.127, doc. 4, rev. 1, ch. 4 ¶ 113 (2007) (discussing a program to round up guns in Haiti).

236. *See* Josh Rogin, *House Panel Votes to Defund the OAS*, THE CABLE (July 20, 2011, 12 :17 PM), http://thecable.foreignpolicy.com/posts/2011/07/20/house_panel_votes_to_defund_the_oas [http://perma.cc/0JoPiXRXZ5t].

237. Organization of American States, American Convention on Human Rights art. 62(3), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

238. *See, e.g.*, Flores-Nova v. United States, 652 F.3d 488, 493 (3d Cir. 2011).

239. Mary Beth Sheridan, *Despite Obama Pledge, Democrats Show Little Enthusiasm for CIFTA Treaty on Gun Trafficking*, WASH. POST, Oct. 21, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/21/AR2010102107266.html [http://perma.cc/0fqtDHwD3gG].

240. THEODORE R. BROMUND, RAY WALSER & DAVID B. KOPEL, THE HERITAGE FOUND., THE OAS FIREARMS CONVENTION IS INCOMPATIBLE WITH AMERICAN LIBERTIES (2010), *available at* http://www.heritage.org/research/reports/2010/05/the-oas-firearms-convention-is-incompatible-with-american-liberties [http://perma.cc/0eftcv6CB9Z].

plethora of suits all at once.[241]

A Mexican lawsuit, however, would face a serious obstacle. The 2005 Protection of Lawful Commerce in Arms Act (PLCAA) prohibits nearly all anti-gun suits except those arising from criminal conduct on the part of a gun manufacturer or gun seller.[242] Mexico would have to successfully attack the constitutionality of the PLCAA before any civil suit could succeed.

Lower courts have turned aside challenges to the PLCAA,[243] but the U.S. Supreme Court has never ruled on it, other than to deny certiorari.[244] If the Mexican government were willing to accept some defeats in lower courts while moving the case toward the Supreme Court, a case with Mexico as a petitioner might be especially likely to capture the Court's attention. If the litigation process took several years, President Obama might have the opportunity, in the interim, to appoint several new Justices. There is no guarantee how an Obama-dominated Court would rule, but it would be foolish to presume that the Court would definitely uphold the PLCAA *in toto*. After all, *District of Columbia v. Heller*[245] and *McDonald v. City of Chicago*[246] were hotly disputed 5–4 decisions.

V. CONCLUSION

In a nation where the constitution guarantees the right to arms, the laws ought to provide a practical, functional system for law-abiding persons to acquire arms. In practice, the Mexican system fails to do so. Law-abiding citizens are often forced to resort to extra-legal means to obtain arms for lawful self-defense. Meanwhile, the pervasive corruption of Mexican law enforcement, which is substantially worsened by drug prohibition, ensures a ready supply of the most dangerous arms for the most dangerous criminals. The Mexican gun-control system is a failure that harms public safety. Given the systemic

241. Peter J. Boyer, *A Reporter at Large: Big Guns*, THE NEW YORKER, May 17, 1999, at 61.

242. 15 U.S.C. §§ 7901–7903 (2012).

243. *See, e.g.*, Estate of Charlot v. Bushmaster Firearms, Inc., 628 F. Supp. 2d 174, 185–86 (D.D.C. 2009).

244. *See, e.g.*, City of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008), *cert. denied*, 556 U.S. 1104 (2009).

245. 554 U.S. 570 (2008).

246. 130 S. Ct. 3020 (2010).

state failure that exposes Mexican citizens to the depredations of criminals, the Mexican gun-control statute ought to be reformed so that average, law-abiding Mexicans can lawfully acquire ordinary means of lawful self-defense. Mexico's current gun-control laws are not a model for the United States.

APPENDIX: THE MEXICAN GUN CONTROL STATUTE

This is not an official translation. It is not the official product of the Mexican government. Do not rely on this unofficial document for legal advice. If you have questions about the law—such as those about transporting a gun into Mexico—consult a Mexican government official.

This translation is based on the 2004 Mexican government text.[247] In the translation, punctuation follows the Spanish text, even when the punctuation does not comply with modern English usage; for example, commas are kept in places where modern English would not use a comma. I did not attempt to rewrite the Mexican statute as if it were an American statute. Instead, I translated the Mexican statute into English. For example, *la portación de armas* is often rendered by other translators as "bearing arms" or "carrying arms" to match modern English usage. However, I rendered the term as "the carrying of arms," which is a more literal translation and preserves more of the flavor of the Mexican text. Likewise, *requisites* is generally translated as "requirements." I instead render it as "requisites," which, again, adheres more closely to the Mexican text.

247. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], *as amended,* Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.), *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/102.pdf [http://perma.cc/0fZA5kS6xnW]. For reference, see the prior law as enacted in 1972. Ley Federal de Armas de Fuego y Explosivos [LFAFE] [Federal Firearms and Explosives Law], Diario Oficial de la Federación [DO], 11 de Enero de 1972 (Mex.), *available at* http://www.diputados.gob.mx/LeyesBiblio/ref/lfafe/LFAFE_orig_11ene72_ima.pdf [http://perma.cc/0WVJpXp1PPW].

Federal law of firearms and explosives[248]
Chamber of Deputies of House of Congress
General Secretariat January 23, 2004
Ministry of Parliamentary Services

FEDERAL LAW OF FIREARMS AND EXPLOSIVES

New Law published in the Official Gazette on January 11, 1972
EXISTING TEXT
Last reform published January 23, 2004

In accordance with the National government, which is to say: United States of Mexico. President of the Republic
LUIS ECHEVERRIA ÁLVAREZ, Constitutional President of the United States of Mexico, to his constituents, know:
That the Congress has directed me to execute the following

DECREE
The Congress of the United States of Mexico, decreed:

FEDERAL LAW OF FIREARMS AND EXPLOSIVES

FIRST TITLE

ONLY CHAPTER
General rules

Article 1st
The provisions of this Act are of public interest.

Article 2nd
The application of this Law corresponds to:

I. The President of the Republic;
II. The Secretary of Government;[249]

248. Translation assistance by Angelica Tovar-Hastings, Denver University, Sturm College of Law, J.D. 2010, LL.M. 2001.
249. The Secretary of Government is the second-highest official in the executive branch of the Mexican government, after the President. EMILY EDMONDS-POLI & DAVID A.

III. The Secretary of the National Defense, and

IV. To the other federal authorities in the cases of their competence.

Article 3rd

The authorities of the States, Federal Districts, and the Municipalities, in their corresponding scopes of competence, will have the intervention that this Law and its Regulations indicate.

Article 4th

It is the Executive of the Union through the Secretaries of Government and of the National Defense, according to the attributions that this Law and its Regulations indicate, to control all of the arms in the country, for which there shall be a Federal Registry of Arms.

Article 5th

The Federal Executive, the Governments of the States, of the Federal District and the City Councils, will make permanent educational campaigns that induce the reduction of the possession, the carrying and the use of arms of any type.

For reasons of public interest, only the advertising of sporting arms, for hunting or sporting purposes, is allowed, within the boundaries of this Law.

Article 6th

The federal Laws or regulations on connected matters are supplementary to this Law.

SHIRK, CONTEMPORARY MEXICAN POLITICS 108 (2d ed. 2012). The Secretary is responsible for almost all domestic affairs. *Historical Overview*, SECRETARÍA DE GOBERNACIÓN, http://www.segob.gob.mx/en_mx/SEGOB/Antecedentes_historicos [http://perma.cc/0TYK9NXFtaY] (last visited Jan. 7, 2014). The post is approximately similar to the Home Minister in the United Kingdom. *See Secretary of State for the Home Department*, GOV.UK, https://www.gov.uk/government/ministers/secretary-of-state-for-the-home-department#responsibilities [http://perma.cc/0eiZVKSLrMw] (last visited Jan. 7, 2014).

SECOND TITLE
Possession and Carrying

CHAPTER I
Preliminary provisions

Article 7th

The possession of any firearm shall be registered to the Ministry of Defense, by the effect of its inscription in the Federal Registry of Arms.

Article 8th

Not permitted is the carrying or possession of arms prohibited by the Law or reserved for the exclusive use of the Army, Navy and Air Force, save only in cases of exception mentioned in this Law.

Article 9th

People are allowed the possession or carrying, under the terms with the limitations established by this Law, arms of the following characteristics:

I. Pistols of semiautomatic operation of caliber not superior to .380 (9mm), however excepting pistol calibers .38 Super, .38 Commando, and also in 9 mm calibers the Mauser, Luger, Parabellum and Commando, as well as similar models of the same caliber of the excepted ones, of other brands.

II. Revolvers in calibers not superior to .38 Special, with the exception of the caliber .357 Magnum.

The farmers in cooperatives, *cumuneros*,[250] and day laborers of the field, outside the urban zones, may possess and carry, with a single declaration, one of the above-mentioned arms, or rifle of .22 caliber, or a shotgun of whichever caliber, except of those of barrel length shorter than 635 mm (25), and those of higher caliber than 12 (.729 or 18.5 mm).

III. Those mentioned in article 10 of this Law.

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250. After the 1917 revolution, many large land-holdings were broken up, and the land was given to small farmers. MEXICO: A COUNTRY STUDY 112–13 (Tim L. Merrill & Ramón Miró eds., 4th ed. 1998). These *cumuneros* hold title to the land, and can transfer it by inheritance, but cannot sell it. *Id.*

IV. Those that are integrated in collections of arms, by the terms of articles 21 and 22.

Article 10[251]

The arms that can be authorized to sportsmen for shooting or hunting, to possess in the home and to carry with a license, are the following:

I. Pistols, revolvers and .22 caliber rimfire rifles.

II. Pistols of .38 caliber for the purpose of Olympics shooting or competition.

III. Shotguns in all calibers and models, except those of barrel length shorter than 635 mm (25), and those of caliber superior to 12 (.729 or 18.5 mm).

IV. Shotguns of 3 barrels in the calibers authorized in the previous section, with a barrel for metallic cartridges of distinct caliber.

V. High-powered rifles, repeating or semiautomatic, not convertible to automatic, excluding .30 caliber carbines and rifles, muskets and carbines of caliber .223, 7 and 7.62 mm and Garand rifles in .30 caliber.

VI. High power rifles of calibers superior to those indicated in the previous section, with special permission for use abroad, in hunting of big game not existing in the national fauna.

VII. The other arms of sporting characteristics in agreement with the legal norms of hunting, applied by the Secretaries of State or Organizations involved, as well as the national and international regulation of shooting sports.

The persons who practice the sport of *Charreria*[252] hunting can be authorized to have revolvers of greater caliber than the ones indicated in the 9th article of this Law, solely to complete their *Charreria* attire, and having to carry them unloaded.

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251. In the original text, only Articles 1st through 9th are ordinal. Articles 10 and above are cardinal.

252. *Charreria* is the name for a Mexican sport of horsemanship. Paulina Kababie, Tracy Everbach, Steven Elliott & Lisa Button, *Family Carries Charreria Tradition Through Generations*, NBC LATINO, June 7, 2012, http://nbclatino.com/2013/06/07/family-carries-charreria-tradition-through-seven-generations/ [http://perma.cc/0gtneCLrH9W]. It is somewhat similar to American rodeo. *Id.* Participants wear costumes, which include guns. KATHLEEN M. SANDS, CHARRERÍA: AN EQUESTRIAN FOLK TRADITION 283 (1993).

Article 10 Second

The possession of cartridges corresponding to the arms that can be possessed or carried is limited to the quantities that are established in article 50 of this Law, for each arm registered in the Federal Registry of Arms.

Article 11

The arms, munitions and material for the sole uses of the Army, Navy and Air Force are the following:

a) Revolvers in .357 Magnum and those superior to .38 Special.

b) Pistols in the calibers 9 mm Parabellum, Luger and similar, the .38 Super and Commando, and the superior calibers.

c) Rifles, *mosquetones*,[253] carbines, and *tercerolas*,[254] in calibers .223, 7 mm, 7.62 mm and .30 caliber carbines in all models.

d) Pistols, carbines and rifles with burst-fire systems, sub-machine guns, and machine guns in all calibers.

e) Shotguns with barrel of length less than 635 mm (25), those of caliber superior to 12 (.729 or 18.5 mm) and teargas launchers,[255] with exception of those for industrial use.

f) The ammunition for the previous arms and cartridges with special artifices like tracers, incendiaries, armor-piercing, smoke-producing, *expansivos de gases*[256] and shells with loads superior to 00 (.84 cms. diameter) for shotguns.

g) Cannons, artillery pieces, mortars and tanks with their attachments, accessories, projectiles and ammunition.

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253. *A mosquetone* is a rifled long gun shorter than a standard rifle. *Mosquetones*, WORD REFERENCE, http://www.wordreference.com/definicion/mosquetones [http://perma.cc/0fjmNL4zyeT] (last visited Jan. 7, 2014). An example of a mosquetone is the 1916 Mauser. *See Fusiles Mauser*, SOCIEDAD BENÉFICA DE HISTORIADORES AFICIONADOS Y CREADORES, http://www.sbhac.net/Republica/Fuerzas/Armas/Infanteria/Fusiles/Fusiles.htm [http://perma.cc/0YtK948FCEm] (last visited Jan. 7, 2014).

254. A *tercerola* is a firearm shorter than a carbine, used by cavalry. *Tercerola*, WORD REFERENCE, http://www.wordreference.com/definicion/tercerola [http://perma.cc/09Vmb25f4Vi] (last visited Jan. 7, 2014). Examples of *tercerolas* include the 1871 Remington and the 1879 Remington. *See Tercerola de Retrocarga, de Repetición*, ARMAGINTZAREN MUSEOA MUSEO DE LA INDUSTRIA ARMERA, http://www.armia-eibar.net/armas/arma_larga/EA330 [http://perma.cc/0QAo7Fmo1ym] (last visited Jan. 7, 2014); TERCEROLA REMINGTON-MODELO 1871, http://home.coqui.net/sarrasin/tercerola.htm [http://perma.cc/0J8eSCsWavL] (last visited Jan. 7, 2014).

255. "*Lanzagases.*"

256. The statutory text may be in error. The phrase "expansivos de gases" may be missing a comma after "expansivos." If a comma were inserted, the statute would ban expanding bullets and bullets containing gas.

h) Projectile-rockets, torpedoes, grenades, pumps, mines, depth charges, flame throwers and the like, as well as the apparatuses, artifices and machines for their launching.

i) Bayonets, sabers and lances.

j) Ships, submarines, boats and seaplanes for naval warfare and their armament.

k) Aircraft of war and their armament.

l) Devices of war, gases and chemical substances of exclusively military application, and diverse inventions for use by the armed forces.

In general, all the arms, the ammunition and materials destined exclusively for the war.

Those of this function, by means of the justification of necessity, will be able to be authorized by the Secretary of the National Defense, individually or to corporations, to those who hold jobs or positions for the Federation, for the Federal District, for the States or the Municipalities.

Article 12

The prohibited arms, by effect of this Law, are those listed in the Penal Code for the Federal District in the Subject of the general jurisdiction and for all the Republic in the Subject of Federal jurisdiction.

Article 13

Not considered as prohibited arms are utensils, tools or instruments for working in the field or any occupation, art, profession or sport that have well-known application for such, but their use is limited to the premises or site in which the work or sport practice takes place.

When those instruments are carried by necessities of work or for the exercise of a sport, it is necessary to demonstrate, according to the case, these circumstances.

Article 14

The loss, theft, destruction, seizure or securing of the weapon that is possessed or carried, must be disclosed to the Secretary of the National Defense, in the terms and through the channels established by the Regulations of this Law.

CHAPTER II
Possession of arms in the place of residence

Article 15

In the home it is allowed to possess arms for security and legitimate defense of residents. The possession imposes the duty to show them to the Secretary of the National Defense, to be registered.

For each arm there must be a record of its registration.

Article 16

For the purposes of control and possession of arms, an individual must declare a sole address of permanent residence for himself and his family.

Article 17

Any person who acquires one or more arms, is obliged to register it with the Secretary of the National Defense within thirty days. The registration will be made in writing, indicating brand, caliber, model and serial number if any.

Article 18

The public servants and chiefs of police federal, of the Federal District, of the States and the Municipalities, are required to make the registration referred to in the previous article.

Article 19

The Secretary of the National Defense will have the authority to determine in each case, what arms for shooting or hunting of the listed ones in article 10, by their characteristics, can be possessed, as well as the corresponding ammunition allowances. With respect to the hunting arms, it will be required to have previously the opinion of the Secretaries of State or Agencies that have authority.

The authorization requests should be made directly or by the conduit of the Club or Association.

Article 20

The Clubs and Associations of the sports of shooting and

hunting must be registered by the Secretaries of the Government and of National Defense, and must comply with the requisites listed in the Regulations.

Article 21

Natural persons or legal entities, public or private, may possess collections or museums of antique or modern arms, or both, according to permission of the Secretary of the National Defense.

Also they will be able to have, with the same requisites, arms that are prohibited by this Law, when they have cultural, scientific, artistic or historical value or significance.

When in a collection or museum not assigned to a military institution of the Nation, arms exist which are reserved for the exclusive use of the Army, Navy and Air Force, there is required further authorization in writing, of the respective department.

Article 22

Individuals who have collections of weapons must ask permission for acquisition and possession of new arms destined to the enrichment of the collection or of the museum, and register them.

Article 23

The weapons which form part of a collection may be sold altogether, or individually, according to the terms of the dispositions of this Law and with prior written permission of the Secretary of the National Defense and the other competent authorities.

CHAPTER III
Cases, conditions, requirements and places for the carrying of arms

Article 24

In order to carry arms the respective license is required.

The members of the Army, Navy and Air Force are excepted from the previous item, in cases and conditions listed in the applicable laws and regulations.

The members of the institutions of police, federal, state,

Federal District and municipalities, as well as private security services, may carry weapons according to the cases, conditions and requirements established by the present law and other applicable laws.

Article 25

The licenses for carrying of arms will be of two classes:

I. Particular; which must be revalidated every two years, and

II. Official, which will remain valid for the duration of the office or employment on which the license is based.

Article 26

The specific license for the carrying of arms will be individual for private individuals, or collective for legal entities, and may be issued when the compliance with the following requirements is met:

I. In the case of private individuals:

A. Have an honest living;

B. Have completed, for those who are obligated, the National Military Service requirement;

C. Not have physical or mental impairment for the use of arms;

D. Not have been convicted of crimes committed with arms;

E. Do not use drugs, enervating or psychotropic, and

F. Prove, at the discretion of the Secretary of the National Defense, the need to carry arms for:

a) The nature of his occupation or employment, or

b) Special circumstances of the place where he lives, or

c) Any other justifiable reason.

There may also be issued particular licenses, for one or several arms, for sporting activities, either shooting or hunting, only if those involved are members of some registered club or association and meet the requirements set out in the first five paragraphs of this section.

II. In the case of legal entities:

A. Being constituted in accordance with Mexican laws.

B. For private security services:

a) Have authorization to function as a private security service, and

b) Have the favorable opinion of the Secretary of Government of justification of the need for the carrying of arms, and limits of number and characteristics of the arms, as well as places of utilization.

C. As for other legal entities, when the circumstances warrant, in the judgment of the Secretary of the National Defense, for internal security services and the protection of his installations; according to the prescriptions, controls and supervision determined by the Secretary.

D. Prove that those who carry weapons comply with the provisions of the first five points of section I above.

With prior authorization from the Ministry of National Defense, the title-holders of collective licenses, will issue numbered personal identification credentials, which contain the dates on the collective license and shall be renewed biennially.

The time limit for issuing individual and collective licenses will be fifty working days, counted from the filing of the formal application.

Article 27

Foreigners may only be authorized to carry arms when, in addition to satisfying the requirements listed in the previous article, they prove their status of immigration, except in cases of temporary licenses for tourists for sporting purposes.

Article 28

(repealed).

Article 29

The official licenses for the carrying of arms can be collective or individual.

I. The collective licenses can be issued to:

A. The government entities and public agencies in charge of guarding strategic facilities in the country.

The holders of collective licenses will be issued personal numbered identification credentials, which contain the dates on

the collective license and shall be renewed biennially.

B. Police institutions. These licenses will be subject to the following guidelines:

a) The institutions must comply with the applicable federal or local laws;

b) The Secretary of Government will ask the Secretary of the National Defense to issue collective licenses to police institutions, which will only be requested for people who are part of the operational organization and are listed on the payroll; the Secretary should be notified of any change in its workforce. The competent authorities will resolve the application within the sixty days following the filing of the application before the Secretary of Government, and

c) The heads of police institutions, shall issue to the operational staff, written in the registry established by the relevant law, the personal numbered identification credentials, for periods of six months, which during their period shall be treated as individual licenses.

C. The holders of collective licenses shall regularly send to the Secretary of the National Defense and the Secretary of Interior, a report of the weapons in their possession, duly correlated with their structure and operational organization, listing the numbered credentials and the information of the persons who carry arms.

D. The competent authorities shall coordinate with the governments of the States to obtain, with timeliness and accuracy, information necessary for compliance with this law.

E. The Secretary of the National Defense shall regularly inspect the weapons, only for verification, without having any authority over personnel.

II. Individual licenses shall be issued to those who hold office or employment in the Federation or Federal Entities, for the implementation of their required obligations, in the opinion of the competent authority, to carry weapons.

III. The public servants referred to in this article shall also meet the requirements in the first five paragraphs of section I of article 26 of this law.

Article 30

The Secretary of the National Defense, with the exceptions

noted in article 32 of this Law, shall be responsible for the issuance, suspension and cancellation of the licenses for carrying of arms, as well as his registry, control and surveillance.

The Secretary will timely notify the Interior of the licenses which are authorized, suspended or canceled.

Article 31

The licenses for carrying arms may be canceled, without affecting the application of resultant sanctions, in the following cases:

I. When their possessors have misused the arms or the licenses;

II. When their possessors have altered the licenses;

III. When arms have been used outside of authorized places;

IV. When an arm has been carried other than that covered by the license;

V. When the licensed arms have been modified from its original characteristics;

VI. When the issuance of the license was based on deception, or when in the opinion of the Secretary of the National Defense the reasons that were taken into account in awarding the license no longer exist or for supervening causes the issuance requirements are no longer met;

VII. By order of competent authority;

VIII. When the possessors change their domiciles without notifying the Secretary of the National Defense;

IX. For noncompliance with the provisions of this Law, its Regulations or those of the Secretary of the National Defense which are issued based on this Legislation.

The suspension of licenses to carry arms, shall proceed only if in the opinion of the Secretary of Government it is needed to maintain or restore the peace of people or regions.

Article 32

The Secretary of Government shall have the power for the issuance, suspension and cancellation of individual licenses to carry arms of the federal employees, of which he shall notify the Secretary of the National Defense for the purposes of inscribing

the arms in the Federal Register of Arms.

The Secretary of Government also has the power for the suspension and cancellation of the credentials of identification issued by the officials of police institutions, under the protection of an official collective license for the carrying of arms and which are similar to individual licenses.

Article 33

The credentials of honorary agents or police or informers and similar others do not empower them to carry arms, without the corresponding license.

Article 34

The licenses to carry arms shall state the territorial limits in which they have validity. In the cases in which they are limited to security guards for certain areas or determinate zones, they shall specify the area in which they shall be valid.

Article 35

The licenses authorize only the carrying of arms listed by the person for whose name it is issued.

Article 36

It is prohibited to armed individuals to assist demonstrations and public celebrations, deliberative assemblies, meetings to discuss controverted interests, any meeting that, for their purposes, has predictable opposition tendencies, and, in general, any act which seeks results obtained by the threat or use of weapons; with the exception of the parades and meetings for the sporting purposes of *Charreria*, shooting or hunting.

THIRD TITLE
Manufacture, Trade, Import, Export and Related Activities.

CHAPTER I
Preliminary provisions

Article 37

It is exclusively the authority of the President of the Republic to authorize the establishment of manufacturers and sellers of

arms.

The control and monitoring of the activities and industrial and commercial operations carried out with arms, munitions, explosives, devices and chemical substances, will be made by the Secretary of the National Defense.

The specific permits that are required for these activities will be awarded by the Secretary of the National Defense by notifying the Secretary of Government and without affecting the powers falling within the remit of other authorities.

Public federal departments and agencies carrying out these activities, are subject to the laws that regulate them.

Article 38

The permits referred to in the previous article, do not relieve those concerned from following the requirements laid down in other laws, according to the nature of the activities.

Article 39

In the cases referenced in articles 37 and 38 of this Law, it is required to conform to the local and municipal authorities respecting the safety and location of the establishments concerned.

Article 40

Industrial and commercial activities related to arms, munitions, explosives and to other objects regulated by this Law, are subject to rules made by the Secretary of the National Defense. When the material is for the exclusive uses of the Mexican Navy, the activities will be subject to the provisions of the Secretary of the Navy.

Article 41

The provisions of this title are applicable to all activities related to arms, items and materials listed below:

I. ARMS

a) All the permitted firearms, contained in articles 9 and 10 of this Law;

b) Gas Weapons;

c) Industrial Cannons, and

d) The constituent parts of the previous arms.

II. MUNITIONS

a) Ammunition and its constituent parts for the weapons mentioned in the previous section;

b) The cartridges used in the tools setting anchors in the construction industry and those whose functions use gunpowder.

III. GUNPOWDER AND EXPLOSIVES

a) Gunpowder in all its compositions;

b) Picric acid;

c) Dinitrotoluene;

d) Nitrostarch;

e) Nitroglycerin;

f) Nitrocellulose: Fibrous type, moistened in alcohol, with a maximum concentration of 12.2% nitrogen, with a minimum of 30% solvent. Cubic type (dense-paste), with a maximum concentration of 12.2% nitrogen and having a minimum of 25% solvent;

g) Nitroguanidine;

h) Tetryl;

i) Pentrite (P.E.T.N.) or Pentaerythritol tetranitrate;

j) Trinitrotoluene;

k) Fulminates of mercury;

l) Nitrides of lead, silver and copper;

m) Dynamites and amatoles;

n) Lead styphnate;

o) Nitro carbonites (explosives with ammonium nitrate);

p) cyclonite (R.D.X.).

q) In general, any substance, mixes or compound with explosive properties.

IV. DEVICES

a) Initiators;

b) Detonators;

c) Safety fuses;

d) Detonating cords;

e) Pyrotechnics.

f) Any instrument, machine or invention applied to the uses of explosives.

V. CHEMICAL SUBSTANCES ASSOCIATED WITH EXPLOSIVES

a) Chlorates;

b) Perchlorates;

c) Sodium metal;

d) Magnesium powder;

e) Phosphorus.

f) All those that alone or in combination are liable to be employed as explosives.

Article 42

The specific permits referred to in article 37 of this Law, may be:

I. General, those awarded to businessmen or persons who work for a living in these activities permanently;

II. Ordinary, which is issued in each case for the conduct of mercantile transactions domestically or with foreign commercial businesses, to the businesses with a current general permit in force, and

III. Extraordinary, which is awarded to those who eventually have need to effectuate any transaction to which this Title relates.

Article 43

The Secretary of the National Defense may deny, suspend or cancel at his discretion the permits referred to in the preceding article, when the activities protected involve danger to the security of persons, facilities, or may disrupt the public tranquility or order.

Article 44

The permits are nontransferable.

The general permits will have validity during the year in which they are issued, and can be revalidated at the judgment of the Secretary of the National Defense.

The ordinary and extraordinary permits will have validity

which is indicated concretely in each case.

Article 45

The factories, industrial plants, workshops, shops and other establishments that engage in activities regulated under this Title, must meet the conditions of safety, technical operation, location and production which are determined in the Regulations.

Article 46

(Repealed).

Article 47

(Repealed).

CHAPTER II
Of commercial and industrial activities and operations

Article 48

The general permits for the production, organization, repair and connected activities with respect to arms, objects and materials that this Title covers, include the authorization of the purchase of parts or elements that are required.

Article 49

To sell to individuals more than one gun, dealers must have received special permission in advance.

Article 50

The dealers may sell to individuals only:

a) Up to 500 cartridges in .22 caliber.

b) Up to 1,000 cartridges for shotguns or others that are loaded with ammunition, new or reloaded, although they are of different calibers.

c) Up to five kilograms of sport gunpowder for reloading, canned or in containers, and 1,000 pieces each of the constituent parts of shotgun cartridges, or 100 bullets or constituent elements for cartridges for other permitted arms.

d) Up to a maximum of 200 cartridges, for other permitted

arms.

The Regulations of this Law, shall identify timelines for carrying out new sales to the same person.

Article 51

The dealing of arms and cartridges for the exclusive use of the Army, Navy and Air Force will be conducted by the official institution which is indicated by the President of the Republic, and will be carried out in the terms and conditions which are indicated by orders issued by the Secretary of the National Defense or the Secretary of the Navy, as appropriate.

Article 52

The Secretary of the National Defense has the power to establish, by means of general administrative arrangements, terms and conditions regarding the acquisition of arms and ammunition for branches and organizations of the Federal Executive, of the states, of the Federal District and of the municipalities, as well as for the individuals of authorized security services or for sport activities of shooting and hunting.

Article 53

The dealing, donation or exchange of arms, ammunition and explosives between individuals, require extraordinary permission.

Article 54

Those who lack permits under article 42 of this Law and who need to purchase quantities in excess of: five kilograms of gunpowder in cans or containers, a thousand primers, or any quantity of explosives and *artificios*[257] must obtain authorization under the terms of this Law.

257. The term *artificios* includes fireworks, but permit certificates refer to fireworks as *artificios pirotecnicos* (pyrotechnic artifices). *See Requisitos*, AYUNTAMIENTO DE MÉRIDA, http://isla.merida.gob.mx/serviciosinternet/tramites/php/phpInfoTramitesWEB004.php?idTramite=201# [http://perma.cc/0K6uHzxPMAT] (last updated Jan. 24, 2013). Accordingly, the legal meaning of *artificios* appears to include but not be limited to fireworks.

CHAPTER III
Of import and export

Article 55

The weapons, items and materials referred to in this Act which are imported under permits ordinary or extraordinary, shall be put precisely to the use stated in the said permit. Any amendment, change or transformation that seeks to introduce a different use requires a new license.

Article 56

For the issuing of export permits for the arms, items or materials mentioned, the interested party must certify to the Secretary of the National Defense, that he holds an import permit from the government of the destination country.

Article 57

When the arms, items and materials of commercial import or export business come under the control of the respective customs offices, the interested parties will inform the Secretary of the National Defense who will designate a representative to be involved in the customs office concerned, without which condition it is not permitted to take them back from government seizure or to leave the country.

Article 58

Individuals who acquire weapons or ammunition abroad, must apply for extraordinary permission to take them back from government possession.

Article 59

Temporary imports and exports of arms and ammunition from hunting tourists and shooting sportsmen, must be covered by the corresponding extraordinary permit, which sets out the conditions that must be complied with in accordance to the Regulations of this Law.

CHAPTER IV
Of Transport

Article 60

General permits for any regulated activities in this title, include the authorization for the transportation within the national territory, of the arms, items and materials which are covered, but their holders are subject to the related laws, regulations, and orders.

Article 61

Transportation which is based on permits issued by the Secretary of the National Defense to persons or merchants, to carry out one or several of the activities listed in this title, shall comport with the safety measures which are specified in the permits.

Article 62

The person or business that owns general permits for the special transport of arms, items and materials contained in this title shall require from its senders, a certified copy of the permit they have been granted.

Article 63

The persons who enter the country in transit, may not carry or acquire arms, items and materials mentioned in this title, without the corresponding license or permit.

Article 64

When the Mexican Postal Service accepts shipments of arms, objects and materials mentioned in this title, it must demand the corresponding permit.

CHAPTER V
Of storage

Article 65

The storage of the arms, objects and materials referred to in this title, may be authorized as a complementary activity of the general permission granted, or as specific for persons or

businesses.

Article 66

The arms, objects and materials that are protected by the permits, can only be stored in the quantities and premises authorized.

Article 67

The storage of arms, objects and materials referred to in this Title, must be subject to the requirements, tables of compatibility and distance-quantity indicated by the Secretary of the National Defense.

CHAPTER VI
Of control and monitoring

Article 68

Whoever has a general permit, will have to render to the Secretary of the National Defense, within the first five days of every month, a detailed report of their activities, in which is specified the turnover which occurred in the previous month.

Article 69

The businesses dedicated to the regulated activities in this Law, have the obligation to give the facilities necessary to the Secretary of the National Defense to practice inspection visits.

Article 70

In cases of disturbance of the public tranquility, the correspondent authorities for the application of this Law, will dictate within their scopes of competence, the measures necessary to assure the strict fulfillment of the orders of suspension or cancellation of the permits.

Article 71

In cases of war or disturbance of the public order, the factories, industrial plants, workshops, warehouses and establishments that make, produce, organize, repair, store or sell whatever arms, objects and materials referred to in this Law, under previous agreement of the President of the Republic, will

come under the direction and control of the Secretary of the National Defense, in accordance with the legal orders that are issued.

Article 72

The Secretary of the National Defense, when he estimates it necessary, will inspect the security conditions of factories, industrial plants, workshops, warehouses, munitions dumps and vehicles assigned to the activities referred to in this title.

Article 73

The permitees referred to in this Title are obliged to comply with the measures of information, control and security that are established by the Secretary of the National Defense, subject to this Law.

Article 74

The auctioning of the arms, objects and materials mentioned in this Law is prohibited. Excepted are administrative and judicial auctions, in which case, the respective authorities will have to communicate it to the Secretary of the National Defense, so that they can designate a representative who attends the act. The only bidders are the persons or business who have permission of the Secretary of the National Defense.

Article 75

In the case of judicial or administrative awarding of the arms, objects and materials referred to in this Law, the awardee, within the fifteen following days, will have to ask for the corresponding permission to have such, indicating the purpose that he intends for them.

Article 76

The holders of general permits are obliged to conserve, for a term of five years, all the documentation related to these permissions.

FOURTH TITLE[258]
Sanctions
ONLY CHAPTER

Article 77

There will be fines of ten to one hundred days for:

I. Whoever possesses arms without having made the declarations of the same to the Secretary of the National Defense;

II. Whoever possesses arms, cartridges or the ammunition in a non-authorized place;

III. Whoever infringes arrangements in article 36 of this Law. In this case, in addition to the sanction, the weapon will be secured, and

IV. Whoever has cartridges in superior amounts to those which article 50 of this Law refers.

To effectuate the imposition of the administrative sanctions referred to in this article, the case will be referred to notify the local administrative authority which has the competence to impose police punishments.

Article 78

The Secretary of the National Defense, as well as the rest of authorities federal, state, of the Federal District or municipal that perform security functions, will gather the arms, prior to obligatory issuance of the corresponding receipt, from all those persons who carry them without having a license, without carrying the license with themselves or from anyone who, while having the license, has badly made use of the arms.

The confiscated weapon will not be given to the interest holder, but only after previous payment of ten days of fines and the exhibition of the license. The term to exhibit the license will be of fifteen days.

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258. This chapter makes frequent reference to "days of fines." This is a civil law practice in which a fine is assessed as a fraction of a person's annual income. So if one person makes income X, and a second person earns income $2X$, and both persons are penalized "three days of fines," the second person will pay twice as much as the first person. Article 91 provides the cross-reference for how "days of fines" are calculated in Mexico.

To effectuate the payment of the fine above-mentioned, the infraction will be transferred, as soon as possible, to the corresponding federal fiscal authority.

Article 79

When an arm is secured or taken under the terms of the previous article, the civil employee that takes it will have to inform his superior immediately, who will inform the Federal Registry of Arms of the Secretary of the National Defense, as well as the other authorities established by applicable legal orders, about the results that follow. If information is not provided, the person in charge will have to cover the amount with ten days fines.

It is comparable to the crime of robbery described in article 367 of the Penal Code for the Federal District in the subject of general jurisdiction and for all the Republic in the subject of federal jurisdiction, and the same penalties will be applied, when the public servant who secures or gathers a weapon does not give it to his superior or, as the case may be, to the competent authority.

Article 80

There will be cancelation of the registration of the Club or Association of shooting or hunting, that stops fulfilling the obligations imposed by this Law and its Regulations.

There will be suspension of the license of carrying arms for the sport of shooting or hunting, when the registration of the Club or Association to which the license pertains has been cancelled, until the interested party files another registration with the Secretaries of Government and of the National Defense, in agreement with article 20 and the last paragraph of article 26 of this Law.

The license will be cancelled when the holder infringes the duties that are indicated by this Law and its Regulations for him, or when he no longer belongs to the Club or Association of which he was a member.

Article 81

There will be sanctions of two to seven years of prison and of fifty to two hundred days of fines, for whoever carries an arm

included in articles 9 and 10 of this Law without having been issued the corresponding license.

In cases involving the carrying of two or more arms, the corresponding penalty will be increased up to two-thirds.

Article 82

There will be imposed from one to six years of prison and from one hundred to five hundred days of fines, on those who transfer the ownership of an arm without the corresponding permission.

The transmission of ownership of two or more arms, without permission, or the recidivism in the conduct indicated in the previous paragraph, will be sanctioned according to article 85 Second of this Law.

Article 83

Whoever without the corresponding permission carries an arm of exclusive use of the Army, Navy or Air Force, will be sanctioned:

I. With prison of three months to a year and one to ten days of fines, when it concerns one of arms covered in subsection i) of article 11 of this Law;

II. With prison of three to ten years and fifty to two hundred days of fines, when concerning arms covered in subsections a) and b) of article 11 of this Law, and

III. With prison of four to fifteen years and one hundred to five hundred days of fines, when concerning the other arms covered in article 11 of this Law.

In cases involving the carrying of two or more arms, the corresponding penalty will be increased up to two-thirds.

When three or more people, members of a group, carry arms covered by section III of the present article, the penalty corresponding to each one of them will be increased to double.

Article 83 Second

Whoever without the corresponding permission stockpiles arms, will be sanctioned:

I. With prison of two to nine years and ten to three hundred days of fines, if the arms are covered in subsections a) or b) of article 11, of this Law. In the case of subsection i) of the same article, there will be imposed one to three years of prison and five to fifteen days of fines, and

II. With prison of five to thirty years and one hundred to five hundred days of fines, when the arms are any other covered in article 11 of this Law.

By stockpiling must be understood the possession of more than five arms of those of exclusive use of the Army, Navy and Air Force.

For the application of the sanction by crimes of carrying or stockpiling arms, the Judge will have to take into account the activity to which the author was dedicated, its antecedents and the circumstances in which he was stopped.

Article 83 Third

Whoever without the corresponding permission possesses a weapon of exclusive use of the Army, Navy or Air Force, will be sanctioned:

I. With prison of three months to a year and one to ten days of fines, when the arms are covered in subsection i) of article 11 of this Law;

II. With prison of one to seven years and twenty to one hundred days of fines, when the arms are covered by subsections a) and b) of article 11 of this Law, and

III. With prison of two to twelve years and fifty to two hundred days of fines, when the arms are any other covered in article 11 of this Law.

Article 83 Fourth

Whoever possesses cartridges in greater amounts than allowed, will be sanctioned:

I. With prison of one to four years and ten to fifty days of fines, if they are for the arms that are covered in articles 9, 10 and 11, subsections a) and b), of this Law, and

II. With prison of two to six years and twenty-five to one

hundred days of fines, if they are for the arms that are covered in the remaining subsections of article 11 of this Law.

Article 84

There will be imposed five to thirty years of prison and of twenty to five hundred days of fines:

I. To whoever participates in the introduction to the national territory, in clandestine form, of arms, ammunition, cartridges, explosives and materials of exclusive use of the Army, Navy and Air Force or subject to control, in accordance with this Law;

II. To the public servant, who being required by his functions to prevent this introduction, does not do it. In addition, there will be imposed the forfeiture of the job or position and incapacitation to carry out any public job or commission, and

III. To whoever acquires the objects referred to in subsection I for mercantile aims.

Article 84 Second

Whoever introduces to the national territory in clandestine form firearms that are not reserved for the use of the Army, Navy and Air Force, there will be imposed three to ten years of prison.

The resident abroad who for the first time introduces a single arm of those referenced in the previous paragraph, will have only administrative sanction of two hundred days of fines, his arm will be confiscated, and he will be given a receipt for the arm. When the person leaves the country, the arm will be given back to him upon presentation of the receipt.

Article 84 Third

The penalties referred to in articles 82, 83, 83 Second, 83 Third, 83 Fourth, 84 and 84 Second of this Law will be increased up to half when the responsible person is or has been a government employee of any police corporation, member of any private security service or member of the Army, Navy or Air Force in retirement, reserve, or in active-duty.

Article 85

There will be imposed two to ten years of prison and twenty to five hundred days of fines on retailers of arms, ammunition and

explosives, who acquire them without verifying the legal origin of such.

Article 85 Second

There will be imposed five to fifteen years of prison and one hundred to five hundred days of fines:

I. To those who make or export arms, ammunition, cartridges and explosives without the corresponding permit;

II. To the retailers in arms that without permission transfer the property of the objects that subsection I refers to, and

III. To those who have arms illegally which have been equipment for the federal bodies of police, state or municipal or of the Army, Navy or Air Force.

Article 86

There will be imposed three months to three years of prison and two to two hundred days of fines, to those who without the respective permission:

I. Buy explosives, and

II. Transport, organize, repair, transform or store the objects referred to in this Law.

The prison sentence anticipated by this article will be increased to double when the transport referred to in subsection II is of the arms covered by subsections a) or b) of article 11 of this Law.

If the transport is of the arms covered in article 11 of this Law, except the ones mentioned in subsection a), b) and i), the penalty will be of five to thirty years of prison and twenty to five hundred days of fines.

Article 87

There will be imposed a month to two years of prison and two to one hundred days of fines, to those who:

I. Manage industrial factories, plants, workshops, warehouses and other establishments that are dedicated to the activities regulated by this Law, without adjusting to the security

conditions that are obligatory;

II. Send the objects material to this Law, if the transport takes place by conduit of non-authorized companies;

III. Make the transportation that the previous section mentions, and

IV. Alienate explosives, artifices and chemical substances related to explosives, to businesses or people who do not have the corresponding permission of the Secretary of the National Defense.

Article 88

The arms material to the crimes indicated in this chapter, will be seized to be destroyed. Excepted are, those of exclusive use of the Army, Navy and Air Force that will be sent to these institutions, and those of historical, cultural, scientific or artistic value that will be sent to the Museum of Arms of the Secretary of the National Defense. The seized objects, explosives and other materials will be applied to works of social benefit.

Article 89

For the infraction of any of the norms of the present Law, independently of the sanctions established in this Chapter, the Secretary of the National Defense will be able, in the terms that the Regulation indicates, to suspend or to cancel the permits that have been granted.

Article 90

Other infractions to the present Law or its Regulations, not specifically anticipated, will be able to be sanctioned with the penalty of one to two hundred days of fines.

Article 91

For the application of the pecuniary sanction of days of fines, it will be arranged according to article 29 of the Penal Code of the Federal District in the Subject of general jurisdiction and to all the Republic in the Subject of Federal jurisdiction.

TRANSITIONS

Article the First

This Law will take effect fifteen days after its publication in the Official Newspaper of the Federation.

Article the Second

Once the regulations of this Law are issued, the related dispositions of the regulations in force will apply, as long as they are not opposite to the provisions established in this Law.

Article the Third

At the 90th day of the use of the present Law, the previous licenses of carrying arms will be without effect. But if within that term, the interested parties adjust to the arrangements of this Law, their licenses will be revalidated.

Article the Fourth

The societies existing and in operation at the date of the present Law, will not be affected in their constitution by the dispositions of the same law; but if they wish to acquire other businesses or to install new industrial units of those mentioned in article 46, they will require the permission of the Secretary of Foreign Relations that, in cases which are resolved to grant it, will only be able to be granted by means of the fulfillment of the requirements provided for the new societies.

Article the Fifth

Within the 90 days following the effective date of this Law, commerce and industries will have to adjust to the precepts of the same.

Article the Sixth

All persons who have one or more arms in their domicile, are obliged to show it to the Secretary of the National Defense, within a term of ninety days as of the effective date of this Law.

Article the Seventh

The corresponding Regulations will indicate the form and terms in which the individuals will have to turn over the arms

that, having been allowed and already registered as of the date of the publication of this Law, are now reserved for exclusive use of the Army, Navy and Air Force.

Article the Eighth

All orders contrary to the present Law are repealed.

Mexico, DF, the 29th of December of 1971. - Victor Manzanilla Schaffer, S.P.-Juan Moisés Calleja, D.P.-Juan Sabines Gutiérrez, S.S.-Mark Antonio Espinosa P, D.S.-Titles.

In fulfillment of the arrangement of section I of article 89 of the Political Constitution of the Mexican United States and for their due publication and observance, I issue the present Decree in the residence of the Federal Executive authority, in the city of Mexico, Federal District, on the thirtieth day of the month of December one thousand nine hundred seventy-one. - Luis Echeverria Alvarez. - Title. - The Secretary of the National Defense, Hermenegildo Cuenca Diaz. - Title. - The Secretary of Government, Mario Moya Palencia. - Title. - The Secretary of Foreign Relations, Emilio O. Rabasa. - Title. - The Secretary of Navy, Luis M. Bravo Carrera. - Title. - The Secretary of Treasury and Public Credit, Hugo B. Margáin. - Title. - The Secretary of the National Patrimony, Horacio Flores de la Peña. - Title. - The Secretary of Industry and Commerce, Carlos Torres Manzo. - Title. - The Secretary of Agriculture and Cattle Raising, Manuel Bernardo Aguirre. - Title. - The Secretary of Communication and Transport, Eugenio Méndez Docurro. - Title. - The Public Work Secretary, Luis Enrique Bracamontes. - Title. - The Secretary of Hydraulic Resources, Leandro Rovirosa Wade. - Title. - The Secretary of Public Education, Victor Bravo Ahuja. - Title. - The Secretary of Health and Assistance, Jorge Jiménez Cantú. - Title. - The Secretary of the Labor and Social Welfare, Rafael Hernández Ochoa. - Title. - The Secretary of the Presidency, Hugo Cervantes del Rio. - Title. - The Head of the Department of Agrarian Subjects and Colonization, Augusto Gómez Villanueva. - Title. - The Head of the Department of Tourism, Agustín Olanchea Borbón. - Title. - The Head of the Department of the Federal District, Octavio Sentíes Gómez. - Title.

THE FEDERALIST SOCIETY
2013 EXECUTIVE BRANCH REVIEW CONFERENCE

PANEL: CRIMINAL LAW AT THE FEDERAL LEVEL

PANELISTS
HON. MARY BETH BUCHANAN
JOHN G. MALCOLM
HON. GEORGE J. TERWILLIGER III
ADAM LIPTAK, *MODERATOR*

ADAM LIPTAK: Welcome, everybody. My name is Adam Liptak. I cover the Supreme Court for the *New York Times.* The formal title of this session is *Criminal Law at the Federal Level;* I like to think of it as *Some Conservatives Who Are Soft on Crime.*

[Laughter.]

ADAM LIPTAK: You know, that's not entirely fair, but maybe that's what you expect from the *New York Times.*

We're going to talk about some serious and fascinating issues, and I think we will hear some different perspectives from our very distinguished panelists. Certainly, there are authentic questions about the vast reach of federal criminal law—a fairly recent development.

We're going to follow the standard panel-discussion template. We'll hear brief, maybe ten-minute, presentations from each panelist. Then, if Mary Beth is at odds with her copanelists, and I anticipate that she will be, she may give a brief rebuttal.

Let me begin with brief introductions. Each of the panelists has done so much interesting work that I can't possibly touch on it all, so please read the panelists' extended biographies which have been provided to you.

First, we'll hear from George Terwilliger. George is a partner at Morgan Lewis. He served in the Justice Department as United States Attorney, Deputy Attorney General, and Acting Attorney General. Second, we'll hear from Mary Beth Buchanan. Mary Beth is the Ethics and Reputational Risk Officer for the United Nations. She served in the Justice Department for twenty-two years, including eight years as United States Attorney for the Western District of Pennsylvania. Third, we'll hear from John Malcolm. John has held various jobs in the government and private sectors, and I am most impressed by his title, which I don't know how he fits on a business card.

JOHN G. MALCOLM: I don't know either.

[Laughter.]

ADAM LIPTAK: It is the Rule of Law Programs Policy Director and the Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at the Heritage Foundation. That is an exceptionally good title.

Let's start with George.

HON. GEORGE J. TERWILLIGER III: Thank you, Adam,

and thank you for being here. Also, thank you to the Federalist Society for hosting this critically important discussion.

I thought the comments from Jon Turley, David McIntosh, and Ted Cruz—made a few minutes ago—about liberty being the cornerstone of our constitutional and federalist system were right on the money.[1] Nothing impacts liberty as much as being put in prison, so this panel discussion on the impact of federal criminal law is right at the heart of the matter. Of course, over-criminalization also affects economic liberty, and the deprivation of economic liberty is a drag on economic expansion, growth, and sustainability.[2]

My job today is to discuss the history of over-criminalization. I think the other panelists will talk about where we are, but I want to talk about how we got here—to the current reach of federal criminal law into the lives and businesses of Americans. The reason for discussing how we got here is not just to discuss a matter of historical and legal policy interest; it's to distinguish where we are from where we ought to be. Tracing the development of over-criminalization may show us the path back.

Let me begin with a proposition. Adam referred to it as being soft on crime, but that's not it at all. I was at the Justice Department for fifteen years. I had a reputation, deserved or not, as a tough prosecutor of crime, including white-collar crime. However, when it comes to commerce, the kinds of cases that we choose to bring and the laws that Congress decides to enact ought to be framed by reference to the constitutional role of the federal establishment. Federal criminal law has a place in commerce, but that place is to protect the means and instrumentalities of commerce, not to become a super-powerful regulatory tool.[3]

Reliance on criminal sanctions to enforce an increasingly

1. R. Ted Cruz, David M. McIntosh, Jonathan R. Turley & Dean A. Reuter, *Is the Administrative State on the Rise?*, THE FEDERALIST SOCIETY (June 13, 2013), http://www.fed-soc.org/publications/detail/is-the-administrative-state-on-the-rise-event-audiovideo [http://perma.cc/K3SV-436H].

2. *See generally Defining the Problem and Scope of Over-criminalization and Over-federalization: Hearing Before the H. Comm. on the Judiciary Over-Criminalization Task Force*, 113th Cong. 9 (2013) (statement of Steven D. Benjamin, President, National Association of Criminal Defense Lawyers).

3. *See generally Defining the Problem and Scope of Over-criminalization and Over-federalization: Hearing Before the H. Comm. on the Judiciary Over-Criminalization Task Force*, 113th Cong. 6–8 (2013) (statement of Hon. George J. Terwilliger III, Partner, Morgan, Lewis & Bockius LLP).

byzantine set of regulatory standards is offensive to principles of fundamental fairness. The Supreme Court has said it over and over again: people ought to be able to understand what they're required by law to do, or prohibited by law from doing, before they're held accountable for a criminal violation.[4] All you have to do is read our federal regulations and listen to the testimony of experts, who will disagree on the interpretation of those regulations, to realize that the "understandability standard" is ignored on a daily basis in the context of enforcement proceedings.[5]

So how did we get here? First, there can be no doubt—and I won't belabor this point, Hamilton probably wrote on it the most extensively and the most eloquently—that one of the reasons we have a Commerce Clause in the Constitution is that commerce provides for the wealth and strength of nations.[6]

As Michael Novak explained, more than anything else, the invention of the market economy in Great Britain and the United States revolutionized the world between 1800 and the mid-twentieth century.[7] As he put it so well, "After five millennia of blundering, human beings finally figured out how wealth may be produced in a sustained, systematic way."[8] We shouldn't mess around with that too much, yet that is exactly what we're doing by having the federal establishment shift its primary focus from protecting the means and instrumentalities of commerce to regulating commerce through criminal means.

Again, I want to emphasize that the use of federal criminal law to punish fraudsters, hucksters, liars, cheats, and others who abuse the free market system, is a good thing. It's appropriate and it's consistent with the Founders' intent. Simply put, a dishonest market cannot be a free market.

The paradigm shift to where we are today began in the first half of the twentieth century with Progressive Era and New Deal Era reliance on federal criminal law to regulate corporate behavior. There are three critical Supreme Court cases that I want to discuss. First, in 1909, in *New York Central & Hudson River*

4. *See, e.g.*, FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012).

5. *See* James V. DeLong, *The New "Criminal" Classes: Legal Sanctions and Business Managers, in* GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING 9, 14 (Gene Healy ed., 2004).

6. *See, e.g.*, THE FEDERALIST NO. 11 (Alexander Hamilton).

7. MICHAEL NOVAK, THE SPIRIT OF DEMOCRATIC CAPITALISM 17 (1982).

8. *Id.*

Railroad Co. v. United States, the Court held the respondeat superior doctrine can be used to hold a corporation criminally liable for the actions of its employees.[9] Congress later enacted a statute making a corporation a person for purposes of criminal law enforcement, but that statute simply codified this decision.[10]

Then, in 1922, in *United States v. Balint*, the Court recognized the abandonment of the common law *mens rea* requirement to permit "prosecutions under statutes the purpose of which would be obstructed by [a *mens rea*] requirement."[11] That was a hugely important step because, in the entire history of Anglo-American jurisprudence, what distinguished criminal conduct from many other kinds of conduct was having a guilty mind.[12]

Finally, in the 1943 case *United States v. Dotterweich*, the Court, heeding "the admonition that the meaning of a sentence is to be felt rather than to be proved," abandoned criminal intent in the corporate context with respect to certain statutes.[13] Again, Congress followed the court's lead.[14]

So where are we today? As you know, Congress empowers agencies to write regulations in accordance with broad statutory objectives.[15] The agencies write the regulations and, in doing so, define federal crimes.[16] The result is a morass of highly detailed regulations, the minutia of which corporations and individuals are expected to understand.

As Senator Cruz said earlier, stories are wonderful.[17] One of my favorites is *United States v. McNab*, the so-called Honduran lobster case. In this case, lobster importers were indicted on forty-seven counts of conspiracy, smuggling, money laundering, and violations of the Lacey Act, which prohibits the importation of "fish or wildlife taken, possessed, transported, or sold in violation of . . . foreign law"—here, Honduran law.[18] At trial, the defense presented expert testimony that the State had

9. New York Cent. & Hudson R.R. Co. v. United States, 212 U.S. 481, 494–95 (1909).
10. 18 U.S.C. § 18 (2013).
11. United States v. Balint, 258 U.S. 250, 252 (1922).
12. *See* Staples v. United States, 511 U.S. 600, 605 (1994).
13. United States v. Dotterweich, 320 U.S. 277, 280–81, 284 (1943).
14. *See* 21 U.S.C. § 331 (2012).
15. Richard E. Myers II, *Adaptation and Resiliency in Legal Systems: Complex Times Don't Call for Complex Crimes*, 89 N.C. L. REV. 1849, 1852 (2011).
16. *Id.*
17. *See* Cruz, McIntosh, Turley & Reuter, *supra* note 1.
18. United States v. McNab, 331 F.3d 1228, 1232–34 (11th Cir. 2003); 16 U.S.C. § 3372(a)(2)(A) (2012).

misinterpreted Honduran law.[19] Nevertheless, undeterred, the federal establishment marched forward.

One of my other favorite stories is *United States v. Whiteside*.[20] There, the Eleventh Circuit, in a ray of sunshine, overturned the convictions of two hospital administrators under 18 U.S.C. § 1001, which makes it a crime to make any false or misleading statement to a federal agency on a matter within the agency's jurisdiction.[21] The alleged false statement was a single report classifying debt interest in terms of how the debt was used at the time of the filing of the report rather than at the time of the debt origination.[22] At trial, the government's expert witness testified that the regulation could be interpreted in different ways.[23] The court overturned the defendants' convictions because even the expert didn't know what the law required.[24]

So where can we go from here? I don't think we're standing in front of an inevitable tidal wave that cannot be rolled back. To the contrary, I think we can rededicate federal criminal law to the principles of fairness and to statutes that require knowing and intentional conduct. Likewise, I think we can hold Congress accountable for reviving the notion that we shouldn't regulate commerce through criminal statutes.

The principal economic focus of federal criminal law should be to promote and protect the means and instrumentalities of commerce, not to regulate commerce. After all, entrepreneurial risk-taking, which is the heart of American commerce, can only thrive so long as it is nourished, and regulation through criminalization undermines that.

Thank you.

[Applause.]

ADAM LIPTAK: Mary Beth?

HON. MARY BETH BUCHANAN: Thank you very much.

I do not disagree with everything that George has said, and I'm sure that I will not disagree with everything that John says. Being asked to be on this panel was a very interesting proposition because I realized that we're all former Justice

19. *McNab*, 331 F.3d at 1247–48 (Fay, J., dissenting).
20. *See* United States v. Whiteside, 285 F.3d 1345 (11th Cir. 2002).
21. *Id.* at 1353; *see also* 18 U.S.C. § 1001(a) (2012).
22. *Whiteside*, 285 F.3d at 1351.
23. *Id.* at 1352.
24. *Id.* at 1352–53.

Department prosecutors, but I'm the only one who is going to tell you that what we did was entirely appropriate and that we exercised our jurisdiction appropriately.

There clearly is a very difficult balance between the administrative laws and the criminal laws. Who can hear the term over-criminalization and want more of it? Certainly, no one. I think we have to look at the increasing number of criminal laws—particularly, the increasing number of regulations—and figure out, as George suggested, how we got here and how we can fix the problem.

After listening to the first session this morning, I'm going to take the position that the problem lies less with the executive's enforcement of the laws than it does with the complexity and the vast and increasing number of criminal regulations. We can't forget that it is the executive's role to enforce the law and to choose the appropriate enforcement mechanism. While every American citizen isn't going to know every regulation that is promulgated, people and companies are going to be familiar with the regulations that affect their industries.

In addition to what goes on every day, including the regulation, administration, and conduct of commerce, there is also the work of the federal and state prosecutors. Prosecutors work continuously to protect individuals, corporations, and the government from being the victims of crimes. In many situations, in order to ensure a level playing field and conduct by companies that accords with the law, they have to use criminal tools. I'm going to give you a few quick examples from my experience at the Justice Department. You decide whether we used criminal statutes appropriately or whether, as George suggested, we used criminal statutes as an improper regulatory tool.

In one case, we dealt with a specialty steel producer that had bid on far more contracts than it could honor. To supply the contracts, it needed more wire than it could produce or acquire in the domestic market, so it purchased wire from France. Federal law, however, prohibited the producer from using the French wire in the steel-making process. Rather than comply, the producer removed the labels that said "Made in France" and slapped on labels that said "Made in USA." Clearly, the producer acted in a manner that was inconsistent with federal statute and regulations and did so deliberately in order to gain an unfair

advantage over its competitors.

Here's another quick example. This one is from the environmental area—an area in which these laws are never very popular, particularly with this group, because of their strict-liability component. These strict-liability laws tend to look as though very, very strict guidelines are applied to companies that do not intend to violate the law. However, if you look closely enough, there are many situations in which companies do intend to violate the law. In this case, a municipality hired a company to remove asbestos and lead paint from public housing. This company chose to dispose of the asbestos by dumping it over the hill. This was a lot cheaper and quicker and permits were not required, but this practice was in violation of the law. With the lead paint abatement, the appropriate method is to wash down the walls of the building with a very toxic chemical. This results in barrels of wastewater which must be diluted before pouring the water into the river. However, the company did not properly instruct its employees on the dilution process. As a result, the employees' efforts to comply with the law were ineffective. Moreover, their efforts to dilute the wastewater exposed them to the toxic chemical. Thus, the company was putting its own employees at risk by failing to comply with regulations.

We examined the employees in front of a grand jury. It was clear that they didn't realize that their actions were wrong, so we didn't hold them accountable. Instead, we held the company accountable because the company knew what it was supposed to do and it didn't comply.

There are all sorts of other laws we could talk about with which no one would disagree. Consider, for example, our terrorism laws. Many material support cases can only be brought in the federal system.[25] Consider also our immigration laws. Overstaying a visa is not a crime, it's an administrative violation,[26] but four of the 9/11 hijackers were visa overstays.[27] We're now reconsidering the whole immigration system to determine when we can allow our administrative laws to control and when we need to use the criminal law system.

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25. *See* 18 U.S.C. §§ 2339A–2339B (2012).

26. *See Visa Overstays: Can We Bar the Terrorist Door?: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Int'l Relations*, 109th Cong. 11 (2006) (statement of Mark Krikorian, Executive Director, Center for Immigration Studies).

27. *Id.* at 9.

We have also had cases on the other side. Here is a health care example. An oncologist was taking part in a Health and Human Services program that allowed him to acquire inexpensive chemotherapy drugs. He was supposed to use the drugs to treat patients in his low-income rural community. Instead, he used the drugs to treat patients from a nearby, and significantly more affluent, community. Moreover, in many cases, he failed to provide patients with the full dosage.

We considered the course of his conduct and decided to press criminal charges. In the end, however, the jury found him guilty of only a civil violation. The health care regulations were so confusing that the jury could not decide whether criminal sanctions were appropriate. There, the criminal law was totally ineffective because the regulations really were too complex.

So what do we do? What is the answer? I think we have to keep in mind that we have three branches of government and each branch has its own area of responsibility. Congress should examine the legislation that it's enacting each year and decide whether it is necessary or whether there are statutes in place that could be amended instead. Likewise, Congress should examine legislation that is already on the books and determine whether it's still relevant. However, this isn't 1790. Business and commerce are far more complex today than they were then. Some laws may seem over-burdensome to companies, but other laws are necessary to protect companies' intellectual property interests, overseas activities, and trade secrets. So the law cannot be all bad. Congress should consider the purpose laws are meant to serve as well as the way in which laws are used.

I have one suggestion I'd like to leave you with. We have put the responsibility on companies to make sure that they have compliance programs in place to detect and prevent violations of law.[28] Maybe we ought to put the same responsibility on regulatory agencies. Maybe Congress ought to require agencies to monitor and continuously review their regulatory structures, determine whether their regulatory structures are appropriate and effective, and change their regulatory structures as necessary.

ADAM LIPTAK: Thanks, Mary Beth.

[Applause.]

28. *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2012).

ADAM LIPTAK: John?

JOHN G. MALCOLM: I think that last suggestion is a great one. Good luck getting an agency to take a hard look at itself and trim itself back.

I'm going to talk about why over-criminalization is a problem. It is certainly a problem for corporations, but it's also a problem for individuals.

Let me begin with a story about something that happened here in Washington. In April 1940, Attorney General Jackson addressed a room full of prosecutors.[29] He told them that they were "one of the most powerful peace-time forces known to our country."[30] He continued, "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."[31] What Attorney General Jackson said then is certainly true now.

As you've heard, I was at the Justice Department for a number of years. I have a very high regard for most of the prosecutors whom I've met. No soft-on-crime bleeding heart am I. However, I recognize that over-criminalization is a very serious problem and that its victims are all too real.

What do I mean by the term "over-criminalization"? We have heard that term a lot this morning. What I mean by it is the misuse or overuse, sometimes both, of criminal law and penalties. Looking back at a little bit of history, under the common law, there were only a handful of criminal offenses, including murder, rape, and robbery.[32] All of those offenses were *malum in se* offenses—offenses that involved conduct that everyone knew was morally wrong.[33] If it turned out a person didn't know he was committing a crime, then discovered he was

29. Robert H. Jackson, Attorney General of the United States, The Federal Prosecutor, Address Before the Second Annual Conference of United States Attorneys (April 1, 1940), *available at* http://www.justice.gov/ag/aghistory/jackson/1940/04-01-1940.pdf [http://perma.cc/9742-FSUE].

30. *Id.*

31. *Id.*

32. Paul J. Larkin, *The Need for a Mistake of Law Defense as a Response to Overcriminalization*, HERITAGE FOUND. (April 11, 2013), http://www.heritage.org/research/reports/2013/04/the-need-for-a-mistake-of-law-defense-as-a-response-to-overcriminalization [http://perma.cc/K3SV-436H].

33. *Id.*; *see also* Mens Rea*: The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the H. Comm. on the Judiciary Over-Criminalization Task Force*, 113th Cong. 5 (2013) (statement of John S. Baker, Visiting Professor, Georgetown Law School, Professor Emeritus, Louisiana State University Law School) [hereinafter *Hearings on* Mens Rea, statement of John S. Baker].

committing a crime, you could truly say to him, "Ignorance of the law is no excuse. You knew that what you were doing was morally wrong, so the fact that it's also a crime shouldn't surprise you."

Today, on the other hand, there are buried within the U.S. Code approximately 4,500 statutes and 300,000—possibly more—federal regulations with criminal sanctions attached.[34] In fact, there are so many criminal statutes and regulations that a dirty secret is that nobody really knows how many there are.[35] Yet dozens more are created each year.[36] Every single one of these new federal laws gives prosecutors more power. Most of these new laws and regulations create *malum prohibitum* offenses.[37] Unlike *malum in se* offenses, *malum prohibitum* offenses don't violate any kind of moral code on their face.[38] The only reason *malum prohibitum* offenses are offenses is because Congress or a regulatory agency says they are.[39]

Regulations creating *malum prohibitum* offenses affect virtually every aspect of our lives: the food we eat, the property we own, and the way we run our businesses.[40] Unlike laws creating *malum in se* offenses, regulations creating *malum prohibitum* offenses do not prohibit conduct.[41] In fact, they allow conduct, but they circumscribe it.[42] They say who can do it, how it can be done, and under what circumstances it can be done.[43] Often, these regulations are so byzantine that laypersons cannot understand them.[44] When criminal penalties attach to violations of obscure regulations, over-criminalization problems ensue.

There's an even bigger problem with all this. It used to be the case that in order for an accused to be convicted of an offense, a

34. John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUND. (June 16, 2008), http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes [http://perma.cc/C4EE-GCBU].

35. *Regulatory Crime: Defining the Scope of the Problem: Hearing Before the H. Comm. on the Judiciary Over-Criminalization Task Force*, 113th Cong. 4–5 (2013) (statement of Reed D. Rubinstein, Esq., Partner, Dinsmore & Shohl LLP); *see also* Baker, *supra* note 34 (explaining why the number of federal crimes is difficult to calculate).

36. Baker, *supra* note 34.

37. *Hearings on* Mens Rea, statement of John S. Baker, *supra* note 33, at 5.

38. Larkin, *supra* note 32.

39. *Id.*

40. Andrei Shleifer, *Efficient Regulation*, *in* REGULATION VS. LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 27, 27 (Daniel P. Kessler ed., 2010).

41. State v. Horton, 51 S.E. 945, 946 (N.C. 1905).

42. *Id.*

43. *Id.*

44. DeLong, *supra* note 5, at 14.

prosecutor had to prove beyond a reasonable doubt that the defendant committed the criminal act, the *actus reus*, with a guilty mind, the *mens rea*.[45] Today, a lot of criminal statutes and regulations lack a *mens rea* requirement or lack an adequate *mens rea* requirement.[46] This means a prosecutor can seek a conviction even when he can't prove the defendant intended to break the law. When this is the case, accidents and innocent mistakes can become crimes.

A great example is the Clean Water Act.[47] Under the Clean Water Act, a prosecutor only has to prove that the accused did the physical act constituting the offense, not that the accused intended to break the law.[48] Many of these offenses today are now so arcane that it is incomprehensible for a reasonable person to know whether what they are doing constitutes a crime or not. As a result, many morally blameless individuals and companies end up committing acts that constitute criminal offenses, and some of them end up getting prosecuted for them.

When a guy like Abner Schoenwetter—the lobster importer to whom George referred—ends up spending six years behind bars for importing lobsters in plastic bags rather than cardboard boxes, and for allegedly violating a Honduran regulation that, as George said, the Attorney General of Honduras specifically disavowed, there's a problem.[49]

The federal government pursued a case against Gibson Guitar that got a fair amount of press.[50] That case also involved the

45. *Hearings on* Mens Rea, statement by John S. Baker, *supra* note 33, at 1.

46. Mens Rea: *The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the H. Comm. on the Judiciary Over-Criminalization Task Force*, 113th Cong. 5 (2013) (statement of Norman L. Reimer, Executive Director, National Association of Criminal Defense Lawyers) [hereinafter *Hearings on* Mens Rea, statement of Norman L. Reimer]; *see generally* Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, HERITAGE FOUND. & NAT'L ASS'N OF CRIMINAL DEF. LAWYERS (May 5, 2010), http://www.heritage.org/research/reports/2010/05/without-intent [http://perma.cc/32TN-KJ3N].

47. *See* Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006 & Supp. 2011).

48. *See* Whit Davis, *Water Criminals: Misusing* Mens Rea *and Public Welfare Offense Analysis in Prosecuting Clean Water Act Violations*, 23 TUL. ENVTL. L.J. 473, 473–74 (2010) (citing United States v. Sinskey, 119 F.3d 712, 717 (8th Cir. 1997) and United States v. Weitzenhoff, 35 F.3d 1275, 1284 (9th Cir. 1994)) (explaining that the United States Supreme Court has not addressed whether the Clean Water Act requires criminal intent, but noting that the majority of federal appellate courts have held that the Clean Water Act does not require criminal intent).

49. *See* United States v. McNab, 331 F.3d 1228, 1247 (11th Cir. 2003); Brian Walsh, *The Worst Thing That Anybody Can Do to You Is Take Away Your Freedom*, HERITAGE FOUND. (Aug. 8, 2011, 3:06 PM), http://blog.heritage.org/2011/08/08/the-worst-thing-that-anybody-can-do-to-you-is-take-away-your-freedom [http://perma.cc/VDR6-9TUW].

50. *See* Eric Felten, *Guitar Frets: Environmental Enforcement Leaves Musicians in Fear*,

Lacey Act, which makes it a crime to import flora and fauna, not in violation of U.S. law, but in violation of some other country's law.[51] The government would have prosecuted Gibson Guitar for importing wood for guitar frets, allegedly in violation of Indian import-export laws and Madagascan export laws (which weren't even written in English), had it not reached a settlement agreement with Gibson Guitar.[52]

The City of Palo Alto, California, arrested and charged a 61-year-old grandmother, Kay Leibrand, because the bushes on her property routinely exceeded the two-foot height maximum that the city had put in place.[53]

The government charged a fisherman named Robert Eldridge Jr. with violating the Marine Mammal Protection Act because he freed a whale that had gotten caught in his commercial fishing net rather than report the incident to federal authorities so that they could free the whale.[54]

I could give you lots and lots of examples. In fact, you have in front of you a new publication available through the Heritage Foundation website; it's called *USA vs. You.*[55] It includes roughly twenty-two stories of unjust prosecutions.[56] I would commend it to you.

WALL ST. J. (Aug. 26, 2011), http://online.wsj.com/news/articles/SB10001424053111904787404576530520471223268 [http://perma.cc/M8CQ-5P8Y].

51. *Id.*; 16 U.S.C. § 3372(a)(2)(A) (2012).

52. Mark Memmott, *Gibson Guitar Settles Criminal Case over Exotic Wood Imports*, NPR (Aug. 6, 2012, 1:01 PM), http://www.npr.org/blogs/thetwo-way/2012/08/06/158203277/gibson-guitar-settles-criminal-case-over-exotic-wood-imports [http://perma.cc/4M6-6UDW].

53. Colleen Kaveney, *One Nation Under Arrest: Criminalizing Unsatisfactory Hedge Pruning*, HERITAGE FOUND. (May 14, 2010, 3:21 PM), http://blog.heritage.org/2010/05/14/criminalizing-unsatisfactory-hedge-pruning [http://perma.cc/3B2F-54G5]; *see also* PALO ALTO MUN. CODE §§ 8.04.020(b), 8.04.050(a)(8) (2013).

54. Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, WALL ST. J., Sept. 27, 2011, http://online.wsj.com/news/articles/SB10001424053111904060604576570801651620000 [http://perma.cc/V3VQ-N8WS]; *see also* Beth Daley, *Fisherman Accused of Harassing Whale Faces Three Federal Counts*, BOS. GLOBE (Mar. 10, 2009), *available at* 2009 WLNR 4528869 (WestlawNext) (explaining that, according to court documents, Eldridge "did knowingly and unlawfully take a marine mammal, to wit, a humpback whale in waters under the jurisdiction of the United States by acts of pursuit, torment, and annoyance which had the potential to injure said marine mammal in the wild"); *see also* 16 U.S.C. §§ 1362(13), 1362(18)(A), 1373(a), 1375(b) (2013) (respectively, defining "take," defining "harassment," authorizing federal agencies to prescribe regulations regarding takings, and authorizing criminal penalties for violations of this subchapter and any permit or regulation issued by the agencies).

55. *See generally USA vs. You*, HERITAGE FOUND., http://www.heritage.org/usavsyou [http://perma.cc/9XPR-JS2S] (last visited Jan. 7, 2014).

56. *Id.*

When morally blameless people get caught in the spider web of over-criminalization, and when their lives are adversely impacted—perhaps irreparably—by obscure regulations, respect for the fairness and integrity of our criminal justice system is diminished.[57] That should concern us all.

A frequent retort of prosecutors is that we shouldn't worry about this because prosecutors are bright and ethical people, capable of deciding who deserves to be prosecuted and who doesn't under vague criminal laws.[58] I know this argument extremely well because I used to make it myself. Upon reflection, though, I have come to the conclusion that the argument is wrong. It's not wrong because prosecutors are inherently untrustworthy or because prosecutors are bad people. It's wrong because that approach to criminal law enforcement is fundamentally unfair and contrary to the foundations of our legal system. It is the constitutional function of the legislature, not the prosecutor, to draw the line between lawful and unlawful conduct.[59] Prosecutors are not disinterested players in the criminal enforcement process. There are lots of incentives for prosecutors to file charges;[60] there are very few incentives for them not to file charges.[61] Prosecutors get kudos for bringing cases, but they rarely get praise for declining them.

Most prosecutors are people of good will. However, as is the case in any profession, there are good ones who exercise good judgment and bad ones who exercise bad judgment. The bad ones sometimes succumb to pressure to bring cases they shouldn't. When you boil it down, the government's argument asks the public to bear the risk that prosecutors won't do the right thing. That shouldn't be permitted in a government such as ours, a government of laws and not of men.

Again, I do not mean to denigrate the motives of the people who keep us safe and engender respect for the rule of law.

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57. DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 12 (2008).

58. *See, e.g.*, Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 430 (1960).

59. U.S. CONST. art. I, § 1.

60. *See* Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 105 (2013), http://columbialawreview.org/ham-sandwich-nation_reynolds/ [http://perma.cc/6FTP-PPAB]; Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334, 335 (2002).

61. Reynolds, *supra* note 60, at 105.

Much, if not most, of the blame for our current problems belongs at Congress' doorstep. Congress passed vague laws and empowered unelected bureaucrats to implement nebulous regulations with criminal penalties. However, I will say that prosecutors do more harm than good when they pursue criminal convictions against otherwise law-abiding citizens for conduct that no reasonable person would think was criminal.

What can be done about this? I have a few quick suggestions. First, it's important to remember that not every bad result has to trigger a criminal prosecution. If a person does something that unwittingly results in harm, there is no reason why that person can't be dealt with, perhaps severely, in the administrative system or civil justice system. Using either of these systems would compensate the victim and send a general message of deterrence without saddling the actor with a criminal conviction.

Second, legislators should resist pressure to respond to sensationalistic headlines by enacting new and unnecessary laws. If conduct already constitutes a state crime, absent a unique federal interest, there is no reason for it to constitute a federal crime as well.

Third, legislators should resist pressure from special-interest lobbyists who push for regulations that would criminalize the conduct of their competitors and give them a competitive advantage.

Fourth, and this is the last thing I will say, honest mistakes should not result in prison time. Absent extraordinary circumstances, prosecutors should have to prove a *mens rea.* Congress should enact a default *mens rea* defense to apply whenever a statute or regulation lacks a *mens rea* requirement.[62] That is to say, a *mens rea* requirement should apply unless Congress makes very clear its intention to create a strict liability offense.[63]

With that, I'll open it up.

HON. GEORGE J. TERWILLIGER III: Adam, I want to add one thing to what John just said that I think is important. A

62. *See generally Regulatory Crime: Solutions: Hearing Before the H. Comm. on the Judiciary Over-Criminalization Task Force,* 113th Cong. 5 (2013) (statement of Lucian E. Dervan, Assistant Professor of Law, Southern Illinois University School of Law); *Hearings on* Mens Rea, statement of Norman L. Reimer , *supra* note 46, at 12–14.

63. *See generally Hearings on* Mens Rea, statement of Norman L. Reimer, *supra* note 46, at 13.

corollary to the principle I mentioned before—that people of ordinary intelligence ought to be able to understand the law—is the due-process principle that clear standards prevent discriminatory enforcement.[64] If everyone knows what the law requires, prosecutors can't enforce the law discriminatorily.[65]

I just heard a talk by an attorney named Lauren Stevens. She was in charge of the Federal Drug Administration practice at GlaxoSmithKline. The government prosecuted her and would have sent her to jail for allegedly making false statements to the federal government in a series of letters responding to a Federal Drug Administration information request.[66] She was subsequently acquitted on the basis that no reasonable juror could have reasonably believed that she intended to commit a crime.[67] That is a perfect example of how vague regulations lend themselves to discriminatory enforcement by prosecutors. It also illustrates the real dangers of the situation we have created for ourselves.

ADAM LIPTAK: Mary Beth, is there any debate between you and your colleagues on this?

HON. MARY BETH BUCHANAN: Sure. I read the case to which George is referring. It is troubling that a lawyer who provided information to the government in her capacity as counsel for Glaxo was charged with obstructing the investigation of the prosecution. That should be chilling to any lawyer. However, we have to step back and ask: what information did she provide? What information did she have? What should she have known? Did she attempt to obstruct the investigation? Without having all the information in front of us, we don't know. We don't know what a reasonable juror could or couldn't have reasonably believed.

I disagree with John that every bad result triggers a criminal prosecution. Most of them don't. That's what prosecutors do every day. They look at conduct and they decide the appropriate

64. *See* United States v. Williams, 553 U.S. 285, 304 (2008) (citing Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972)).

65. *See id.*

66. *See* Alicia Mundy & Brent Kendall, *U.S. Rebuffed in Glaxo Misconduct Case*, WALL ST. J., May 11, 2011, http://online.wsj.com/news/articles/SB10001424052748703730804576315101670843340 [http://perma.cc/L2T2-X8MR].

67. Transcript of Court's Ruling on Defendant's Motion for Acquittal at 8, United States v. Stevens, Criminal Action: RWT-10-694 (May 10, 2011) *available at* http://pdfserver.amlaw.com/cc/20110510Stevens_ruling.pdf [http://perma.cc/DG68-NGEF].

way to address it. There have been many cases in which I told the Assistant U.S. Attorneys not to move forward with a prosecution. If we can't decide whether something is a crime, we're not going to punt the question to the grand jury.

If you don't want prosecutors' discretion determining whether a criminal law has been violated, whose discretion do you want? The question comes down to intent. Even under John's answer, if every crime had a *mens rea*, you would still have to figure out the actor's intent. You would have to look at as many pieces of information as you could find to determine what the actor was thinking. It's not a perfect system, and it's never going to be a perfect system.

I think the reasonable way to address the situation in which we find ourselves today is to step back, look at the laws and regulations that we have, and determine whether we need all those laws and regulations.

JOHN G. MALCOLM: Just very quickly—I was saying that Congress shouldn't race to criminalize every bad result. Not every harm needs to have a criminal penalty attached. There are cases in which the prosecutor doesn't have to prove any *mens rea* or has to prove only a watered-down *mens rea*.[68] However, there are also cases in which the prosecutor has to prove willful conduct.[69] Proving willful conduct is adequate protection. In those cases, the prosecutor should decide whether he can prove willfulness.

ADAM LIPTAK: I'd like to turn to the audience for questions in just a moment. I'll ask a question or two first. After that, we have a microphone over there, and we'd love to include thoughts from the audience in the conversation.

First, I want to ask John and George whether any elements of their critiques apply at the state level, or whether over-criminalization is a federal problem only. John talked briefly about the incentives of federal prosecutors. I might think the incentives of elected state prosecutors are even more skewed.

HON. GEORGE J. TERWILLIGER III: That's a great question, Adam, particularly given the local beat of your paper in New York.

[Laughter.]

68. *Hearings on* Mens Rea, statement of Norman L. Reimer, *supra* note 46, at 6.
69. *E.g.*, 18 U.S.C. § 401(3) (2012).

HON. GEORGE J. TERWILLIGER III: We've seen great examples of exactly what you're talking about in the use of the Martin Act by state attorneys general to go after people in the finance industry for allegedly fraudulent conduct.[70] The Martin Act's prohibitions are so general and expansive that the Martin Act could be "Exhibit A" in a case against laws that allow prosecutors to engage in discriminatory enforcement.

I hear what Mary Beth is saying about not sending cases to the grand jury. But cases get to the grand jury; the Honduran lobster case got to the grand jury. Let's take Mary Beth's example of the 9/11 hijackers. What is the point of saying that we should have prosecuted them for overstaying their visas? Instead, we should have had a regulatory system that worked. The idea that prosecuting the 9/11 hijackers would have stopped their 9/11 activities is, in my opinion, crazy. To go back to your question, Adam, state prosecutors, especially elected state prosecutors with statewide jurisdiction, can be far worse than federal prosecutors because they are not constrained by the review mechanisms that exist in the federal system.

JOHN G. MALCOLM: I would agree with that. I would also add that district attorneys are all aspiring governors so they have an incentive to bring prosecutions. Sometimes those prosecutions run amuck, like the Duke lacrosse case that fortunately ended up okay.[71]

However, I would point out that, under our constitutional system, states have the primary police power to protect the health, welfare, and morals of their citizens.[72] They also have a very good idea about which crimes have the greatest impact on their local communities.

Nonetheless, the enforcement of laws that lack a *mens rea* and regulations that have run amuck are problems that occur at the state level, too.[73]

ADAM LIPTAK: Yes, sir.

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70. *See* Michael J. De La Merced, *In JPMorgan Case, the Martin Act Rides Again*, N.Y. TIMES, Oct. 2, 2012, http://dealbook.nytimes.com/2012/10/02/in-jpmorgan-case-the-martin-act-rides-again/?_r=0 [http://perma.cc/9EYC-ZAWC].

71. *See* Duff Wilson & David Barstow, *All Charges Dropped in Duke Case*, N.Y. TIMES, Apr. 12, 2007, http://www.nytimes.com/2007/04/12/us/12duke.html?pagewanted=all [http://perma.cc/K3XH-TQXY].

72. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

73. Vikrant Reddy, *Overcriminalization in the States*, TEX. PUB. POLICY FOUND. (Nov. 15, 2013), http://www.texaspolicy.com/center/effective-justice/reports/overcriminalization-states [http://perma.cc/3DPG-XFVH].

MICHAEL ROSMAN: My name is Mike Rosman and I am from the Center for Individual Rights. I'd like to follow-up on the last comment Mr. Malcolm made. It seems to me that Congress has passed a lot of laws creating crimes that are essentially state crimes. I made a list: the Hobbs Act;[74] the federal anti-carjacking statute;[75] and laws against female genital mutilation,[76] hate crimes,[77] gun possession,[78] and wire fraud.[79] Are state prosecutors abdicating their role as the primary enforcers of criminal law?

ADAM LIPTAK: Let me ask Mary Beth to give the first response.

HON. MARY BETH BUCHANAN: I think the quick answer to your question—we'd be here all day if we tried to look at each of your examples individually—is that there are certainly many areas of overlap between state and federal crimes. Bank robbery, for example, is both a state and federal crime.[80] Moreover, the elements of bank robbery are almost exactly the same at the state level as they are at the federal level. The same is true for wire fraud.[81]

Criminal activity that crosses state lines and affects commerce is more appropriately dealt with at the federal level.

MICHAEL ROSMAN: Can you explain to me why its more appropriate for wire fraud to be prosecuted by a U.S. Attorney than by a state prosecutor?

HON. MARY BETH BUCHANAN: Sure. If you dissected the transaction as it crossed state lines, you would have multiple prosecutors addressing the same continuum of conduct. That's bad because, in terms of economic resources, it is more effective to do it in one location.

I do have another quick point. We can disagree about whether certain things should or shouldn't be crimes. But think about the Gibson Guitar case; importing wood for guitar frets may not seem like a serious crime, but it interferes with other countries' laws. We want other countries to enforce our laws, so, from a

74. 18 U.S.C. § 1951 (2012).
75. *Id.* at § 2119.
76. *Id.* at § 116.
77. *Id.* at § 249.
78. *Id.* at § 922.
79. *Id.* at § 1343.
80. *See id.* at § 2113.
81. *See id.* at § 1343.

reciprocity standpoint, we may want to enforce theirs.

ADAM LIPTAK: Thanks. I see several people waiting.

HON. GEORGE J. TERWILLIGER III: Can I add an answer? It's a profound question that is definitely worth asking.

The rationale for the current division of responsibility is probably best explained by reference to innumerable black-and-white movies about the development of the West; there's a crooked sheriff and an honest U.S. marshal. The fact of the matter is that the states have not done a very good job of policing their jurisdictions for corruption and organized criminal activity. Congress criminalized federal bank robbery at the federal level, not just because bank robbers like John Dillinger were crossing state lines, but also because bank robbers appeared to be immune from state law enforcement.[82]

Ideally, the states should have primary police power; there is no federal police power.[83] That said, there is a role for the federal government, particularly with respect to national and transnational organized criminal activity.[84]

ADAM LIPTAK: Yes, sir.

CLARK NEILY: Clark Neily from the Institute for Justice. I want to thank you for a really interesting panel.

My understanding is that the Hyde Amendment includes a provision that allows criminal defendants to be reimbursed for their defense costs if the judge determines the prosecution was "vexatious, frivolous, or in bad faith."[85] This also seems to happen so infrequently that it serves as no real significant disincentive. How would you react if Congress enacted a law giving the juries the power to reimburse costs in the event of unreasonable prosecutions? It seems to me that this would require prosecutors to balance the desire for criminal convictions against the concern of high costs. We put a lot of faith in juries when it comes to convicting defendants. Why not put equal faith in juries to determine whether prosecutions are unreasonable?

HON. GEORGE J. TERWILLIGER III: I wouldn't put that

82. Ronald L. Gainer, *Remarks on the Introduction of Criminal Law Reform Initiatives*, 7 J.L. ECON. & POL'Y 587, 587 (2011).

83. United States v. Lopez, 514 U.S. 549, 566 (1995).

84. *See generally* John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095 (1995).

85. The Hyde Amendment, enacted as Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997), is codified as a statutory note to 18 U.S.C. § 3006A (2012).

decision in the hands of the jury. It's a separate question, the answer to which would depend on a lot more information than would be introduced as evidence at trial. You would have to gum the system with a whole set of separate procedures.

This issue aroused a lot of passionate and intense debate when the Hyde Amendment was first enacted.[86] The Hyde Amendment is a balance between competing interests.[87] Professionally and personally, I don't favor the idea that we can reform the system through retribution against people who are doing their jobs as well as they can. There are innumerable sanctions available for prosecutors who overstep their bounds and abuse the powers of their office.

JOHN G. MALCOLM: I think it would also have a real chilling effect, and prosecutors would only bring slam-dunk cases. Also, there are checks and balances, albeit not very rigorous ones, along the way; for example, a prosecutor needs the grand jury to return an indictment.[88] I suppose it's true, as some have said, that a grand jury would indict a ham sandwich if presented with a case,[89] but the grand jury does provide some protection. Also, a prosecutor is subject to sanctions if he withholds information from the grand jury, lies to the grand jury, or does something that's truly vindictive.[90]

ADAM LIPTAK: Let's take Rachel back there.

ATTENDEE: If prosecutorial discretion is going to be an effective check, there has to be some sort of understanding among the prosecutorial corps about the appropriate balance between government power and individual liberty. I'm wondering what you did to determine whether applicants to the Justice Department had that understanding. I'm also wondering what you did to instill that understanding in them after they were hired.

HON. MARY BETH BUCHANAN: I can say I did not want to hire people who were one-sided in their views. I didn't want to hire people who said they only wanted to be a prosecutor, they were born to be a prosecutor, and they couldn't see the other side. Those people get you in trouble. They don't present all the

86. *See* United States v. Gilbert, 198 F.3d 1293, 1300–01 (11th Cir. 1999).
87. *Id.* at 1300–03.
88. *See* Reynolds, *supra* note 60, at 106.
89. *See id.*
90. *See* Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 390–405 (2002).

facts—the good, the bad, and the ugly—and you need all the facts.

After people were hired, we tried to assign them mentors. We had regular criminal division meetings to talk about prosecutions, and we had a lot of training programs.

Based on what I saw as a career prosecutor and a presidential appointee, the vast majority of prosecutors really do try to do the right thing. Unfortunately, there's always going to be people who are so blinded by their points of view that they let self-interest get in the way of doing what's right.

HON. GEORGE J. TERWILLIGER III: It's a great question, Rachel. When I served as a U.S. Attorney, I hired front-line federal prosecutors. I have always believed that the most important and most essential characteristic of somebody who is a good candidate to be an Assistant United States Attorney is good judgment. So, for me, in the interview process and the process of evaluating candidates, judgment was an important issue.

However, you still need a check. I think John referred to this a moment ago. One of the things we did when I took over the office was institute an indictment review process. The judgment of one prosecutor wasn't enough to present an indictment to the grand jury. Rather, a small group of prosecutors had to review each case. That acted as a pretty powerful filter on the overzealous exercise of individual judgment.

ADAM LIPTAK: I think we have time for one more question. Sir?

DONALD E. SANTARELLI: I'm Don Santarelli. I used to work in the Justice Department. I want to bring a different perspective to the table. I have, for maybe thirty years, served on the board of the National District Attorneys Association (NDAA) and the American Prosecutors Research Institute, which is the NDAA's technical assistance resource.

The dual sovereignty issue is very important, as George said. On the one hand, many state prosecutors have very limited budgets and limited capacity. They depend on cooperation with the federal government to prosecute cases that exceed their capacity. On the other hand, U.S. Attorneys in many jurisdictions go to the local district attorneys to prosecute cases at the state level under the state statute. Prosecution at the state level might result in lesser penalties, but it nevertheless resolves cases.

This relationship has evolved over the years. To the extent

that there is cooperation, let me cite you an example. The NDAA created the National Identity Theft Prosecution Center. The federal government funded the Center and the Secret Service conducted trainings at the Center because it was decided that identify theft cases were better prosecuted at the federal level. The thresholds were lower and identity theft was often local rather than international in origin.

The search for perfection and balance in our federalist system will go on, but I don't want us to ignore the fact that district attorneys serve at the pleasure of their communities. A district attorney who gets a little out of whack and becomes a little outrageous loses the support of his local bar, and a district attorney can't stay a district attorney without the support of the local bar. The bar judges his qualifications notwithstanding the election. In contrast, a federal prosecutor can climb high enough that he's responsible only to himself and, maybe, the Justice Department.

Thank you for letting me make a comment as opposed to a question.

HON. GEORGE J. TERWILLIGER III: Let me just say—I want to be clear with my allusion to the black-and-white movies—that the point Don Santarelli makes is really well taken. I know so many district attorneys who were completely frustrated by their lack of resources. They wanted to do the job and they reluctantly turned to the federal government only because, if the federal government couldn't get the job done, no one could.

ADAM LIPTAK: We are just about to run out of time. We can hear a couple more comments.

JOHN G. MALCOLM: I would say this on the concurrent jurisdiction point. Congress has expanded its definition of what constitutes commerce, and modern technology is such that communications almost invariably cross state lines.[91] This creates significant jurisdictional overlap and causes problems.

One problem is that, if Congress continues passing laws and declaring everything to be a priority, sooner or later, nothing is going to be a priority. The other problem is the loss of accountability. For instance, if there's gun violence in a community but nobody gets prosecuted, is that the state

91. *See* United States v. Lopez, 514 U.S. 549, 552–56 (1995) (discussing the history of commerce clause jurisprudence).

prosecutor's fault or the federal prosecutor's fault? If there is no clear division between the state prosecutor's primary responsibility and the federal prosecutor's primary responsibility, and if everything is a matter of concurrent jurisdiction, then over-criminalization problems ensue. However, sometimes specialized expertise and cooperation between state and federal authorities can smooth these problems over.

ADAM LIPTAK: Any last thoughts, Mary Beth?

HON. MARY BETH BUCHANAN: Priorities are both national and local, and they have to coexist.

ADAM LIPTAK: This is a rich topic, and these are the perfect people with whom to discuss it. Please thank the panelists.

[Applause.]

DISPUTING THE DOGMA OF DEFERENCE

TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT. Clark M. Neily III. New York: Encounter Books, 2013. 220 pages. $23.99.

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I. INTRODUCTION

If, as Alexis de Tocqueville said, every political controversy in America ends up as a judicial dispute,[1] then the reverse is also true. The role of courts and judges in our constitutional system is a constant source of political discord, which today typically centers on the basic dichotomy of "judicial activism" versus "judicial restraint." The latter position is generally ascribed to conservatives, who began in the Warren Court era to complain that federal judges were exceeding their constitutional boundaries by issuing decisions that expanded privacy rights, the rights of the accused, the rights of free speech, and so on.[2] Scholars like Lino A. Graglia[3] and Raoul Berger,[4] and judges like Justice Antonin Scalia,[5] Judge J. Harvie Wilkinson,[6] and Judge Robert Bork,[7] argue that courts should cultivate a sense of "modesty"[8] by deferring to legislative authority, respecting long-standing traditions, and avoiding the "creation" of new individual rights. During this same period, liberals have been cast as defenders of judicial power and have generally embraced a crusading "living constitution" theory.[9] Under this theory,

1. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 257 (Harvey Mansfield & Delba Winthrop eds. & trans., The Univ. of Chi. Press 2000) ("There is almost no political question in the United States that is not resolved sooner or later into a judicial question.").

2. *See generally* Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CALIF. L. REV. 1441 (2004) (outlining the early history and various definitions of the term "judicial activism").

3. *See* Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293, 299 (1996).

4. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. 1997).

5. Justice Scalia virtually never uses the terms "judicial restraint" or "judicial activism," but his jurisprudence fits comfortably within the traditional "restraint" role. For an especially keen overview of Justice Scalia's views on these subjects, see Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1249–54 (2009).

6. *See, e.g.*, J. HARVIE WILKINSON, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE (2012).

7. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

8. Chief Justice Roberts used this term in his confirmation hearings. *See* CLARK M. NEILY, III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT 121 (2013).

9. *See generally* G. Edward White, *The "Constitutional Revolution" as a Crisis in Adaptivity*, 48 HASTINGS L.J. 867, 873 (1997) ("[W]ith the emergence of the idea that the Constitution was a 'living' document came a potentially radical constriction in the role of judges as constitutional interpreters . . . . The new conception of the Constitution questioned the degree to which judges as members of an unelected elite could serve as effective interpreters of the majoritarian policies of a democratic society, policies to which a 'living' Constitution should conform.").

judges should read constitutional language loosely to suit modern needs and expand protections for rights of privacy, speech, or the "new property"[10] of welfare entitlements.

These simplistic categories have never really suited, and recent years have seen an increasing discomfort with them on both the left and right. Liberal commentators like Professors Cass Sunstein[11] and Erwin Chemerinsky,[12] and judges like Justice Ruth Bader Ginsburg[13] and former Justice John Paul Stevens,[14] have attacked conservative Supreme Court Justices for their alleged "activism"[15] on the grounds that conservatives seem increasingly willing to resort to the judicial system to advance their political agenda.[16] And libertarians—often wrongly categorized as conservatives[17]—have grown bolder in arguing that courts should be less deferential toward lawmaking bodies and should ramp up protections for individual rights.[18] What is needed today is a

10. This term was originated by Charles Reich. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 786–87 (1964).

11. *See* CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005).

12. *See* ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION (2010).

13. Charyl K. Chumley, *Ruth Bader Ginsburg Blames Supreme Court Colleagues for Judicial Activism*, WASH. TIMES, Aug. 26, 2013, http://www.washingtontimes.com/news/2013/aug/26/ruth-bader-ginsburg-faults-court-colleagues-judici/ [http://perma.cc/79D2-JZUL].

14. David Corn, *Stevens Accuses Supreme Court Conservatives of Judicial Activism*, MOTHER JONES, Jan. 21, 2010, http://www.motherjones.com/mojo/2010/01/stevens-accuses-supreme-court-conservatives-judicial-activism [http://perma.cc/5WWU-WGWL].

15. *See* Stuart Taylor, Jr., *In Praise of Judicial Modesty*, THE ATLANTIC, Mar. 21, 2006, http://www.theatlantic.com/magazine/archive/2006/03/in-praise-of-judicial-modesty/304769/ [http://perma.cc/9DH8-YBUZ].

16. *See generally* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008).

17. Libertarians are often labeled "conservatives" or "libertarian conservatives." *See, e.g.*, FRANK S. MEYER, IN DEFENSE OF FREEDOM: AND RELATED ESSAYS (1996). In fact, libertarians are a type of liberal, in that their primary focus is on protecting autonomy and fostering individual flourishing. They do not fit the standard criteria of conservatism put forward by many scholars. *See, e.g.*, ROBERT NISBET, CONSERVATISM: DREAM AND REALITY 53 (2008) (noting conservatism's "stress on the social bond, the relative insignificance of the individual, love of tradition, hierarchy, and heroism"); Russell Kirk, *Ten Conservative Principles*, THE RUSSELL KIRK CENTER FOR CULTURAL RENEWAL, http://www.kirkcenter.org/index.php/detail/ten-conservative-principles/ [http://perma.cc/BSJ9-83HZ] (last visited Jan. 7, 2014) (adapted from RUSSELL KIRK, THE POLITICS OF PRUDENCE (1993)) (emphasizing conservative "adhere[nce] to custom, convention, and continuity"). A better term for "libertarian" would probably be "market liberal."

18. *See, e.g.*, CLINT BOLICK, DAVID'S HAMMER: THE CASE FOR AN ACTIVIST JUDICIARY (2007); Ilya Somin, *Libertarianism And Judicial Deference*, 16 CHAP. L. REV. 293 (2013); TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY (forthcoming 2014).

wholesale reconsideration of the sloppy fight over "activism" and "restraint."

Clark Neily's powerful book *Terms of Engagement*[19] gives us the best opportunity in a long while for such reconsideration. Neily offers both a practical and theoretical case that the entire ideology of "judicial restraint," or what I call the "Dogma of Deference," has corrupted our constitutional order and betrayed the principles that order was designed to preserve. Neily is not a law professor, but a practicing civil rights attorney, and he draws effectively on both his real experiences as a litigator and a thorough understanding of contemporary legal theory to demonstrate the crucial need for an *engaged* judiciary: one which will take seriously the courts' obligation to serve as "an intermediate body between the people and the legislature . . . to keep the latter within the limits assigned to their authority" and thereby prevent "dangerous innovations in the government, and serious oppressions of the minor party in the community."[20]

II. THE CONFUSED FRAMING OF "ACTIVISM" AND "RESTRAINT"

To understand the basic problem with the Dogma of Deference, it's best to begin with the history. Contrary to popular myth, the notion of judicial restraint did not originate with the political right but with early twentieth-century Progressives who viewed constitutional protections for realms of individual autonomy as obstacles to their social and political ambitions. For example, legislative restrictions on freedom of contract, such as maximum-hours legislation or minimum-wage legislation, contradicted longstanding constitutional protections for the individual's right to earn a living in whatever manner he chose[21]—protections which are now widely associated with the 1905 decision in *Lochner v. New York*,[22] but which predated that decision by at least 300 years.[23] Undermining these protections was essential to the accomplishment of Progressive and New Deal objectives, and that was largely accomplished in 1934 with the

19. NEILY, *supra* note 8.

20. THE FEDERALIST NO. 78, at 492, 494 (Alexander Hamilton) (Benjamin Fletcher Wright, ed., 1961).

21. *See generally* TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW 13–15, 213–16 (2010).

22. 198 U.S. 45, 61 (1905).

23. *See* SANDEFUR, RIGHT TO EARN A LIVING, *supra* note 21, at 17–25, 39–44, 102–21.

adoption of rational basis scrutiny in *Nebbia v. New York*.[24]

Nebbia represented the triumph of a decades-long effort to enshrine the Dogma of Deference in American constitutional law. According to that view—today embraced by conservatives and liberals alike—the purpose of the Constitution is to empower legislative majorities to manifest their desires as law. The judiciary should allow the "democratic process"[25] greater control over areas of life once reserved for individual autonomy. Individual rights are created by, and revocable by, the majority to suit collective purposes.[26] Justice is the outcome of majority decision-making, and any individual who thinks himself aggrieved by that process should mobilize political support for redress, not seek it from the courts. Courts should presume the constitutionality of all laws, and impose on plaintiffs a severe burden of proving that the law was unjustified.[27] And while protections for individual autonomy were pared down, provisions that grant power to government, such as the Commerce Clause, were expanded. Progressive intellectuals thus read the Commerce Clause broadly, and protections for liberty narrowly.

As Neily observes, "[t]he progressive vision of government is of course much different from the Founders' vision."[28] The Constitution's authors had no general theory of judicial "restraint," and the Constitution contemplates no such idea. The

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24. 291 U.S. 502 (1934).

25. Progressive-style "democracy" was in fact not so much rule by the people as rule by experts in politically independent administrative agencies. By separating politics from administration, the modern state would empower experts to articulate and enforce the "true" spirit of the nation, and thus its autocracy was supposed to still be in some sense "democratic." *See generally* RONALD J. PESTRITTO, WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM 127–28 (2005). *See also* BRUCE A WILLIAMS & ALBERT R. MATHENY, DEMOCRACY, DIALOGUE, AND ENVIRONMENTAL DISPUTES: THE CONTESTED LANGUAGES OF SOCIAL REGULATION 15 (1995) (arguing that Progressive "romanticism" about the regulatory state "avoid[ed] the troubling issue of the degree to which democratic values are contradicted by regulatory policy-making within administrative agencies"). This was part of the overall Progressive effort to "infuse[]" concepts like "freedom" with "new meaning." ERIC FONER, THE STORY OF AMERICAN FREEDOM 140 (1998).

26. *See* LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 409 (2001) ("Freedoms are socially engineered spaces where parties engaged in specified pursuits enjoy protection from parties who would otherwise naturally seek to interfere . . . . [R]ights are created not for the good of individuals, but for the good of society. Individual freedoms are manufactured to achieve group ends.").

27. Even at its most extreme, the New Deal Court did *not* see the rational basis test as an irrebutable presumption; it was a presumption of fact that could be overcome by sufficient evidence. Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934).

28. NEILY, *supra* note 8, at 113.

Founders created the Judiciary as a coequal branch with no constitutional mandate to defer or subordinate itself to the Legislative or Executive Branches. On the contrary, the Framers saw an independent, assertive judiciary as crucial to the system of checks and balances, and they would have been mortified at the idea that courts should adopt a systematic posture of obeisance to the legislature.[29] *The Federalist No. 78*, focusing on the role of the courts, emphasizes the importance of judges working "to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves," and which can lead to oppression of minorities and perversions of the constitutional scheme.[30] The major object of *The Federalist No. 78*, in fact, is to defend an active and vigilant court system against the accusation that such a thing would be dangerous.[31] Hamilton rejects the arguments of those who "say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature" by observing that such a thing can happen in *any* lawsuit, and unless one is willing to argue "that there ought to be no judges," one must concede that there is a role for judicial independence and for judicial review.[32]

James Madison echoed these sentiments when proposing the Bill of Rights. Aware that the legislature was by far the most dangerous branch of government—"the invasion of private rights is *chiefly* to be apprehended," he wrote, "from acts in which the [g]overnment is the mere instrument of the major number of the [c]onstituents"[33]—Madison hoped that the amendments would lead "independent tribunals of justice" to act as "the guardians of those rights" and serve as "an impenetrable bulwark

29. *See e.g.*, THE FEDERALIST No. 78, *supra* note 20, at 494 (Alexander Hamilton). *See also* Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 53 (1998) (discussing the history of the concept of an independent Judicial Branch in the U.S., noting that "the Founders' conceptual commitment to an independent Judicial Branch was a reaction to bad prior experiences with dependent judiciaries.").

30. THE FEDERALIST No. 78, *supra* note 20, at 494 (Alexander Hamilton).

31. *Id.* at 489–96.

32. *Id.* at 493.

33. Letter to Thomas Jefferson (Oct. 17, 1788), *in* 5 WRITINGS OF JAMES MADISON, 1787–1790, at 272 (G. Hunt ed., 1904).

against every assumption of power in the Legislative or Executive."[34] Judicial review was commonplace at the time of the framing, and it was not much disputed in the wake of *Marbury v. Madison*.[35] Even during the earliest clashes over the Marshall Court, Jeffersonians complained not that the Court was intruding unjustly on legislative ground, but that the Court was being too deferential.[36] While courts have always expressed reluctance to declare statutes void unless clearly persuaded of their invalidity,[37] no general theory of deference appears in the writings of the founding era.[38] And although unpopular court decisions led to periodic attacks on the courts throughout the nineteenth century, it was not until the Progressive Era that intellectual leaders began developing a general theory of judicial restraint—one which would elevate "democracy" over "liberty" as the central constitutional value, and accordingly would rationalize judicial deference to legislative, and to only a slightly lesser extent, executive, authority. Those efforts climaxed when, in *Nebbia*, the Supreme Court adopted the theory of "rational basis scrutiny."

Although there would be some hiccups in the years that followed,[39] the general trend begun in *Nebbia* has resulted in

34. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), *in* 5 WRITINGS OF JAMES MADISON, 1787–1790, *supra* note 33, at 385.

35. 5 U.S. (1 Cranch) 137 (1803). Although Jefferson certainly disliked the result in *Marbury*, he did not at the time dispute the power of judicial review generally, or advance any demand for judicial deference to legislatures. He insisted only that the other branches were equally vested with the power to determine constitutionality. In his retirement, however, he did complain about what he saw as "[a] judiciary independent . . . of the will of the nation." Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), *in* 15 THE WRITINGS OF THOMAS JEFFERSON 295, 298 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903.

36. This came in the controversy over the Court's decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *See, e.g.*, Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* SELECTED WRITINGS OF JAMES MADISON 333, 335 (Ralph Ketcham ed., 2006) ("Does not the [McCulloch] Court also relinquish by their doctrine, all controul on the Legislative exercise of unconstitutional powers? According to that doctrine, the expediency & constitutionality of means for carrying into effect a specified Power are convertible terms; and Congress are admitted to be Judges of the expediency. The Court certainly cannot be so; a question, the moment it assumes the character of mere expediency or policy, being [evidently] beyond the reach of Judicial cognizance.").

37. *See, e.g.*, McCulloch, 17 U.S. (4 Wheat.) at 423 (referring to judicial invalidation as a "painful duty").

38. *See generally* Alan Gura, Heller *and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1127, 1136–42 (2009) (quoting various Framers' views advocating a strong judiciary).

39. Rational basis deference was not initially confined to economic liberty, private property, and the other rights that Chief Justice Rehnquist would call "poor relation[s]."

today's constitutional law.[40] Today, the consensus view among judges, lawyers, and law professors of nearly all political backgrounds is that courts are too intrusive and should strive to avoid invalidating laws whenever possible—even if that requires them to "rewrit[e] unconstitutional laws to avoid striking them down, treat[] express constitutional limits on government power as rhetorical fluff, and credulously accept[] implausible explanations for government conduct."[41] Courts treat the right to earn a living at an ordinary trade—a right that even the liberal Justice William O. Douglas called "the most precious liberty that man possesses"[42]—and the right to be secure in one's property—once considered the crucial "guardian of every other right"[43]—as virtually negligible considerations, deserving little or no judicial enforcement. And the protections that other rights do enjoy are assaulted every day by a large portion of the legal community, who insist that protecting these rights undermines our democratic processes. The Dogma of Deference, as Neily notes, "has become the default standard for deciding constitutional cases, and it is the very antithesis of judicial engagement."[44]

III. THE DOGMA OF DEFERENCE

Neily diagnoses three myths that together comprise the Dogma of Deference. First, the theory sees democracy as the central constitutional value, and accordingly holds that courts should avoid invalidating laws whenever possible—such interference amounts to judicial "tyranny."[45] Democracy is taken

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Dolan v. City of Tigard, 512 U.S. 374, 392 (1994). In the famous footnote four of *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), the Court signaled a partial retreat from the deference established in *Nebbia*, and as World War II led the United States to fight fascist powers that were further down the path of the sort of law-as-power theories Progressivism had tempted it towards, the Supreme Court began to raise the level of scrutiny in certain specified areas. Good examples of this are the Court's overruling of *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), only three years later in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), and its creation of strict scrutiny in *Korematsu v. United States*, 323 U.S. 214 (1944).

40. *See* Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1481–85 (2008) (discussing the historical development of scrutiny).

41. NEILY, *supra* note 8, at 6.

42. Barsky v. Bd. of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

43. *See generally* JAMES ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3d ed. 2007). The quotation is from Arthur Lee (1740–1792).

44. NEILY, *supra* note 8, at 5.

45. NEILY, *supra* note 8, at 157.

as a self-justifying good,[46] and thus when the democratic process deprives an individual of freedom, the individual is owed no explanation.[47] His freedom was on loan to begin with.[48] Second, in the absence of judicial intervention, the democratic process will, on the whole, ensure constitutional fidelity—or will at least cause less damage to society than judicial intervention.[49] If a citizen objects to the deprivation of his freedom, he should not resort to the courts, but should protest, organize, and marshal enough democratic support to have the law altered.[50] Third, because individual rights are instrumental goods serving the overall goal of collective political power, unenumerated rights are to be regarded with extreme suspicion.[51] Protecting a right that is not specifically listed in the Constitution is likely to

46. One particularly clear exponent is J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 4 (1981) (defending judicial restraint because "[d]emocracy is, I believe, intrinsically and fundamentally valuable," but recognizes that "[t]he opposing theory is that democracy is simply an instrumental value. . . . [D]emocracy is valuable only to the extent that it produces substantively 'better' decisions than would any other available decisionmaking procedure. . . . If one believes that the value of democracy is only instrumental and if one runs across a congressional enactment that is clearly unwise, then one has a duty to correct the mistake, if possible."). The American Founders, of course, clearly regarded democracy as an instrumental value and not as an intrinsic value. That is why the Declaration of Independence and the Constitution prioritize individual liberty over democracy; indeed, neither document even uses the word "democracy," while both make clear that liberty is fundamental and that collective decision-making is derivative. *See* James Madison, Sovereignty, *in* 9 WRITINGS OF JAMES MADISON, 1819–1836, at 570–71 (G. Hunt ed., 1910) ("Whatever . . . the origin of the [majority's authority to rule], it is evident that . . . the sovereignty of the society as vested in & exercisable by the majority, may do anything that could be *rightfully* done by the unanimous concurrence of the members; the reserved rights of individuals (of conscience for example) in becoming parties to the original compact being beyond the legitimate reach of sovereignty, wherever vested or however viewed."). *See also* Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 626–35 (1991) (discussing the enumeration of rights and the presumption of liberty).

47. NEILY, *supra* note 8, at 108–09.

48. To quote Justice Scalia, "the whole theory of democracy . . . is that the majority rules; that is the whole theory of it. You protect minorities only because the majority determines that there are certain minority positions that deserve protection." Gregory Bassham, *Justice Scalia's Equitable Constitution*, 33 J.C. & U.L. 143, 164 n.156 (2006). Or, as then-law clerk William H. Rehnquist put it, "in the long run, it is the majority who will determine what the constitutional rights of the minority are." JOHN A. JENKINS, THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST 39 (2012).

49. NEILY, *supra* note 8, at 104.

50. *Id.* at 104–05. *See also* William H. Rehnquist, *The Notion of A Living Constitution*, 54 TEX. L. REV. 693, 705 (1976) ("[O]ne who feels deeply upon a question as a matter of conscience will . . . persuade others . . . [and w]hen adherents to the belief become sufficiently numerous . . . press his views upon the elected representatives of the people, and to have them embodied into positive law.").

51. NEILY, *supra* note 828, at 96.

intrude on the presumptive authority of the body politic.[52]

These are myths because the American constitutional order is not premised on any basic "right of a majority to embody their opinions in law."[53] On the contrary, the Constitution is premised on the fundamental right to individual freedom. It is only because all people have a right to liberty that they are entitled to create a government to protect that liberty—and to change their government when it becomes destructive to their rights.[54] The Constitution declares that among the reasons for its ordination and establishment is to "secure the Blessings of Liberty," not to empower the majority to exercise its will.[55] Government exercises only limited, delegated authority—not a primary right to rule. It follows, then, that "[w]hether it is putting people in jail, bulldozing their homes, or making them pass a test to sell flower arrangements, the government owes people an honest explanation and a measure of care in restricting their freedom."[56]

Relying on the legislature instead of the courts to secure individual rights is foolhardy at best, and at worst, is a cynical way of abandoning citizens to the mercy of the very branch most likely to act unjustly. The Founding Fathers were well aware that the legislature is the greatest threat to individual liberty—that it is constantly "extending the sphere of its activity, and drawing all power into its impetuous vortex."[57] This is because legislatures have many inherent structural biases against minorities that can prevent the political process from redressing their valid grievances. Their very unpopularity makes them unlikely to assemble a legislative coalition to protect them, or to persuade their opponents to leave them be. Predatory interest groups are likely to invest resources in manipulating the political process to

52. *Cf.* BORK, *supra* note 7, at 139 ("The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities.").

53. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). *But see id.* at 76 (Holmes, J., dissenting).

54. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

55. U.S. CONST. pmbl. As Michael C. Dorf acknowledges, "democratic participation as an interpretive über-principle cannot be derived from the Constitution's text and structure standing alone." Michael C. Dorf, *The Coherentism of Democracy and Distrust*, 114 YALE L.J. 1237, 1246 (2005).

56. NEILY, *supra* note 8, at 32.

57. THE FEDERALIST No. 48, at 343 (James Madison) (Benjamin Fletcher Wright, ed., 1961).

benefit themselves, and to entrench that power against potential future threats—for example, through gerrymandering to protect incumbents. Legislatures are also in a position to break down the ability of other branches to check and balance them.[58] The Framers called these problems the "mischiefs of faction";[59] modern scholars call it "public choice." And the Framers sought to prevent these problems by establishing an independent judiciary with the power and the obligation to resist legislative encroachments. Courts have at times recognized that they have a "special role in safeguarding . . . those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'"[60] But the Dogma of Deference encourages them to betray that responsibility and to withhold that protection from various groups—including property owners[61] or entrepreneurs[62]—who need it, on the assumption that these groups are sufficiently protected by the majoritarian process. There is no political justification for this assumption and no constitutional warrant for this double standard. As Neily writes, "the assumption that bad laws will eventually be repealed . . . represents the triumph of hope over experience. Judges should know better."[63]

As to unenumerated rights, it is clear from the text of the Constitution, and from the contemporaneous debates, that the Framers expected courts to enforce such rights. They well knew that during the five preceding centuries, Anglo-American courts *only* enforced unenumerated rights.[64] The U.S. Constitution

58. *See* THE FEDERALIST No. 10, *supra* note 58, at 129–36 (James Madison).

59. *Id.* at 133.

60. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 486 (1982) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

61. *See, e.g.*, San Remo Hotel L.P. v. City & Cnty. of San Francisco, 27 Cal. 4th 643, 691–92 (2002) (Brown, J., dissenting) (arguing that property owners as an abused minority in San Francisco should have been entitled to higher judicial protection).

62. Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 50 (regarding it as an "amiable fiction" to assume that would-be entrepreneurs can obtain political protection for their right to enter a trade).

63. NEILY, *supra* note 8, at 104.

64. Anglo–American courts enforced individual rights under the "law of the land" clause of the Magna Carta. Enumerated rights in the English Bill of Rights or Petition of Rights were seen as general principles defining the "law of the land," but were not seen as definitive lists of the rights of Englishmen. Even if they were, those lists of rights were, unlike the American Bill of Rights, subject to legislative overriding or repeal. *See generally* TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION, *supra* note 18, at ch. 3.

enumerated no rights between 1789 and 1791, when the Bill of Rights was ratified; it is absurd to imagine that the Framers assumed Americans had no rights in the interim.[65] Most importantly, the Ninth Amendment specifies that unenumerated rights are as much a part of the Constitution as those that are specified, and that lawyers and judges who would "deny or disparage" such rights by interpretation are doing violence to the law.[66] The Dogma of Deference simply cannot accommodate any sensible reading of the Ninth Amendment,[67] and so its advocates have dismissed it as a meaningless "ink blot."[68] Neily even recounts one incident when he asked such an advocate what he would do if he were serving on the Court when voters passed a constitutional amendment "that said something like: 'We the people of the United States, having carefully considered the pros and cons of empowering judges to enforce unenumerated natural rights of American citizens, hereby instruct them to do so.' He said he would refuse to enforce such an amendment."[69] Adherents to the Dogma of Deference thus show their true hand: their commitment to judicial restraint takes precedence even over the explicit text of the Constitution in cases where the text guarantees freedom in the abstract. Such text does exist: the Ninth Amendment and the Privileges or Immunities Clause,[70] as well as the Due Process Clause—which enumerates the abstract concept of "liberty" as a protected right[71]—provide explicit textual grounds for courts to enforce rights that are left unspecified. When proponents of judicial restraint profess ignorance as to the meaning of these provisions[72]—or admit that

65. *See* NEILY, *supra* note 8, at 19.

66. U.S. CONST. amend. IX.

67. This is also true of the Privileges or Immunities Clause of the Fourteenth Amendment. *See* Kyle Alexander Casazza, *Inkblots: How the Ninth Amendment and the Privileges or Immunities Clause Protect Unenumerated Constitutional Rights*, 80 S. CAL. L. REV. 1383 (2007).

68. *See* BORK, *supra* note 7, at 166.

69. NEILY, *supra* note 8, at 128.

70. *See generally* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006); *see also* Casazza, *supra* note 67.

71. *See* Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) ("'[L]iberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; . . . and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.").

72. Bork referred not only to the Ninth Amendment, but also the Privileges or Immunities Clause of the Fourteenth Amendment, as "inkblots." *See* BORK, *supra* note 7, at 166.

they would refuse to enforce them in any event—they are essentially admitting that the Dogma cannot consist with the Constitution as written.

So much for that theory. But as Neily observes, there are at least as many problems with the *practice* of judicial restraint.[73] First, the primary means by which such restraint is applied—the "rational basis" test that controls most constitutional claims—lacks clear, principled standards.[74] Second, the Dogma of Deference introduces a persistent and unjustifiable pro-government bias into a judicial system that is supposed to give plaintiffs a fair hearing when adjudicating their rights.[75] Third, deference often betrays the clear text of the Constitution.[76] Ironic as it may seem, the rhetoric of deference is frequently a camouflage under which judges can radically alter the Constitution. Fourth, the deference agenda perpetuates itself through the political system in a manner that is, again ironically, profoundly anti-democratic: "It's like a kid choosing his own babysitter."[77]

Judicial deference typically takes the form of the "rational basis" test, under which the court will presume a challenged law to be constitutional unless the plaintiff proves otherwise. Proving otherwise is extremely difficult.[78] At least according to some decisions, a plaintiff can do so only by disproving every conceivable basis for the law in question.[79] This does not just mean disproving every rationale offered by the government's attorneys in court; some precedents hold that courts must consider other potential justifications for the law, even purely hypothetical ones which the legislature never actually considered, and even if such justifications are extremely implausible.[80] Neily thus calls it the "rationalize-a-basis test,"[81] a form of legal fabrication in which "the government's true end is irrelevant; it need not support its factual assertions with evidence; and judges must invent justifications for the

73. *See* NEILY, *supra* note 8, at 147.
74. *Id.* at 49.
75. *Id.* at 118.
76. *Id.* at 117.
77. *Id.* at 122.
78. *Id.* at 50.
79. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1993).
80. NEILY, *supra* note 8, at 52.
81. *Id.* at 49.

government's actions if necessary to uphold the law."[82] As one judge has put it, rational basis "can hardly be termed scrutiny at all. Rather, it is a standard which invites us to cup our hands over our eyes and then imagine if there could be anything right with the statute."[83] If the sin of legal "formalism" was that judges (allegedly[84]) based their decisions on magic words and sanitized concepts instead of the real facts of modern life and the imbalances of power,[85] then the rational basis test is the ultimate legal formalism. By simply invoking that test, the government can typically escape having to seriously explain its actions.

Taken literally, a burden of proof that requires a plaintiff to disprove every conceivable basis for a challenged statute would be impossible to discharge,[86] since it imposes not just the logical impossibility of disproving a negative, but, as Neily puts it, "proving an infinite set of negatives, including purely hypothetical ones."[87] Luckily, courts do not actually use this

82. *Id.* at 54. Thanks to inconsistent rulings on the question, it is actually not clear that the rational basis test requires courts to go to quite *this* extreme in the name of deference. *See infra* text accompanying notes 88–93.

83. Arceneaux v. Treen, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring).

84. *But see* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2009).

85. *See, e.g.*, Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 518 (2006) (viewing formalism as "the deductive application of legal rules that bore little relation to and took little account of social conditions"); TAMANAHA, *supra* note 84, at 112–13 (quoting Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96, 98 (1922)) (viewing formalism as the "belief that justice must be administered in accordance with fixed rules, which can be applied by a rather mechanical process of logical reasoning to a given state of facts and can be made to produce an inevitable result"); Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 124–25 (2003) ("Langdellian formalists conceived of law as a precise set of axiomatic principles—a logically coherent and utterly closed system of rules . . . .").

86. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring) ("[I]t is difficult to imagine a legislative classification that could *not* be supported by a 'reasonably conceivable state of facts.' Judicial review under the 'conceivable set of facts' test is tantamount to no review at all.").

87. NEILY, *supra* note 8, at 52. As Neily observes, courts in other contexts have refused to actually require litigants to disprove an infinite series of possible rationalizations for a challenged law. *Id.* at 177 n.13. He gives the examples of *United States v. Phillips*, 540 F.2d 319, 326 (8th Cir. 1976), in which the court held that a person need not discharge the "impossible burden of proving . . . negatives" when seeking to suppress illegally obtained evidence, and *United States v. Wilgus*, 638 F.3d 1274, 1288–89 (10th Cir. 2011), which held that the Religious Freedom Restoration Act does not require the government to prove that there was absolutely no practicable alternative to infringing on a citizen's religious practice, because "prov[ing] a negative . . . is a formidable task . . . . In the abstract, such a thing can never be proven conclusively; the ingenuity of the human mind, especially if freed from the practical constraints of policymaking and politics, is infinite." *See also* Alame v. Smetka, No. 08-10777, 2009 WL 236073, at *8 (E.D.

standard when applying the rational basis test. The Supreme Court has insisted that the rational basis test is *not* an insurmountable burden,[88] and it has backed away from its more extreme characterizations of the rational basis test.[89] In fact, plaintiffs have won rational basis cases on many occasions.[90] Recent decisions suggest that rational basis scrutiny does impose at least some basic limits on legislative power.[91] But rather than clarifying how the constitutional standard applies, these decisions have only increased the confusion, leading some scholars to declare that there are actually various subspecies of rationality review[92]—a conclusion the Supreme Court has denied.[93]

These theoretical confusions have serious real-world consequences. A plaintiff forced to disprove every conceivable basis for the law needs to know where he may stop. Is he required to disprove even dubious, but theoretically possible rationalizations for the statute? When there simply is no evidence, how far must he go to obtain evidence to prove a negative, i.e., disprove what might have motivated a hypothetical

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Mich. Jan. 29, 2009) (holding that the rational basis standard of *Turner v. Safley*, 482 U.S. 78 (1987), does not require a prisoner "to hypothesize any number of potential legitimate penological interests and then disprove a reasonable relationship between each and the regulation at issue").

88. *See, e.g.*, Mathews v. Castro, 429 U.S. 181, 185 (1976).

89. *See* Romer v. Evans, 517 U.S. 620, 632–33 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained . . . . By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."); Heller v. Doe, 509 U.S. 312, 321 (1993) ("True, even the standard of rationality as we so often have defined it must find some footing in the realities of the subject . . . .").

90. *See, e.g., Romer*, 517 U.S. 620; *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

91. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring) (determining a court using a rational basis test should strike down laws with "only incidental or pretextual" public benefits or justifications).

92. *See, e.g.*, Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923, 928 (2010) (discussing "rational basis with bite"); Michael Allan Wolf, *Taking Regulatory Takings Personally: The Perils of (Mis)reasoning by Analogy*, 51 ALA. L. REV. 1355, 1378 (2000) (discussing "rational basis with bite"); Gayle Lynn Pettinga, *Note: Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–24 (1972) (discussing "equal protection bite").

93. *Cleburne*, 473 U.S. at 458 (Marshall, J., concurring in part and dissenting in part) ("[T]he Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called 'second order' rational-basis review rather than 'heightened scrutiny.'").

legislator? In one rational basis case, a Washington, D.C. court was asked to rule on the constitutionality of an almost century-old ordinance forbidding shoe-shine stands on the sidewalks, but which allowed all other kinds of street vendors.[94] Despite extensive research, neither party could find any historical evidence to explain this distinction.[95] Is that enough?[96] What more must a plaintiff in such a case do? Neily gives another example from a case he litigated: the story of Sandy Meadows, who challenged the constitutionality of a Louisiana law that imposes an expensive and time-consuming licensing requirement on florists.[97] Meadows, who had been eking out a living for herself arranging flowers, was shut down by the state under a statute that required her to undergo extensive education and pass a difficult examination testing such subjective matters as the beauty and "harmony" of her floral designs.[98] There is, it need hardly be said, no serious danger to the public health from the unlicensed performance of such tasks,[99] and Neily introduced compelling evidence, including the sworn testimony of enforcement officials, to show that the law was adopted solely to protect established florists against competition from entrepreneurs like Meadows who threatened their bottom line.[100] Yet the district court, employing the rational basis test, ignored this evidence and upheld the law because it was imaginable that a consumer might scratch a finger on the wires that florists use to hold together flower arrangements.[101] It did not matter that there was no evidence such a thing had ever happened. Under a standard of review that invites the court to conjure up rationalizations for a challenged law, a plaintiff can never know what type or amount of evidence will satisfy a judge that the law

94. Brown v. Barry, 710 F. Supp. 352 (D.D.C. 1989).

95. *Id.* at 355.

96. The court held the shoeshine stand ordinance unconstitutional, commenting that it was not obliged to "muse endlessly about this regulation's conceivable objectives nor to 'manufacture justifications' for its continued existence." *Id.* at 356. But other cases—most recently Chief Justice Roberts' opinion in National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012)—suggest the contrary: that courts are obliged to manufacture some justification for a statute, even where doing so defies common sense.

97. Meadows v. Odom, 360 F. Supp. 2d 811 (M.D. La. 2005), *vacated as moot*, 198 F. App'x 348 (5th Cir. 2006).

98. SANDEFUR, RIGHT TO EARN A LIVING, *supra* note 21, at 133–34.

99. No other state has found any need to license florists. NEILY, *supra* note 8, at 59.

100. *See* SANDEFUR, RIGHT TO EARN A LIVING, *supra* note 21, at 133–34.

101. *Meadows*, 360 F. Supp. 2d at 824.

lacks the required degree of rational fit.

The lack of clear standards also biases the judicial system against plaintiffs who seek to defend their constitutional rights against legislative or administrative interference. The rational basis standard calls for judges to act not like disinterested arbiters, but rather like colleagues of the government attorneys defending the law. If a judge must affirmatively seek out other possible justifications for a law that is alleged to be unconstitutional, the plaintiff cannot count on the judge fairly weighing the evidence in the record. Instead, courts "abandon[] judicial neutrality and serv[e] as courtroom advocates for one party in a legal dispute. That would be an outrage in any other setting, and a clear violation of judicial ethics."[102]

Aside from the inherent unfairness of subjecting a litigant to a proceeding in which the judge prejudicially presumes against one of the parties, this aspect of the rational basis test also undoes one of the critical checks and balances in the constitutional structure. It is more important for a court to maintain neutrality in cases between a private party and the government than in cases between two private parties, since a failure in the latter results in a single injustice, while partiality in a case involving government action risks the judiciary's reputation as a whole. That harm to judicial credibility is politically dangerous, because when citizens feel that they cannot rely upon the courts to adjudicate such disputes fairly, they are likely to seek extralegal alternatives to resolve their grievances.

An example of this was recently seen in the dispute over the constitutionality of the Patient Protection and Affordable Care Act. Apparently believing it his duty to uphold the Act's constitutionality at practically any cost,[103] Chief Justice Roberts manufactured a dubious rationalization under which the Act's individual mandate provision was recast as a tax on voluntary conduct, rather than a command to act.[104] Such special pleading on behalf of the government—by the very Court that the nation looked to for an impartial resolution—undermined confidence in the federal courts as a whole, and encouraged the Act's

102. NEILY, *supra* note 8, at 53.

103. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012) ("[W]e have a duty to construe a statute to save it, if fairly possible.").

104. *Id.* at 2594–2600.

opponents to engage in such illegal forms of opposition as "nullification."[105]

The situation is worse in more ordinary cases. Consider, for example, *Colon Health Centers of America, LLC v. Hazel*,[106] a recent case challenging a Virginia statute that forbids medical clinics from buying equipment without obtaining a Certificate of Need. Laws like this bar the purchase of equipment not for reasons relating to the applicant's skills, experience, or honesty, but simply to forbid economic competition in the medical industry.[107] The plaintiffs filed a well-pleaded complaint alleging facts that, if proven, would show that the law positively harms consumers with no countervailing benefit to the public. Yet the district court dismissed the lawsuit, holding that the rational basis test made it absolutely impossible for the plaintiffs to prevail.[108] The court wrote that the concept of that law was to "avoid private parties making socially inefficient investments," and since this was "a legitimate governmental interest," the plaintiffs' allegations regarding "the benefits of allowing them to engage in their profession" or "the negative effects of [the challenged] laws" were "entirely beside the point."[109] Thus "[e]ven if plaintiffs had evidence that Virginia's COPN laws do not in fact advance [the government's asserted] interest," such evidence "would be of no moment."[110] Not only did the court fail to seriously weigh the allegations, it held that evidence is actually irrelevant, and by invoking the magic words of "rational basis," dodged any need to weigh the allegations without bias.[111] With

105. *See, e.g.*, Daniel Amico, *States Move to Nullify ObamaCare*, FREEDOMWORKS (June 26, 2013), http://www.freedomworks.org/blog/danielamico9/states-move-to-nullify-obamacare [http://perma.cc/ZGE6-E4ZE]. *See also* Timothy Sandefur, *State Standing to Challenge Ultra Vires Federal Action: The Health Care Cases and Beyond*, 23 U. FLA. J.L. & PUB. POL'Y 311, 322–27 (2012).

106. No. 1:12CV615, 2012 WL 4105063 (E.D. Va. Sept. 14, 2012), *aff'd in part, rev'd in part*, 733 F.3d 535 (4th Cir. 2013).

107. *See generally* Patrick John McGinley, *Beyond Health Care Reform: Reconsidering Certificate of Need Laws in a "Managed Competition" System*, 23 FLA. ST. U. L. REV. 141, 146 (1995) (concluding that hospitals regulated by a health planning agency engage in both output restriction and market division, which are "classic characteristics of a cartel").

108. *Colon Health Ctrs.*, 2012 WL 4105063, at *6.

109. *Id.* at *5–6.

110. *Id.* at *6.

111. *Colon Health Centers* was dismissed on a 12(b)(6) motion, contrary to the requirement in the Federal Rules of Civil Procedure that the court presume as true the facts in the plaintiffs' complaint. Even if one accepts the rational basis test as a proper approach on the merits of a complaint, the *Colon Health Centers* decision went beyond what that test calls for by holding that a plaintiff could not conceivably prove a rational

decisions like this, it is little wonder that Neily regards the rational basis test as a way for courts to provide "the appearance of judicial review without determining what the government is really up to or requiring an honest (and potentially embarrassing) account of its actions."[112] Given that the prejudicial rational basis test applies to cases involving economic liberty, in which plaintiffs are often working-class or poor citizens with virtually no political influence, the judicial abandonment of their rights is particularly disturbing. Unsurprisingly, it encourages not only illegal, black-market activity, but breeds a sense of disaffection and invisibility among those people who most need an engaged judiciary to protect them.[113]

Further, just as courts employing the rational basis test typically ignore the facts, the Dogma of Deference generally encourages courts to ignore the text of the Constitution itself. Nowhere is this more obvious than in *Kelo v. City of New London*.[114] There, the Supreme Court employed its strongest deference language in the service of a decision that essentially erased the phrase "for public use" from the Fifth Amendment. Although paying lip service to the fact that the Constitution allows the government to take private property only "for public use,"[115] the Court construed that phrase to mean "public purpose," a phrase it "defined . . . broadly" so as to "afford[] legislatures broad latitude in determining what public needs justify the use of the takings power."[116] Of course, the legislature or an administrative agency can always be expected to declare that its actions serve the public good in some manner. Deference therefore essentially yields the judge's chair to the very government that is a party to the lawsuit—making the legislature, as Madison warned, "a judge in [its] own cause"[117]—and thus

basis case. The disturbing trend of expanding the rational basis test into the 12(b)(6) realm is addressed in Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity"* (Mar. 26, 2013) (Pac. Legal Found. Working Paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229261 [http://perma.cc/SS42-EWR4].

112. NEILY, *supra* note 8, at 53.

113. *See* Timothy Sandefur, *Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Society's Values*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 381 (2012).

114. 545 U.S. 469 (2005).

115. *Id.* at 477–78.

116. *Id.* at 480, 483.

117. THE FEDERALIST No. 10, *supra* note 58, at 131 (James Madison).

robs the "public use" requirement of any effective power.

Similar things can be said of various other constitutional provisions, including ones that protect against searches and seizures,[118] preserve the autonomy of states,[119] protect the security of contracts,[120] secure the privileges and immunities of citizens,[121] separate the legislative, executive, and judicial powers,[122] and limit federal regulatory authority to matters involving interstate commerce.[123] These and other constitutional provisions have been drastically undermined by the Dogma of Deference, which, by giving the government far more than the benefit of the doubt, has essentially allowed lawmakers and administrators[124] to write their own tickets. Judicial restraint is thus not really restrained. On the contrary, it accomplishes just what its advocates protest against: it radically alters the constitutional structure. The Constitution denies certain powers to Congress or the states in order to maintain a carefully

118. *See* People v. McKay, 27 Cal. 4th 601, 632–33 (2002) (Brown, J., dissenting) ("In the pervasively regulatory state, police are authorized to arrest for thousands of petty *malum prohibitum* 'crimes'—many too trivial even to be honestly labeled infractions. They are nevertheless public offenses for which a violator may be arrested. Since this indiscriminate power to arrest brings with it a virtually limitless power to search, the result is the inevitable recrudescence of the general warrant.").

119. *See* United States v. Darby, 312 U.S. 100, 124 (1941) (dismissing the Tenth Amendment as "but a truism").

120. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (eliminating, essentially, the Contracts Clause from the Constitution).

121. *See* The Slaughter-House Cases, 83 U.S (16 Wall.) 36 (1873) (eliminating, essentially, the Fourteenth Amendment's Privileges or Immunities Clause from the Constitution).

122. *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (declaring that administrative agencies which combine judicial, executive, and legislative power are constitutional).

123. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (expanding the Commerce Clause to cover virtually any action that has long-term economic consequences).

124. Although Neily confines his discussion to deference to legislatures, deference to administrative agencies is both more pervasive and more nefarious. To identify just one example, administrative agencies are often exempt from the rules of evidence and burdens of proof that apply to courts. Thus, an agency may hold a hearing at which it adjudicates a case in which it is itself the prosecutor in its executive capacity of an alleged infraction of a rule that it wrote in its legislative capacity—and at that hearing, it may receive hearsay testimony or other evidence that would not be allowed in a court. *See, e.g.*, Barnes v. State *ex rel.* Ferguson, 274 Ala. 705, 712 (1963). Of course, a person can appeal an administrative determination by going to a court—but at that point, the record from the agency becomes the record on appeal, and *no additional evidence may be offered. See, e.g.*, City of Fairfield v. Superior Court of Solano Cnty., 14 Cal. 3d 768, 774–75 (1975). Thus evidence that would otherwise be barred from court is not only admitted, but is made irrefutable. Yet notwithstanding such irregularities, courts typically defer to the decisions of administrative agencies in all but the most extreme cases. *See generally* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

designed mechanism of checks and balances. Allowing officials to exercise powers that the Constitution denies them perverts that system and deprives citizens of the benefits of the social compact to which they (theoretically) assented. Worse, by selectively deferring on some subjects but not others, the courts can essentially create a system of government that was never imagined, never deliberated, and never ratified. As Justice Scalia has put it, "[t]he picking and choosing among various rights to be accorded [judicial] protection is alone enough to arouse suspicion; but the categorical and inexplicable exclusion of so-called 'economic rights' (even though the Due Process Clause explicitly applies to 'property') unquestionably involves policymaking rather than neutral legal analysis."[125]

This leads to Neily's counterintuitive but convincing final point: the concept of judicial restraint is actually antidemocratic. Despite the claims of its adherents that judicial restraint preserves "our inalienable right of self-governance,"[126] the Dogma of Deference perpetuates a caste system in which politicians choose the judges who are to evaluate the constitutionality of their acts, and thus choose those most likely to defer to the politicians' decisions. "[P]roducing a more docile judiciary has become a major goal of the confirmation

125. United States v. Carlton, 512 U.S. 26, 41 (1994) (Scalia, J., concurring). It is sadly ironic to quote Justice Scalia on this point, since his own selective restraint has accomplished exactly the same thing. Neily gives just one of many examples: Justice Scalia's refusal to enforce the Privileges or Immunities Clause in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), has perpetuated the indefensible annulment of that provision. *See* NEILY, *supra* note 8, at 92–93.

126. *See* WILKINSON, *supra* note 6, at 114 ("The grand quest of the theorists has left restraint by the wayside and placed the inalienable right of Americans to self-governance at unprecedented risk."). Judge Wilkinson's use of the term "inalienable" is revealing. The Declaration of Independence states unambiguously that it is the rights of individual freedom—not of collective power—that are "inalienable." The American Founders never believed that the right to govern was in any sense inalienable. On the contrary, the whole point of the Declaration was that the King of Great Britain, through repeated injuries and usurpations, had alienated his right to govern the colonies, and that any other government of whatever form that violates individual freedoms would likewise alienate its authority. That is because the authority to govern is not a *right* at all, let alone an inalienable one. It is instead a delegated *power*, given to the government by people who have a fundamental right to freedom. Judge Wilkinson's wording indicates that he has accepted the Progressive reversal of priorities and assumes that the ruler has a basic right to rule—indeed, a right the ruler cannot alienate!—and thus that individual freedoms are permissions given to citizens by the ruler at the ruler's discretion. *See also* SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION, *supra* note 18, at 7–11; *cf.* NEILY, *supra* note 8, at 157.

process."[127] The result is a self-reinforcing political class where the judges do not act as an effective check against legislative overreaching, but as aides in the gradual expansion of the legislature's power.[128] Even after judges take their seats, the President and members of Congress use the rhetoric of deference to pressure judges against enforcing constitutional limits on legislative power. Although cloaked in the language of democracy, these efforts undermine the principles of individual freedom and constitutional restraint on which American democracy has always been premised. The primary victim in such collusion is the individual citizen, who looks in vain to the courts to protect him against legislative malfeasance. Episodes of excessive restraint, such as *Korematsu v. United States*[129] or *Plessy v. Ferguson*,[130] are undemocratic in this sense, because in the American scheme, democracy means a fundamental respect for the rights and dignity of each citizen, not simple majority rule. This is the foundation of both the right to vote and the right to be protected against "the vicissitudes of political controversy."[131] If the Constitution defines the scope of American democracy, its promises of meaningful restrictions on legislative power, enforced by a vigilant judiciary, are at least equally important democratic values as is the citizen's right to vote. That is why de Tocqueville warned against efforts to denigrate judicial independence: "I dare to predict that sooner or later these innovations will have dire results and that one day it will be perceived that by so diminishing the independence of the magistrates, not only has the judicial power been attacked, but the democratic republic itself."[132]

IV. A DOCTRINE TO REPLACE THE DOGMA

Is it possible to restore our constitutional order? Neily outlines "four principles of engaged judging"[133] which courts should apply if they are to faithfully discharge the obligation to "say

127. NEILY, *supra* note 8, at 120.
128. *See generally id.* at 33–48, 117–18.
129. 323 U.S. 214, 217–19 (1944).
130. 163 U.S. 537, 550–51 (1896).
131. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).
132. DE TOCQUEVILLE, *supra* note 1, at 257.
133. NEILY, *supra* note 8, at 137–42.

what the law is."[134] These prescriptions are little more than what one would demand of any impartial arbiter of a dispute between a citizen and his government—and they are already an ordinary part of judging in those constitutional disputes where courts are seriously devoted to protecting individual rights.

First, courts reviewing the constitutionality of the government's actions should try in good faith to find out what the government is actually doing, rather than just taking the government at its word. Courts already do this in cases involving, for example, religious freedom. In Establishment Clause cases, local governments sometimes try to evade the prohibition on government endorsement of religion by claiming that an explicitly sectarian monument or display is really only meant as a secular commemoration of history or tradition. But the Supreme Court has made clear that such arguments are not to be simply accepted at face value; "although a legislature's stated reasons [for a religious display] will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."[135] In Free Exercise cases, also, the Court has held that judges should "survey meticulously the circumstances" of a challenged statute to ensure that it is not a veiled attack on a disfavored religious group.[136] The "facial neutrality" of such a statute "is not determinative" because the Free Exercise Clause "'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs.' Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."[137] A previous generation of lawyers and judges realized that the same logic required that they protect economic liberty and private property rights with the same vigilance. In *Yick Wo v. Hopkins*, the Supreme Court employed the same skeptical scrutiny to invalidate a business-licensing requirement that was so vaguely

134. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

135. McCreary County v. ACLU of Ky., 545 U.S. 844, 864 (2005).

136. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (quoting Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

137. *Church of the Lukumi Babalu Aye*, 508 U.S. at 534 (quoting Gillette v. United States, 401 U.S. 437, 452 (1971); Bowen v. Roy, 476 U.S. 693, 703 (1986)).

written that public officials could use it to arbitrarily discriminate against Chinese workers.[138] Yet today, rational basis deference often blinds courts to similar kinds of discrimination.[139]

Neily's second prescription is that courts should require the government to prove its asserted reasons for restricting individual freedom with actual evidence, rather than with bare assertions.[140] Government agents have a sorry record of misleading courts, withholding evidence, and engaging in serious acts of misconduct in judicial proceedings—even in cases where courts do not apply a deferential standard of review. But in rational basis cases, in which "the absence of '"legislative facts"' explaining the [challenged law] . . . has no significance,"[141] the courts literally invite government lawyers to speculate, assert facts not in evidence, and even submit sworn testimony that lacks any basis in fact. Fair judges would never allow the government to censor speech, prohibit religious practices, or restrict the right to an abortion on the basis of mere speculation, or in the absence of any real evidence that such a restriction is necessary. There is no warrant for allowing the government to play fast and loose with the facts when it comes to other kinds of rights.

Third, Neily urges that courts review constitutional cases neutrally, instead of actively seeking ways to uphold the government's actions.[142] It remains unclear whether a judge employing the rational basis test is free to devise his own justification for a challenged law where no such justification has been advanced in court. Some cases hold that judges "may properly look beyond the articulated state interest" and "may even hypothesize the motivations of the state legislature to find a

138. 118 U.S. 356 (1886). *See also* Ho Ah Kow v. Nunan, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879) ("[W]e cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly.").

139. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam). *See also* Sandefur, *Insiders, Outsiders, and the American Dream*, *supra* note 113, at 419–21 (discussing *Dukes*).

140. NEILY, *supra* note 8, at 139–40.

141. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (internal citations omitted).

142. NEILY, *supra* note 8, at 141.

legitimate objective promoted by the provision under attack."[143] But others reject this approach and have struck down laws that might easily have been rescued from invalidation by such fact-free, post hoc rationalizations.[144] Justice Brennan declared in 1975 that while the Justices had "in the past exercised our imaginations to conceive of possible rational justifications" for challenged laws, "we have recently declined to manufacture justifications in order to save an apparently invalid statut[e]" and have instead "limited our inquiry to the legislature's stated purposes when these purposes are clearly set out in the statute or its legislative history."[145] Yet in 1993, the Court held that "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature," and that a challenged law could be upheld "based on rational speculation unsupported by evidence."[146] And then, that same year, the Court declared that "even the standard of rationality" requires that a challenged law "find some footing in the realities of the subject,"[147] rather than mere assertion.

This uncertainty encourages courts to engage in the fundamentally biased tactic of seeking ways to rule in favor of one side over the other, even in the absence of evidence to support such a ruling, and then compounds this unfairness with unpredictability. In some cases, courts have refused to "muse endlessly about [a] regulation's conceivable objectives [or] to 'manufacture justifications' for its continued existence,"[148] while in others, courts have held that facts are "entirely beside the point" in rational basis cases so that "[e]ven if plaintiffs had evidence that [the challenged] laws do not in fact advance [the government's asserted] interest," that evidence "would be of no moment."[149]

The true path is clear: courts should fairly arbitrate disputes

143. Shaw v. Or. Pub. Emps. Ret. Bd., 887 F.2d 947, 948 (9th Cir. 1989) (internal citations omitted).

144. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 450–52 (1972); Dep't of Agric. v. Moreno, 413 U.S. 528, 537 (1973); Zobel v. Williams, 457 U.S. 55, 65 (1982).

145. Schlesinger v. Ballard, 419 U.S. 498, 520 (1975) (Brennan, J., dissenting).

146. *Beach Commc'ns*, 508 U.S. at 315.

147. Heller v. Doe, 509 U.S. 312, 321 (1993).

148. Brown v. Barry, 710 F. Supp. 352, 356 (D.D.C. 1989).

149. Colon Health Ctrs. of Am., LLC v. Hazel, No. 1:12CV615, 2012 WL 4105063, at *6 (E.D. Va. Sept. 14, 2012), *aff'd in part, rev'd in part*, 733 F.3d 535 (4th Cir. 2013).

over the constitutionality of challenged laws or practices. They should not approach such questions with the premeditated intention to rule in favor of the government, let alone the overwhelming devotion to do so at any cost—an attitude which is manifested in the notion that courts can or should manufacture wholly speculative rationalizations to uphold challenged laws. That approach would never be accepted as a fair administration of justice in any other context.

Neily's final proposal is that the burden of proof in constitutional challenges should in all cases rest with the government, rather than with the plaintiff. This is "only fair" because the government is nearly always in the best position to explain "why it seeks to enforce a particular law or policy, and if it can't come up with any reason for doing so, then that's a pretty strong indication that the government's action is arbitrary."[150]

This proposition most directly challenges the status quo. The presumption of constitutionality is the basic premise of rational basis scrutiny; its elimination would have far-reaching consequences, given that many restrictions on individual rights today are so absurd that it would be impossible for government to articulate, let alone prove, a rational justification for such restrictions.[151] In the decades since the Dogma of Deference was first inaugurated, it has fostered a regulatory welfare state that has, in turn, generated powerful economic constituencies who benefit from the status quo and will combat any effort to change it.[152] But Neily's proposal would meet resistance for a deeper

150. NEILY, *supra* note 8, at 142.

151. One example would be the Agricultural Marketing Agreement Act, which Justices Breyer, Scalia, and Sotomayor regarded with extreme skepticism during oral argument in *Horne v. Department of Agriculture*. *See* Oral Argument at 38:25–55:00, Horne v. Dep't of Agric., 133 S. Ct. 2053 (No. 12-123), *available at* http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=12-123&TY=2012 [http://perma.cc/9LAP-P59A]. Another would be Certificate of Public Convenience and Necessity requirements in the taxi, limousine, or household goods mover industries, *see* Timothy Sandefur, *"Public Convenience and Necessity" and Other Conspiracies Against Trade*, 24 GEO. MASON U. C.R. L.J. (forthcoming 2014), or minimum-price rules in ordinary competitive markets. *See, e.g.*, Exec. Town & Country Servs., Inc. v. City of Atlanta, 789 F.2d 1523, 1528 (11th Cir. 1986) (holding that minimum-price rules for limousines "passed the 'rational basis' test, albeit with little room for comfort").

152. The replacement of meaningful constitutional protection for economic liberty with the doctrine of rational basis review can easily be explained in public-choice terms. Public choice predicts that interest groups in society will seek legislation that benefits themselves at the expense of their rivals; it likewise predicts that they will seek the constitutional order that maximizes the opportunities to obtain such legislation. *See* ANTHONY DE JASAY, JUSTICE AND ITS SURROUNDINGS 83 (2002).

reason: it contradicts the most cherished canon of the Dogma—namely, the presumptive legitimacy of government power, and the corollary model of individual rights as privileges given to individuals by the government for its own purposes, rather than as basic, pre-political claims of justice grounded in the requirements for human flourishing. The presumption of constitutionality follows from the Progressive belief that government power is the rule, and individual rights the exception.

To allocate a burden of proof is to establish a default position—a baseline that ought to persist in the absence of good reason for deviation. To impose the burden on the government to justify its restrictions on individual liberty is to stake out the absence of restriction, i.e., freedom, as the preferred default position. This was the view of the Founders, who believed that individual rights were primary, and the basis of all legitimate political order.[153] It still prevails in cases involving rights that enjoy preferential status in today's law, like cases involving freedom of speech. There, "it is our law and our tradition that more speech, not less, is the governing rule,"[154] and restrictions on expression are accordingly presumed invalid unless the government has a sufficient reason to restrict expression.[155] Free speech law is largely untainted by the Dogma of Deference, and thus still retains the presumption of liberty.[156] But while that approach once also prevailed in areas of economic freedom of choice and the right to own property, it fell to the sustained assault of Progressive intellectuals. In 1905, the Court faced severe criticism when it explained that the right to make contracts is one of the liberties protected by the Fourteenth Amendment, and could not be restrained without good reason.[157] Even in 1932, Justice George Sutherland could still

153. *See, e.g.*, James Madison, Charters, *in* 6 WRITINGS OF JAMES MADISON, 1790–1802, at 83 (G. Hunt ed., 1906) ("In Europe, charters of liberty have been granted by power. America has set the example . . . of charters of power granted by liberty.").

154. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 361 (2010).

155. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

156. The effort is underway, however, to eliminate the presumption of liberty in free-speech cases, and particularly in the realm of campaign-finance regulations. *See generally* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1995); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 39–55 (2006).

157. Lochner v. New York, 198 U.S. 45, 56 (1905) (holding that liberty of contract may only be restrained by "fair, reasonable, and appropriate exercise[s] of the police power," and not by "unreasonable, unnecessary, and arbitrary interference[s] with the

write in *Adkins v. Children's Hospital* that "freedom of contract is . . . the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."[158] But the Progressive architects of judicial restraint waged a concerted battle against this proposition.[159] Their basic philosophical premises—that government has a basic right to rule, and that individual rights are privileges it gives to citizens to suit society's needs[160]—led inexorably to the legal presumption of constitutionality adopted in *Nebbia*.[161] This was the crucial victory of principle on which all subsequent constitutional change rested.[162] And the legal profession today generally speaks of the presumption of constitutionality in the reverent tones appropriate to the core doctrines of the faith.[163] Neily is certainly right that the presumption cannot be defended in either epistemology[164] or political philosophy,[165] but overthrowing it will

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right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family").

158. 261 U.S. 525, 546 (1923).

159. *See, e.g.*, Thomas Reed Powell, *The Judiciality of Minimum Wage Legislation*, 37 HARV. L. REV. 545, 555–56 (1924).

160. *See, e.g.*, Truax v. Corrigan, 257 U.S. 312, 376 (1921) (Brandeis, J., dissenting) (arguing that "rights of property and the liberty of the individual must be remolded, from time to time, to meet the changing needs of society").

161. *See also* F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1461–81 (2010) (discussing three separate structural reasons for the presumption of constitutionality).

162. The presumption of constitutionality was at first viewed as only a rebuttable evidentiary presumption. *See, e.g.*, Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934). It was not until the 1950s that it became "well-nigh conclusive." Berman v. Parker, 348 U.S. 26, 32 (1954). *See also* Barnett, *Scrutiny Land*, *supra* note 40, at 1484 ("It was not until 1955, some twenty-four years after the Supreme Court adopted the presumption of constitutionality . . . that the Warren Court moved from disparaging the other rights retained by the people to denying them altogether."); Sandefur, *Rational Basis and the 12(b)(6) Motion*, *supra* note 111, at 11–21 (detailing early history of presumption of constitutionality).

163. To take just one example, note the horror with which Professor Lino Graglia regards the presumption of liberty: "[I]f consistently followed," he warns, such a presumption would "presume unconstitutional all laws limiting 'liberty,' i.e., substantially all laws, and put on the states or national government the burden of justifying" laws that deprive people of their freedom. Lino Graglia, *Lawrence v. Texas: Our Philosopher-Kings Adopt Libertarianism As Our Official National Philosophy and Reject Traditional Morality As a Basis for Law*, 65 OHIO ST. L.J. 1139, 1140 (2004).

164. *See* JASAY, *supra* note 152, at 150.

165. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 224 (2004); SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION, *supra* note 18, at ch. 1.

prove a major undertaking[166]—as extreme an effort at conversion as any St. Patrick undertook.

Still, it remains possible. During the post-World War II era, Progressives themselves withdrew, at least to a limited extent, from the Dogma's more extreme propositions. In a series of cases beginning with *West Virginia State Board of Education v. Barnette*,[167] Progressive Justices—most notably William O. Douglas—began to assert a more meaningful power of judicial review. They did so haltingly, inconsistently, in a manner intended to preserve deferential review with regard to some rights, but not to others. The purists on the Court resisted these efforts—accusing their brethren, rightly, of reviving the meaningful constitutional boundaries Progressives had labored so hard to tear down.[168] And the results are a mess—a haphazard array of different standards of scrutiny such that, as Justice Thomas recently observed, "citizens are safe from the government in their homes, [but] the homes themselves are not."[169] No demographic in the legal profession today—liberal, conservative, or other—is satisfied with the result. But the very existence of such dissension shows that the notion of constitutional protections for individual liberty—and a vigilant judiciary ready to enforce those protections—is not past rescue. Even among the faithful, the Dogma once was, and can again be, questioned.

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166. *See* Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 968–69 (1999) ("[E]mbracing economic substantive due process would require that liberals reject some deeply ingrained beliefs and practices. For example, they would have to abandon Progressive myths about the old Court, quit casting a blind eye on government's economic irrationality, partiality, and predatoriness, and stop winking at pluralist log-rolling. Worst of all, liberals would have to admit that the supposedly malign and ignorant reactionaries on the old Court knew things about business and government that they and their Progressive forbears were unwilling or unable to see.").

167. 319 U.S. 624 (1943) (holding that the First Amendment barred schools from forcing children to pledge allegiance to the flag, and, in doing so, overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), decided only three years earlier). The decision in *Barnette* led to an emphatic dissent by Justice Frankfurter, who had written *Gobitis*, and played the Dogma of Deference to the hilt in his dissent—and elicited a weak explanation from Justices Douglas and Black of why they had changed their minds.

168. The most notable example is the dispute between Justices Black and Douglas in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Black rightly argued that Douglas was reviving *Lochner*-style judicial review. *Id.* at 507 (Black, J., dissenting). Justice Douglas' effort to evade this resulted in his oft-maligned vagueness about "emanations" and "penumbras." *Id.* at 484.

169. Kelo v. City of New London, 545 U.S. 469, 518 (2005) (Thomas, J., dissenting).

Every time the Court devises some reason to treat a right differently or apply some new level of scrutiny, it is essentially confessing that the Dogma of Deference at the root of it all has outlived whatever usefulness it once had. It is high time for the legal world to reconsider the entire Progressive approach. Will we have the courage to follow those who began questioning whether this was the right path to take? If so, Clark Neily's *Terms of Engagement* will help give us the practical case for an engaged judiciary—one that will vigilantly protect the blessings of liberty for all Americans.

REHABILITATING LOCHNER: A STUDY IN THE LIMITATIONS OF A CONSTITUTIONAL REVOLUTION

REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM. David E. Bernstein. The University of Chicago Press, 2011. 194 pages. $60.00.

REVIEWED BY NICHOLAS MOSVICK*

Since the time of the New Deal and well into modern academia, the "*Lochner era*"[1] has existed as a pejorative for liberal commentators to throw at any "judicial activism" they disliked.[2] It has more recently become a paradigm likewise adopted by the conservative legal movement, through figureheads like Robert Bork and Antonin Scalia.[3] The message remains steadfast: the "*Lochner era*" represents a time and method in which judges used personal preferences about economic and social theory to make constitutional law decisions.[4] Concerns about Lochnerism

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1. "*Lochner era*" refers to the time period around the Supreme Court's decision Lochner v. New York, 198 U.S. 45 (1906).

2. *See* Ian Millhiser, *Worse Than Lochner*, YALE L. & POL'Y REV. INTER ALIA (Nov. 15, 2011, 4:45 PM), http://ylpr.yale.edu/inter_alia/worse-lochner [http://perma.cc/778J-T6UN]. ("Rather, the greatest sin of this era was that, by inventing novel doctrines with no grounding in constitutional text or history, and then attaching multiple, equally extra-constitutional caveats to these doctrines, the Justices ceased to behave as judges who acknowledge that their discretion is bound by law. In other words, the Justices behaved as legislators."); *see also* Matthew J. Lindsay, *In Search of "Laissez-Faire Constitutionalism,"* 123 HARV. L. REV. F. 55, 56 (2010), http://www.harvardlawreview.org/media/pdf/vol123_forum_lindsay.pdf [http://perma.cc/BHX9-39HH] ("In order to mask this fit of legally unjustified, intellectually dishonest judicial activism, the progressive interpretation runs, judges invented novel economic 'rights'—most notably 'substantive due process' and 'liberty of contract'—that they engrafted upon the Due Process Clause of the Fourteenth Amendment.").

3. In the 2010 term, Justice Scalia charged that Justice Kennedy's proposed classification of the deprivation of property as the deprivation of an economic liberty interest would be a "step of much greater novelty and much more unpredictable effect," than the case at hand, and would propel the Court "back to what is referred to (usually deprecatingly) as 'the *Lochner* era.'" Stop the Beach Renourishment, Inc., v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2606 (2010); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 44 (1990) ("[*Lochner*] lives in the law as the symbol, indeed the quintessence, of judicial usurpation of power . . . .").

4. *See, e.g.*, Nancy Staudt & Yilei He, *The Macroeconomic Court: Rhetoric and Implications of New Deal Decision-Making*, 5 NW. J.L. & SOC. POL'Y 87, 91, 96–110 (2010) (the "*Lochner*

continue today, as seen in the debates over the constitutionality of the Patient Protection and Affordable Care Act (Obamacare).[5] In her separate opinion, Justice Ginsburg claimed that *Lochner* was an example of a time when the Court "regularly struck down economic regulation enacted by the peoples' representatives in both the States and Federal Government."[6] As David E. Bernstein[7] writes in his book, *Rehabilitating Lochner*,[8] *Lochner* is

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era" represented the Court's "systematic attempt to shape the nation's economic policy in a manner consistent with a laissez-faire theory of economics embodied in the *Lochner* case."); Frank Blechschmidt, *All Alone in Arbitration:* AT&T Mobility v. Concepcion *and the Substantive Impact of Class Action Waivers*, 160 U. PA. L. REV. 541, 568 (2012) ("*Concepcion* steers the Court closer to its *Lochner*-era jurisprudence, in which the Court often prioritized economic liberty over sensible and socially desirable regulation."); Erwin Chemerinsky, Korematsu v. United States*: A Tragedy Hopefully Never to be Repeated*, 39 PEPP. L. REV. 163, 166 (2011) ("[*Lochner*] belongs in the 'Hall of Shame' that is being examined in this symposium. For over thirty years, it led to the invalidation of legislation protecting employees and consumers.").

5. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2628 (2012) (Ginsburg, J., concurring) (referring to *Lochner*, including Justice Ginsberg's claim that *Lochner* fits in with cases from the beginning of the twentieth century where the Court "regularly struck down economic regulation"); Transcript of Oral Argument at 40, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-398) (referring to *Lochner*, including a comment by Chief Justice Roberts that "it would be—it would be going back to Lochner if we were put in a position of saying, no, you can use your commerce power to regulate insurance, but you can't use your commerce power to regulate this market in other ways"); *id.* at 30 (referring to *Lochner*, including Solicitor General Verrilli's argument that striking down the individual mandate would be importing "*Lochner*-style substantive due process); Peter J. Smith, *Federalism, Lochner, and the Individual Mandate*, 91 B.U. L. REV. 1723, 1726 (2011) ("Because the objections to the individual mandate, though couched in federalism terms, have very little to do with federalism at all, it is difficult to see them as anything other than *Lochner* under a different guise."); Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1829 (2011) ("Following the Court's repudiation of *Lochner* jurisprudence, there is no conceivable basis to argue that the Constitution specially protects an individual's freedom to be uninsured."); Simon Lazarus, *Jurisprudential Shell Game: Health Reform Lawsuits Sneak "Lochnerism" Back from Constitutional Exile*, NAT'L L.J., Dec. 20, 2010, at 38 ("Roberts and his four fellow Republican appointees cannot strike down the mandate without exhuming *Lochner* and the doctrinal apparatus deployed a century ago to abort the modern American regulatory state.").

6. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct at 2628 (Ginsburg, J., concurring).

7. George Mason University Foundation Professor, George Mason University School of Law.

8. DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011). *Citizens United* is perhaps the modern-day *Lochner*, given the incredible hyperbole utilized by its critics. Not surprisingly, those critics are quick to reference the "*Lochner era*" as a starting point for the constitutional evils they presently dislike. *See* David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past and Uncertain Future of Corporate Personhood in American Law*, 44 J. MARSHALL L. REV. 643, 646, 691 (2011) ("[T]he *Lochner* era [was] a period today almost universally condemned as one of the low points in the Supreme Court's history. For the next forty years, the Supreme Court repeatedly ignored constitutional text and history . . . in service of its own constitutional vision in which equal corporate rights and the liberty of contract were a cornerstone of constitutional law. . . . [E]ven before *Citizens United*, the Court was inching back towards the *Lochner* era, when corporations were treated

"likely the most disreputable case in modern constitutional discourse. . . . [It] has since become shorthand for all manner of constitutional evils, and has even had an entire discredited era of Supreme Court jurisprudence named after it."[9] With this in mind, Bernstein focuses on why the predominant examinations of *Lochner* are woefully inaccurate, and why *Lochner*—as a case, a theory, and an era in legal history—needs to be thoroughly reexamined. *Lochner* does not belong in the "anticanon," but rather should be treated as a "normal, albeit controversial, case."[10] Bernstein unquestionably succeeds in showing that the evidence abundantly supports this premise.

Lochner was an atypical case, but not a revolutionary one. *Lochner* simply represented the Justices' need to preserve the fundamental right of "liberty of contract" without excessively diminishing states' "police powers."[11] Bernstein's central theme is to rehabilitate *Lochner* so that modern thinkers understand the modesty of both the decision and its era.[12] Like the "Federalism Revolution" of our recent constitutional past, *Lochner* and the central cases of its era relied on establishing a limiting principle, even if it was a weak one, rather than abandon all hope of limiting government power.[13] The Court, far from the image of a reactionary court committed to the interests of corporations and laissez-faire economics, upheld the "vast majority of the laws that had been challenged as infringements on liberty of contract."[14] As Bernstein ably argues, and the overall evidence substantiates,

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identically to individuals when it comes to fundamental constitutional rights.").

9. BERNSTEIN, *supra* note 8, at 1. *See also* David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373 (2003); *see also* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 190 (1993) ("Aside from *Dred Scott* itself, *Lochner*. . . is now considered the most discredited decision in Supreme Court history."); Washington v. Glucksberg, 521 U.S. 702, 759–61 (Souter, J., concurring) (the cases in the "*Lochner era*" "harbored the spirit of *Dred Scott* in their absolutist implementation of the standard they espoused"); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) ("The received wisdom is that *Lochner* was wrong because it involved 'judicial activism'; an illegitimate intrusion by the courts into a realm properly reserved to the political branches of government.").

10. BERNSTEIN, *supra* note 8, at 7.

11. Lochner v. New York, 198 U.S. 45, 56 (1906).

12. *See* BERNSTEIN, *supra* note 8, at 3.

13. *See id.*

14. *Id*; *see also* Lindsay, *supra* note 2, at 66 ("And in fact, federal and state courts—including those that authored such landmarks of 'substantive due process' as *Lochner*, *In re Jacobs* and *Godcharles v. Wigeman*—upheld the vast majority of police regulations against constitutional challenge."). *See generally* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (showing that the seeds for *Lochner*'s displacement under the New Deal Court were sown by the "*Lochner era*" Court's willingness to uphold the vast majority of state police power claims).

the impact of the "*Lochner era*" was limited.[15] *Lochner* itself only struck down one part of a larger bill, the rest of which remained untouched.[16] Significantly, the majority in *Lochner* included moderates whose votes throughout the era proved that the Court generally upheld federal power in liberty-of-contract cases.[17] As a result, cases like *Lochner* and *Adkins v. Children's Hospital* are outliers—cases outside the pattern of deference to government power.[18] Lastly, Bernstein shows that the lasting legacy of the "*Lochner era*" is in the realm of individual rights generally.[19] This era of modesty in the face of accusations of judicial activism is familiar, as it was repeated during the Rehnquist's Court's "Federalism Revolution."[20]

Lochner should be viewed historically as analogous to the views of many commentators regarding the decisions of the "Federalism Revolution." The primary cases of that revolution were *United States v. Lopez*[21] and *United States v. Morrison*.[22] Commentators now see the "Federalism Revolution" as arising from the need to draw a meaningful limiting principle without significantly revoking powers previously granted.[23] As Charles

15. *See* BERNSTEIN, *supra* note 8, at 3.

16. *Lochner*, 198 U.S. at 62–64.

17. BERNSTEIN, *supra* note 8, at 33.

18. *See, e.g., Lochner*, 198 U.S. at 64–65; Adkins v. Children's Hospital, 261 U.S. 525 (1923).

19. BERNSTEIN, *supra* note 8, at 110.

20. *See* Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 30 (2001); *see also* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 491 (2002).

21. United States v. Lopez, 514 U.S. 549 (1995). Note that in a case the next year, Justice Souter complained in dissent that the majority seemed to be "going *Lochner* one better." Seminole Tribe v. Florida, 517 U.S. 44, 166 (1996) (Souter, J., dissenting). Justice Thomas had to note in his concurrence that "nor can the majority's opinion fairly be compared to *Lochner v. New York*." *Lopez*, 514 U.S. at 601 n.9 (Thomas, J., concurring). Justice Souter also felt that the "*Lochner era*'s" "restrictive views of commerce subject to congressional power complemented the Court's activism in limiting the enforceable scope of state economic regulation. It is most familiar history that during this same period the Court routinely invalidated state social and economic legislation under an expansive conception of Fourteenth Amendment substantive due process." *Id.* at 605.

22. United States v. Morrison, 529 U.S. 598 (2000).

23. *See* Richard H. Fallon, Jr., *supra* note 20, at 491 (2002) (arguing that "the Court's pro-federalism majority has purported to leave leading cases undisturbed, while at the same time surrounding them with exceptions and qualifications"); Robert F. Nagel, *Real Revolution*, 13 GA. ST. U. L. REV. 985, 1003–04 (1997) (characterizing the Court's federalism agenda as "modest and equivocal" since the "most that can be said is that they do not accept the view that states are of no value in our political system"); Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 34 (1995) (rejecting the view that the Rehnquist Court took revolutionary steps, noting that *Lopez* is "a perfect example not of revolution," but of "adjudication precisely in the ordinary course: adjudication that, by its modesty of statement, meticulousness of reasoning, and plausibility of result, fulfills the constitutional function of providing the regularity, definiteness, continuity and textuality

Fried noted, the Court modestly provided a lax standard in *Lopez*, as it is "only if the legislation fails to pass the two preceding (not very demanding) tests that the judgment of degree must be exercised . . . ."[24] The "Federalism Revolution" turned out to be a confined, limited revolution.[25] The Supreme Court aimed to limit only "the way Congress can do things, not to place areas of regulation wholly off-limits to Congress."[26]

This "revolution" was rather about establishing a "non-infinity" principle.[27] This came despite the initial conclusion of many commentators and judges alike that *Lopez* and *Morrison* were "landmark" decisions that changed the kind of deference the Court was willing to give to Congressional decision-making.[28]

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that are the indicia of the rule of law"); Michael C. Dorf, *No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court*, 31 RUTGERS L.J. 741, 744 (2000) ("Even if the Court occasionally strikes down an Act as beyond Congress' enumerated powers, on the whole, it will continue to give Congress wide latitude. The *Lopez* majority reaffirmed such broad-reaching decisions as *Wickard v. Filburn*, *United States v. Darby*, and *Heart of Atlanta Motel, Inc. v. United States*."); Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133, 1138 (2000) (arguing that "even in Lopez, the Court was quite careful to stress that it saw itself as preserving the existing balance of power rather than rolling back federal power. . . . [Rehnquist] portrayed the ruling as a refusal to expand federal power beyond already recognized bounds, rather than as a reduction in federal authority.").

24. Fried, *supra* note 23, at 41.

25. *See* Ann Althouse, *The Alden Trilogy: Still Searching For a Way to Enforce Federalism*, 31 RUTGERS L.J. 631, 638–39 (2000) ("It is notable that the majority of the Court has not used its voting power to overturn *Garcia* . . . [I]t has tried to structure doctrine that presumes against impositions on the state but accepts intrusions in some situations in which Congress follows the steps that demonstrate that it has taken the states' interests into account.").

26. *Id.* at 689.

27. David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously:* Lopez *and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 69 (acknowledging Deborah Jones Merritt's conclusion that *Lopez* is an "explicit rebuke to the previous conventional wisdom regarding the Commerce Clause," because the Court concluded the clause must have some limit); *see also* Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 691 (1995).

28. *See* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 752 (1995) (calling *Lopez* "a revolutionary and long overdue revival of the doctrine that the federal government is one of limited and enumerated powers"); Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 168 (1996) (calling *Lopez* an "about-face"); Chemerinsky, *supra* note 20, at 30 (concluding that *Lopez*, when viewed together with other recent cases, signals a federalism revolution); Kopel & Reynolds, *supra* note 27, at 59 (calling *Lopez* a "landmark" decision); Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of* United States v. Lopez *and* United States v. Morrison, 68 TENN. L. REV. 605, 609 (2001) ("*Lopez* clearly marked a departure from the modern jurisprudential trend of recognizing a broad grant of power to Congress under the Commerce Clause; however, no one knew the precise extent of the departure."); United States v. Pappadopoulos, 64 F.3d 522, 525 (9th Cir. 1995) (calling *Lopez* a "watershed opinion" and holding that Congress cannot constitutionally criminalize the arson of a private home simply because the home received natural gas from out-of-state sources); United States v. Bailey, 115 F.3d 1222, 1233 (5th Cir. 1997) (Smith, J., dissenting) ("*Lopez* is a landmark, signaling the revival of federalism as a constitutional principle, and it must be acknowledged as a

While not explicit, this is ultimately at the heart of Bernstein's most successful argument: the "*Lochner era*" drew many important lines, but did not involve judges implementing personal policy and outdated restrictions on government action to the extent suggested by many modern commentators.[29] As one legal commentator notes, the Court in *Lochner* only "struck down one section of New York's 1895 Bakeshop Act, [but left] the rest of the law's regulatory structure in place, including regulations stipulating 'proper washrooms and closets,' the height of ceilings, floor conditions, and 'proper drainage, plumbing, and painting.'"[30] Thus, *Lochner* was a vote for a nominal limit on the seemingly omnipresent reach of the police power.

Indeed, *Lochner* only had the "modest effect of prohibiting New York state from imprisoning bakery owners whose employees worked more than ten hours in a day or sixty hours in a week," making it an "outlier opinion from a Supreme Court that generally deferred to legislative innovation."[31] As Charles Warren wrote in 1913, "The actual record of the Court thus shows how little chance a litigant has of inducing the Court to restrict the police power of a State, or to overthrow State laws under the 'due process' clause."[32] Even *Lochner's* author, Justice Rufus Peckham—a frequent dissenter in liberty-of-contract

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watershed decision in the history of the Commerce Clause."); United States v. Bishop, 66 F.3d 569, 591 (3d Cir. 1995) (Becker, J., concurring in part and dissenting in part) (arguing against the constitutionality of a federal carjacking statute because *Lopez* "reflects a sea change" in the Supreme Court's Commerce Clause jurisprudence).

29. BERNSTEIN, *supra* note 8, at 3.

30. Damon W. Root, *Ayn Rand, Herbert Spencer, and ObamaCare*, REASON (June 9, 2011, 12:03 PM), http://reason.com/blog/2011/06/09/ayn-rand-herbert-spencer-and-o [http://perma.cc/0es6nsuS8Qc]; *see also* Glenn Harlan Reynolds, *The Lochner Ness Monster*, COMMENTARY, June 1, 2011, http://www.commentarymagazine.com/article/the-lochner-ness-monster/[http://perma.cc/0EBq8ByRKey] ("The law's sanitary provisions, meanwhile, were unaffected by the *Lochner* decision.").

31. BERNSTEIN, *supra* note 8, at 1. *See also* Michael J. Phillips, *The Progressiveness of the Lochner Court*, 75 DENV. U. L. REV. 453, 488–89 (1998) ("And if we limit ourselves to the decisions contemporary critics of *Lochner era* substantive due process emphasize—general police matters, regulation of business and trade, and employment law—the ratio exceeds five to one."); Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 295–96, 308–09 (1913) (observing that in the "*Lochner era*," the Supreme Court struck down over 95% of the Fourteenth Amendment due process and equal protection challenges that came before it between 1887 and 1911, and noting that there were more successful private rights of property cases than "social justice" cases like *Lochner* and *Allgeyer v. Louisiana*, 165 U.S. 578 (1897)—which Warren portrays as significant outliers); Michael J. Phillips, *How Many Times Was Lochner-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049, 1086 n.197 (1997) (concluding tentatively that there were only eleven freedom of contract cases between 1897 and 1936.).

32. Warren, *supra* note 31, at 310.

cases—generally gave "great deference" to state regulations.[33] Peckham wrote five years earlier about the extensiveness of state police power in *Gundling v. City of Chicago*.[34] Peckham determined that "unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."[35] As Bernstein stated in a separate article, "*Lochner* was an anomaly, not the leading edge of a Supreme Court war on Progressive legislation."[36]

Two particular votes in *Lochner* symbolize the limitations of the era's Due Process jurisprudence—Justice Joseph McKenna and Justice Henry Brown. Justice McKenna served on the Court for nearly 30 years (1898–1925), remaining throughout most of the "*Lochner era*," and becoming emblematic of the era's modesty.[37] Brown was also a moderate Lochnerian in the *Lochner* majority, but he was off the Court by 1906.[38] Bernstein correctly observes that McKenna and Brown were surprising votes in *Lochner*,[39] since Brown had written *Holden v. Hardy*, an 1898 decision that

33. BERNSTEIN, *supra* note 8, at 21. Peckham also wrote *Allgeyer v. Louisiana* in 1897, which laid out the principle of liberty of contract in fundamentally libertarian terms, interpreting the Due Process Clause of the Fourteenth Amendment as granting "not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties . . . and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." 165 U.S. at 589. However, Bernstein points out that the holding was narrow and merely granted individuals a right "to contract outside of the state." BERNSTEIN, *supra* note 8, at 20 (citing Allgeyer v. Louisiana, 165 U.S. 578, 590–91 (1897)).

34. 177 U.S. 183 (1900).

35. *Id.* at 188 ("Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state . . . .").

36. David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 2D 9, 11 (2011).

37. Robert Post, *The Supreme Court Opinion As Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1343–45 (discussing McKenna's willingness to change his vote, as matched that era's "norm of acquiescence").

38. *See* Laura Krugman Ray, *Lives of the Justices: Supreme Court Autobiographies*, 37 CONN. L. REV. 233, 269–70 (2004) (describing Brown's general complacency as a Justice); Trevor Broad, *Forgotten Man in a Tumultuous Time: The Gilded Age as Seen by United States Supreme Court Associate Justice Henry Billings Brown*, MICH. J. HIST., Winter 2005, at 18.

39. BERNSTEIN, *supra* note 8, at 33.

upheld a maximum-hours statute for coal miners.[40] *Holden* acutely limited liberty of contract, stating that:

> This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While the power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous or so far detrimental to the health of employ[ee]s as to demand special precautions for their well-being and protection, or the safety of adjacent property.[41]

The standard was something that should not appear unfamiliar to modern eyes: "The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."[42] The standard is not substantively different from modern rational basis review.[43] Only the Court's two prominent libertarians, Justice Peckham (author of *Allgeyer v. Louisiana*[44]) and Justice Brewer, dissented without comment in

40. *Id.* at 51; *see also* Holden v. Hardy, 169 U.S. 366 (1898). Two years later, another Brown opinion cemented the rule of *Holden*—a case which Justices Brewer, Peckham, Shiras, and Chief Justice Fuller joined in dissent. Austin v. Tennessee, 179 U.S. 343, 349–50 (1900) (quoting Holden, 169 U.S. at 392) (upholding an absolute prohibition on the sale of tobacco and stating that "the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests").

41. *Holden*, 169 U.S. at 391–92; *see also* Nebbia v. New York, 291 U.S. 502, 527 & n.25 (1934) (citing *Holden* with other "*Lochner era*" precedents for the proposition that "[o]ther instances are numerous where valid regulation has restricted the right of contract, while less directly affecting property rights"); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 393–94 (1937) (quoting *Holden*, 166 U.S. at 397) (stating that *Holden* symbolized the limits of liberty of contract in a situation in which "inequality in the footing of the parties" harmed employees like miners or hotel workers, and quoting *Holden* for the premise that simply because "both parties are of full age, and competent to contract does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself"); U.S. v. Darby, 312 U.S. 100, 125 (1941) ("Nor is it any longer open to question that it is within the legislative power to fix maximum hours.") (internal citations omitted).

42. *Holden*, 169 U.S. at 398.

43. *E.g.*, *Rational Basis*, LEGAL INFORMATION INSTITUTE: CORNELL UNIVERSITY LAW SCHOOL, http://www.law.cornell.edu/wex/rational_basis [http://perma.cc/0mppWYxr3gn] (last visited Jan. 7, 2014).

44. 165 U.S. 578 (1897).

Holden.[45] Bernstein informs us that this pairing in dissents was the norm.[46] As he points out, *Holden*, not *Lochner*, "was the most influential precedent on the scope of the states' police power to protect workers."[47] The Court "consistently upheld laws regulating labor relations . . . [with] dissents in those cases never receiv[ing] more than three votes."[48] On the question of liberty of contract, the Court was dominated not by laissez-faire fundamentalists, but by moderates.[49]

McKenna, despite his vote in *Lochner*, was almost certainly one of the "moderate Lochnerians." As Bernstein previously argued, most Justices during the era were "moderate Lochnerians in the sense that they believed the Court should engage in meaningful review of regulatory legislation that interfered with the liberty of contract to ensure that such legislation was constitutionally valid as an exercise of the states' police powers."[50] Justice Harlan's dissent in *Lochner*, joined by Justices White and Day, is a prime example of this sensitivity.[51] Harlan's dissent accepted the right to liberty of contract, but argued that the Court should invalidate a purported health and safety law only if the law had "no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[52] Harlan did not despise the right, but rather believed the Court should defer to the state's rationale for the law in question.[53] Importantly, because of a Court norm disfavoring concurring opinions at that time, McKenna and Brown likely joined an opinion by Peckham that contained dicta that only a

45. *Holden*, 169 U.S. at 398.

46. BERNSTEIN, *supra* note 8, at 21.

47. *Id.*

48. *Id.* at 31. *See, e.g.*, Knoxville Iron Co. v. Harbison, 183 U.S. 13, 19–21 (1901) (noting that an act regulating the time and manner of pay was accepted under police power rationale, because it tended "towards equality between employer and employee in the matter of wages," and importantly did not alter the contract price, even though it did undoubtedly "abridge or qualify the right of contract"); Atkin v. Kansas, 191 U.S. 207, 223 (1903) (upholding an eight-hour work day for public employees, saying that "enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution").

49. David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 10 (2003).

50. *Id.*

51. Lochner v. New York, 198 U.S. 45, 65–74 (1906) (Harlan, J., dissenting).

52. *Id.* at 68 (Harlan, J., dissenting) (citations omitted).

53. *Id.* at 66 (Harlan J., dissenting) (quoting Holden v. Hardy, 169 U.S. 366, 391 (1898)).

minority accepted.[54] Bernstein notes the possibility that Peckham originally wrote a dissent that became the majority opinion, while Harlan's dissent originally carried the majority—likely including the votes of McKenna and Brown.[55] This makes perfect sense, given the votes of the Justices in previous liberty-of-contract cases. Notably, after *Lochner* came down in 1905, the status quo largely returned.[56]

Prominent examples of this status quo were cases which dealt with maximum-hours laws for women. *Muller v. Oregon* was a 1908 case turning on an Oregon law specifying the maximum working hours for women.[57] Justice Brewer's opinion for a unanimous court gave the impression that liberty of contract was not as strong a right for women.[58] Bernstein provides plentiful historical background to suggest some answers for *Muller*'s outcome.[59] Much of this discussion relates to the famous so-called "Brandeis brief," produced by progressive attorney, and future Justice, Louis Brandeis.[60] The "Brandeis Brief" focused on distinguishing *Lochner* by spending very little time on the legal arguments and the vast majority on statistical evidence.[61] This

54. BERNSTEIN, *supra* note 8, at 34–35.

55. *Id.* at 33. *See also* CHARLES HENRY BUTLER, A CENTURY AT THE BAR OF THE SUPREME COURT OF THE UNITED STATES 172 (1942); JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890–1920, at 181–82 (1978); Alan F. Westin, *The Supreme Court and Group Conflict: Thoughts on Seeing Burke Put Through the Mill*, 52 AM. POL. SCI. REV. 665, 667 n.3 (1958).

56. *See* Muller v. Oregon, 208 U.S. 412, 421 (1908) ("It is equally well settled that this liberty is not absolute and extending to all contracts, and that a state may, without conflicting with the provisions of the 14th Amendment, restrict in many respects the individual's power of contract."); Bacon v. Walker, 204 U.S. 311 (1907) (upholding a statute prohibiting the grazing of sheep on the public domain within two miles of a dwelling house under the police power, with a McKenna majority, and Peckham and Brewer dissenting); McLean v. Arkansas, 211 U.S. 539, 547–48, 552 (1909) (noting that, with Justice Day writing the majority, Peckham and Brewer dissented again; Day wrote that "[i]f the law in controversy has a reasonable relation to the protection of the public health, safety, or welfare, it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the government"). *But see* Adair v. United States, 208 U.S. 161, 173–74 (1908) (striking down federal regulation of "yellow-dog contracts" as violations of liberty of contract on the basis of *Lochner* and *Allgeyer*; both Justices Day and White dissented with Harlan in *Lochner* and joined him in his *Adair* majority opinion, but McKenna dissented on the basis that federal power under commerce clause superseded the liberty of contract concerns in the case).

57. *Muller*, 208 U.S. at 416.

58. *Id.* at 422 ("[H]er physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man.").

59. BERNSTEIN, *supra* note 8, at 59–61.

60. *Id.*

61. *Id.* at 60.

evidence was used to show how women were distinct from men and, therefore, more like the dependent miners of *Holden* than the bakers in *Lochner*.[62] It also presented complete tables of American and foreign legislation and data from all over the world that was illustrative of the necessity for shorter hours based on psychological, social, and economic considerations.[63] Bernstein contends that despite many scholars claiming that the brief was filled with "junk social science," the Court readily accepted the evidence in Brandeis' brief as simply reinforcing conventional wisdom regarding the physical differences between the sexes.[64] As Brewer himself wrote, Mr. Muller's contention that *Lochner* supported overruling the maximum-hours law in question assumed that the "difference between the sexes does not justify a different rule respecting a restriction of the hours of labor."[65] However, differences in the sexes are not a convincing reason for why the Court began to limit the effects of the *Lochner* ruling in *Muller*.

There are also possible internalist explanations that should not be ignored. Professor Barry Cushman notes that the "neutrality principle," or opposition to class legislation that takes from *A* to give to *B*, likely had a great deal to do with the reasons that McKenna joined both *Lochner* and *Muller*, and why he later wrote *Bunting v. Oregon*[66] before joining the majority in *Adkins*.[67] *Muller* did not violate the neutrality principle because it applied to all women employed in any "mechanical establishment, or factory, or laundry."[68] On the other hand, McKenna wrote an opinion just four years later suggesting that he was not particularly concerned with class legislation.[69] Bernstein suggests

62. *Id.*

63. Brief for Defendant in Error at 3–8, 11–17, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), *available at* http://www.law.louisville.edu/library/collections/brandeis/node/235 [http://perma.cc/05CxCVSX8S1].

64. BERNSTEIN, *supra* note 8, at 60.

65. *Muller*, 208 U.S. at 419.

66. 243 U.S. 426 (1917)

67. Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 936–37 (2005) (suggesting that in *Lochner*, New York's regulation only applied to bakers, while cases like *Bunting* applied to an entire industry, making such a law not class legislation which would violate the "principle of neutrality"). *See also* Lindsay, *supra* note 2, at 75 ("The critical duty of *Lochner*-era courts, as the guardians of state neutrality, was thus to distinguish between the vast majority of police regulations that were legitimately directed toward the public health and welfare and the illegitimate minority that were calculated to serve the interests of a narrow class.").

68. *Muller*, 208 U.S. at 416.

69. *See* District of Columbia v. Brooke, 214 U.S. 138, 150 (1909) ("[W]e have repeatedly decided—so often that a citation of the cases is unnecessary—that it does not

a different internalist account. *Lochner*'s logic implied that maximum-hours laws were permissible so long as they "targeted a health threat recognized either by common knowledge or in the scientific literature."[70] Further, "[u]nder *Lochner* and other precedents either common knowledge *or* scientific evidence was sufficient to justify labor regulation as a proper 'health law' under the police power."[71] Statistical information was particularly of interest to Justice McKenna.[72]

Examples of McKenna's deference to regulations based on a wealth of statistical information reflect the permissive standards of the Court during the "*Lochner era.*"[73] In *Riley v. Massachusetts*, McKenna made strong use of *Muller* as precedent and offered the statement that "[n]either the wisdom nor the legality of such means [as chosen by the legislature] can be judged by extreme instances of their operation" to pronounce such operation as arbitrary and unreasonable.[74] *Bosley v. McGlaughlin* saw Brandeis back before the Court, constructing yet another brief like the one in *Muller*.[75] Justice Hughes accorded similar deference to the conclusions of the state, calling the state's distinction for graduate nurses "obvious" and focusing on a factual inquiry over a discussion of case law and constitutional support.[76] However,

take from the states the power of classification. And also that such classification need not be either logically appropriate or scientifically accurate.").

70. BERNSTEIN, *supra* note 8, at 60.

71. Bernstein, *Brandeis Brief Myths*, *supra* note 36, at 13. Peckham's *Lochner* opinion notably took explicit account of the statistical data regarding the health of bakers. *See id.* at 11.

72. *See* MATTHEW MCDEVITT, JOSEPH MCKENNA: ASSOCIATE JUSTICE OF THE UNITED STATES 142–44 (1946) (claiming that the difference between *Lochner* and *Muller v. Oregon* for McKenna was based on the volume of statistical information presented to the Court in favor of the state's maximum-hours law for women).

73. *See e.g.*, Bunting v. Oregon, 243 U.S. 426 (1917) (upholding a wage and hour law); Rast v. Van Deman & Lewis Co., 240 U.S. 342 (1916) (upholding a license tax on trading stamps); Riley v. Massachusetts, 232 U.S. 671 (1914) (upholding a maximum-hours law for women); Wilson v. New, 243 U.S. 332, 362 (1917) (McKenna, J., concurring) (citing *Riley*, *Holden*, *Miller v. Wilson*, *Bosley v. McGlaughlin*, and *Muller* for the proposition that, whether a state or federal law, laws limiting the hours of service but not the rate of wages were permissible and not in violation of liberty of contract, despite the fact that the case dealt with a federal law mandating an eight-hour day for railroad workers engaged in interstate and foreign commerce); Miller v. Wilson, 236 U.S. 373, 380 (1915) (noting that McKenna joined Justice Hughes's opinion, which states that liberty of contract is not guaranteed against "reasonable regulation to safeguard the public interest"); Bosley v. McLaughlin, 236 U.S. 385 (1915) (building on McKenna's framework from *Riley*).

74. 232 U.S. at 680.

75. REBECCA S. SHOEMAKER, THE WHITE COURT: JUSTICES, RULINGS, AND LEGACY 135 (2004).

76. *Bosley*, 236 U.S. at 392–96.

Bunting v. Oregon stands out as the most prominent of McKenna's opinions as evidence of the limitations of the "*Lochner era.*"

Bunting is predominant because of the doubt it cast over the standing of *Lochner*'s precedent.[77] Legal historian Stephen A. Siegel has also argued that the "*Lochner era*" was dominated by Lochnerian moderates like McKenna and believes *Bunting* is a perfect example.[78] The public or private character as determined by the court became steadily more influential over time while diminishing the strength of liberty of contract. If McKenna and other members of the court were keen on bevies of statistical information to support a state's claim of power, it was indeed because they were moderates on the question of liberty of contract. In his majority opinion in *Bunting*, McKenna emphasized his determination that the law before him regulated hours rather than fixed wages, as it did not explicitly attempt to set a minimum or maximum wage.[79] McKenna would therefore not "ascribe to the legislation such improvidence of expression as to intend one thing and effect another" or "disguise illegal purpose," by conducting a motive inquiry beyond the text of the statute.[80] McKenna states that the Court is not required to be sure of the precise reasons for the exercise of legislative judgment, or be convinced of the wisdom of that exercise, citing his own opinion in *Rast v. Van Deman & Lewis Co.*[81] The case did not overrule *Lochner*, instead suggesting by its result and logic to be in line with *Holden* and maximum-hour cases.[82] The fact that McKenna only cited two cases, *Rast* and *Coppage v. Kansas*,[83] is evidence regarding the degree to which moderate Lochnerians dominated the Court. *Coppage*, a liberty-of-contract case, was not

77. *See* Jack M. Balkin, *"Wrong the Day It Was Decided": Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 697 (2005) ("*Lochner* was never officially overruled by an Article V amendment. Instead it was overruled *sub silentio* in judicial decisions. In fact, it was overruled *sub silentio* twice, first in 1917 in *Bunting v. Oregon*. It was revived in *Adkins*, and then was overruled a second time in a series of decisions beginning in 1934 with *Nebbia v. New York*.").

78. Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 11–16 (1991). Siegel also calls *Holden* a "paradigmatic" example of what he calls a "moderate laissez-faire constitutional opinion." *Id.* at 14 n.58. He believes *Lochner* was a result of the Lochnerian moderates splitting "over a problematic application of their approach." *Id.* at 15–16.

79. Bunting v. Oregon, 243 U.S. 426, 435 (1917).

80. *Id.* at 435–36.

81. *Id.* at 437 (citing Rast v. Van Deman & Lewis Co., 240 U.S. 342, 365 (1916)).

82. *Id.* at 435.

83. 236 U.S. 1 (1915).

cited for liberty-of-contract reasons. The section of *Rast* cited by McKenna in *Bunting* notably contains McKenna's suggestion that it would be "an endless task to cite cases in demonstration" to show the degree to which liberty of contract could be lawfully restricted.[84] McKenna was quick to cite numerous European statistics regarding daily working hours directly from Brandeis' brief. *Bunting* indicates the extent to which moderate Lochnerians controlled the court for most of the period, and the extent to which *Lochner* and, later, *Adkins* were outliers.[85]

The Court did not overturn federal minimum wage legislation for women until six years after *Bunting*.[86] Bernstein observes that Felix Frankfurter prepared a "Brandeis Brief" for the Court in *Adkins*, but, unlike Brandeis, spent a significant amount of time on the legal argument.[87] This legal argument did not focus on "women's alleged disabilities," but rather on the "'fictitious nature of freedom of contract when the employee was bargaining for a wage that did not meet her cost of living.'"[88] Justice Sutherland found Frankfurter's "mass of reports" only "mildly persuasive," finding that the government could not explain why the law assumed women in some fields had lower consumption needs than women in other fields.[89] Notably, Sutherland had observed this in *Bunting* "on the ground that it constituted an attempt to fix wages, but that contention was rejected and the law sustained as a reasonable regulation of hours of service."[90] *Bunting*, *Muller*, *Bosley*, *Riley*, *Miller v. Wilson*, and *Wilson v. New* did not question the principles stated in *Lochner*, and these cases dealt with "incidents of the employment having no necessary effect upon the heart of the contract; that is, the amount of wages to be paid and received."[91] As noted by

84. *Rast*, 240 U.S. at 365.

85. The same year, McKenna dissented when a majority struck down a Washington prohibition on employment agencies that unduly infringed on the liberty of contract. Adams v. Tanner, 244 U.S. 590, 595, 597 (1917) (noting that the majority by Justice McReynolds cites *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897)). McKenna dissented, noting that under decisions so recent as to not to require citation, "the law in question is a valid exercise of the police power of the state, directed against a demonstrated evil." *Id.* at 597 (McKenna, J., dissenting).

86. *See* Adkins v. Children's Hospital, 261 U.S. 525 (1923).

87. BERNSTEIN, *supra* note 8, at 66.

88. *Id.*

89. *Id.* at 67 (quoting *Adkins*, 261 U.S. at 560).

90. *Adkins*, 261 U.S. at 550–51.

91. *Id.* at 553–54. Ellen Frankel Paul has argued that by attempting to merely distinguish these cases, Sutherland's opinion was entirely unconvincing, and took a "cautious stance" by noting that the liberty of contract wasn't "absolute," that "every

Bernstein, this outcome surprised most legal observers at the time, who believed *Lochner* was defunct after *Bunting*.[92] This surprise seems to be the best evidence that *Adkins*, like *Lochner*, was rightly viewed as an outlier case.

Just a year after *Adkins*, it appeared that the moderates were reasserting their dominance in a familiar area. Sutherland wrote the majority again in *Radice v. New York*. Although *Radice* seemed at odds with *Adkins*, Sutherland claimed there was a clear difference: *Adkins* dealt with a statute that was on its face purely a wage-fixing law while *Radice* dealt with legislation on the amount of hours worked.[93] Significantly, the Court noted that the "mass of information" before the legislature when creating this statute suggested that night work was substantially detrimental to the health of women, and that the Court could not say the legislature's conclusion was "without warrant."[94] Rather than manifesting a position of inconsistency, this stance simply displayed another of the limitations of *Lochner*. *Radice* was certainly consistent with cases like *Muller*, *Riley*, *Miller*, and *Bosley*, which dealt with hours legislation aimed specifically at women. Bernstein rightly observes that one cannot ignore the precedential force of *Muller* on *Radice*, as both dealt with hours legislation based on physical differences between the sexes.[95]

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possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt," and that "an enactment must clearly breach a constitutional provision before it can be invalidated." Ellen Frankel Paul, *Freedom of Contract and the "Political Economy" of* Lochner v. New York, 1 NYU J.L. & LIBERTY 515, 560 (2005).

92. *See* BERNSTEIN, *supra* note 8, at 67. *See also* Comment, *Constitutional Law: Due Process of Law—Minimum Wage Act*, 18 ILL. L. REV. 118, 120–23 (1923) (referring to the decision inconsistency with both *Bunting* and *Wilson v. New*); Comment, *The Minimum Wage and Liberty of Contract*, 32 YALE L.J. 376, 389–90 (1923) (arguing *Lochner* had already been thoroughly discredited); E.M.B., *The Supreme Court and The Minimum Wage*, 32 YALE L.J. 829, 829–31 (1923) (noting that thirteen states had upheld similar laws as *Muller* and *Bunting* had eroded the power of liberty of contract under *Lochner*, if it had not overruled it *sub silentio*); F.M.P., *Constitutional Law: Minimum Wage Law for Women as a Violation of the Fifth Amendment*, 21 MICH. L. REV 906, 906–10 (1923) (making specific reference to *Riley*, *Miller* and *Bosley* for the notion that the Court was reversing the trend of cases towards overruling *Lochner*); B.N.G., *Constitutional Law: Police Power: Minimum Wage for Women*, 11 CAL. L. REV. 353, 353–62 (1923) (arguing that the opinion threatened the "unbroken line of cases involving social legislation" from *Muller* to *Riley*, *Miller*, *Bosley*, *Wilson*, *Bunting*, and *Block v. Hirsh*). *But see* Editorial, *Review of Recent Decisions: Minimum Wage Law—Constitutionality*, 8 ST. LOUIS L. REV. 261, 263–64 (1923) (referring to the "well-reasoned" and "convincing" opinion of Justice Sutherland in that the Court determined correctly that the law was merely a wage-fixing law and therefore, did not fit any of the four categories by which Congress could interfere with the liberty of contract).

93. Radice v. New York, 264 U.S. 292, 295 (1924).

94. *Id.* at 294.

95. BERNSTEIN, *supra* note 8, at 69–70; Muller v. Oregon, 208 U.S. 412, 421–23 (1908).

These laws were unlike the minimum-wage laws which were not based on such differences and thus not controlled by *Muller* and its progeny.[96] As the evidence here shows, it is difficult to avoid Bernstein's conclusion that *Adkins*, like *Lochner*, is an outlier case.

However, even as *Lochner* critics and revisionist supporters have long misunderstood the supposed power of "*Lochner era*" liberty-of-contract jurisprudence, Bernstein ably shows that they have also often missed the other ways in which *Lochner* enhanced individual rights in the long term. To his credit, Bernstein does not spend the majority of the book attempting to dismiss common academic claims about the nature and legacy of *Lochner*. Rather, Bernstein focuses principally on highlighting the other principal reason that *Lochner* has been unfairly maligned[97]: not only was it far from a revolutionary, extremist decision, but the principle articulated by the *Lochner* majority was one applied to a number of other areas in order to increase liberty.[98] Although *Lochner* should properly be viewed as a modest case, its legacy should be tied to its effect on other areas of individuals' rights. This is most significantly found in the often forgotten case of *Buchanan v. Warley*.[99]

Buchanan dealt with a segregation ordinance in Louisville, Kentucky that restricted the sale of property to African-Americans.[100] Bernstein notes that even before *Buchanan*, there was hope on the horizon: the Court had issued several liberal race-related opinions that invalidated coercive labor laws affecting African-American workers and held that "grandfather clauses" that implicitly discriminated against potential black voters violated the Fifteenth Amendment.[101] *Buchanan* was a 1917 unanimous opinion, written by Justice Day, which focused on the

96. BERNSTEIN, *supra* note 8, at 69. In fact, Bernstein points out that according to a story from Justice Brandeis, Justice Sutherland was the "swing vote" and that at conference, the initial vote was 5–4. The case was only unanimous because the four *Adkins* majority Justices did not wish to dissent. *Id.*

97. *Id.* at 125.

98. *Id.* at 127 ("Even if one disagrees with the outcome of some of the liberty of contract era's due process cases, the principle established . . . is a sound one, well rooted in long-standing American principle.").

99. 245 U.S. 60 (1917).

100. *Id.* at 71.

101. BERNSTEIN, *supra* note 8, at 80; *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 216 (2004) (discussing the 1911 case of *Bailey v. Alabama*, 219 U.S. 219 (1911)—a case striking down as unconstitutional under the Thirteenth Amendment a state statute criminalizing breach of employment contracts by creating a presumption of fraud whenever workers quit, which in practice was part of "Jim Crow" laws aimed at black workers).

Due Process Clause violations of the plaintiffs' liberty and property.[102] Notably, it cites *Holden* for the proposition that "[p]roperty is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property."[103] Bernstein argues that the case "repudiated *Plessy*'s presumption that segregation laws, including those that infringed on civil rights, are reasonable."[104] The proof of this is that the core question of the case was whether the state could adopt such residential segregation under its police powers.[105] As history shows, any time the Court decided state segregation laws were not reasonable, it was an extraordinary statement.[106]

Critics of this, like Harvard University Professor Michael J. Klarman, have observed that *Buchanan*'s plaintiff was a white male property owner, so the victory was not directly one for blacks.[107] However, Justice Day's ruling does address this point, arguing that "colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color."[108] In fact, the Court rejected all proffered police-power rationales, as well as the argument that whites should be protected against property value depreciation.[109] Klarman argues that *Buchanan*'s effects were limited in practice, as cities all over the country ignored the case's outcome and continued residential segregation by custom, if not by law.[110] Nonetheless, *Buchanan* implicitly protected migration of African-Americans to urban areas.[111] Thus, even if *Buchanan* did not immediately alter the social environment, it significantly altered the judicial environment. It reflected how liberty of contract and the Court's sometimes reluctant skepticism towards statism could provide a counterweight to the "overwhelming expert and public opinion

102. *Id.* at 81.
103. *Buchanan*, 245 U.S. at 74 (citing Holden v. Hardy, 169 U.S. 366, 391 (1898)).
104. BERNSTEIN, *supra* note 8, at 82.
105. *Buchanan*, 245 U.S. at 75.
106. BERNSTEIN, *supra* note 8, at 81–82.
107. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 216 (2004).
108. *Buchanan*, 245 U.S. at 78–79.
109. BERNSTEIN, *supra* note 8, at 81. The Court had also referenced the 1866 Civil Rights Act, which stated that African-Americans had the same contract and property right as whites. *Id.* at 83–84.
110. KLARMAN, *supra* note 107, at 90–91.
111. *Id.* at 83.

that segregation was good social policy."[112] As Bernstein concludes, this shows that the conventional story "that the Court's pro-liberty of contract decisions are somehow linked to its tolerance of segregation" cannot "withstand historical scrutiny."[113] If anything is indicative of that, it is that from 1868 to 1910, African-Americans lost twenty-two of their twenty-eight cases involving the Fourteenth Amendment, but won twenty-five of twenty-seven between 1920 and 1943.[114]

The "*Lochner era*" is undoubtedly much more an era of judicial modesty than has long been perceived. While outlier cases show that the Justices in that era were willing to seriously question arbitrary uses of government power, their standards of review and deference to legislatures generally do not appear foreign to the modern eye. Bernstein's *Rehabilitating Lochner* achieves the major goal of changing the tone of the discussion surrounding this perennially misunderstood constitutional era. Bernstein gives plenty of reasons, demonstrated by case law and supplemental evidence, to believe that Lochnerian moderates dominated the era. He also gives ample reason to believe that the long-term effects of the era have little to do with so-called "laissez-faire constitutionalism," but rather with the very beginnings of substantive due process as a means to validate individual rights against arbitrary government action.[115] By reframing the discussion, Bernstein sheds new light on what *Lochner* perhaps should mean—and that is indeed a very good reason for rehabilitating *Lochner*.

112. *Id.* at 86.

113. *Id.*

114. BERNSTEIN, *supra* note 8, at 84 (citing BERNARD H. NELSON, THE FOURTEENTH AMENDMENT AND THE NEGRO SINCE 1920, at 163 (1946)). This happened despite the fact that NAACP leadership moved to a "progressive" outlook in the 1920s and was hesitant about using "liberty of contract" to fight discrimination. *Id.* at 85.

115. *See id.* at 112–13.

ARE DRONE COURTS NECESSARY? AN ANALYSIS OF TARGETED KILLINGS OF U.S. CITIZENS ABROAD THROUGH A PROCEDURAL DUE PROCESS LENS

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I. INTRODUCTION

This note addresses the question of whether lethal drone strikes on U.S. citizens abroad violate procedural due process rights guaranteed by the Fifth Amendment. It does not address any potential violations of statutory or international law or of any executive orders. Part II lays a predicate by providing background about Anwar al-Awlaki, the first U.S. citizen killed by a drone strike, the criticism his targeted killing caused, and the government's response to this criticism. Part III explores whether citizens can be named enemy combatants and what actions this labeling allows. Next, Part IV discusses what due process actually requires and whether it necessitates judicial process. Part V examines what process, if any, is already afforded to those citizens that are on "kill lists." Finally, Part VI explores the changes that must be made in order to comply with the conclusion of Part IV. Finally, Part VII summarizes and concludes the note.

II. BACKGROUND

On September 30, 2011, the CIA launched a drone strike against Anwar al-Awlaki, a U.S. citizen, in Yemen.[1] His killing—the first time an American drone strike killed a U.S. citizen—sparked condemnation from many commentators in the United States and abroad.[2] Before delving into the constitutionality of such an action, it is helpful to know who al-Awlaki was, how he came to be in such a position, and the issues that this drone strike raised.

A. The Story of Anwar al-Awlaki

Al-Awlaki was born in New Mexico in 1971 to Yemeni parents.[3] When al-Awlaki was seven years old, he moved to Yemen where he lived for eleven years.[4] He returned to the United States to

1. *Islamist Cleric Anwar al-Awlaki Killed in Yemen*, BBC (Sept. 30, 2011), http://www.bbc.co.uk/news/world-middle-east-15121879 [http://perma.cc/0PU3AkU8bmc].

2. Jennifer Griffin & Justin Fishel, *Two U.S.-Born Terrorists Killed in CIA-Led Drone Strike*, FOXNEWS.COM, Sept. 30, 2011, http://www.foxnews.com/politics/2011/09/30/us-born-terror-boss-anwar-al-awlaki-killed/ [http://perma.cc/0Li7kfYzGEK].

3. Scott Shane & Souad Mekhennet, *Imam's Path from Condemning Terror to Preaching Jihad*, N.Y. TIMES, May 8, 2010, http://www.nytimes.com/2010/05/09/world/09awlaki.html [http://perma.cc/0McuwPiF48R].

4. *Id.*

attend Colorado State University and received a degree in civil engineering, but eventually worked full-time as an imam at mosques in California and Virginia despite his lack of any formal Muslim scholarship.[5] Due to his perception of an anti-Muslim backlash after the September 11 attacks, al-Awlaki moved to Britain, where his preaching became much more radical.[6] Al-Awlaki eventually moved to Yemen in 2004,[7] where he was imprisoned (with American encouragement) for his involvement in a kidnapping.[8] During his imprisonment, he delved into the works of Sayyid Qutb, who is often identified as the father of the jihadist movement against the West.[9] After some U.S. officials became wary of the fact that a U.S. citizen was being imprisoned without charges, Yemen agreed to his release.[10] It was at this time that al-Awlaki's radicalization culminated. He started operating his own extremist website and hid in the mountains of Yemen, where U.S. officials believe he started actively plotting, rather than just inspiring, terrorism in the West.[11] Al-Awlaki's "operational" status was confirmed when Umar Farouk Abdulmutallab—the "underwear bomber" who failed to blow up a Detroit-bound airplane on Christmas Day 2009—revealed that al-Awlaki trained him and urged him to carry out the plot.[12]

Al-Awlaki rose through the ranks of al-Qaeda in the Arabian Peninsula and eventually became the leader of external operations due to his abilities.[13] His combination of fluency in English and Arabic, knowledge of Western culture, oratory skills, and "magnetic character" was especially unique.[14] Indeed, his

5. *Id.*

6. For example, in one lecture that was recorded on video, he urged, "The important lesson to learn here is never, ever trust a kuffar [non-Muslim] . . . . Do not trust them!" *Id.* There was also some suspicion by the FBI that al-Awlaki was personally involved in the September 11 attack; the FBI interviewed him four times, but took no further action. *Id.*

7. *Id.*

8. Lee Keath & Ahmed al-Haj, *AP Enterprise: Tribe in Yemen Protecting US Cleric*, SEATTLE TIMES, Jan. 19, 2010, http://seattletimes.com/html/nationworld/2010834237_apmlyemenalqaida.html [http://perma.cc/0ixrtk5Hwcx].

9. Shane & Mekhennet, *supra* note 3.

10. *Id.*

11. *Id.*

12. Mark Mazzetti, Charlie Savage, & Scott Shane, *How A U.S. Citizen Came to Be in America's Cross Hairs*, N.Y. TIMES, Mar. 9, 2013, http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html [http://perma.cc/0WKnGcGVtLz].

13. *Obama Dubs al-Awlaki "External Operations" Chief for Terror Group*, FOXNEWS.COM Sept. 30, 2011, http://www.foxnews.com/politics/2011/09/30/obama-dubs-al-awlaki-external-operations-chief-for-terror-group/ [http://perma.cc/0dnbPveWQ5F].

14. Shane & Mekhennet, *supra* note 3.

words inspired such terrorists as Faisal Shahzad, the would-be Times Square bomber; Nidal Malik Hasan, the Army major who killed thirteen people at Fort Hood; and a group of Canadians who plotted attacks in Ontario.[15] The United States government decided—in light of his "operational" status, the infeasibility of his capture, and his dangerous ability to recruit and inspire jihadists—to place him on a kill list in April 2010.[16]

B. Criticism of the Drone Strike

A variety of commentators condemned the resulting drone strike as an excessive and unconstitutional exercise of executive power. They argued that the government was now depriving citizens of life based on secret intelligence and without trial.[17] Further, they argued that because the strike was not on the battlefield—neither in Iraq nor Afghanistan—al-Awlaki, like any other citizen, should have been afforded due process before being deprived of his life.[18] For example, Ron Paul, a U.S. Representative at the time, criticized the United States for "assassinating American citizens without charges . . . ."[19] The ACLU also questioned the legality of the drone strike and nicely summarized the opposition's argument:

> The targeted killing program violates both U.S. and international law . . . . [T]his is a program under which American citizens far from any battlefield can be executed by their own government without judicial process . . . . The government's authority to use lethal force against its own citizens should be limited to circumstances in which the threat to life is concrete, specific, and imminent. It is a mistake to invest the President . . . with the unreviewable power to kill any

15. *Id.*; Scott Shane, *Born in U.S., a Radical Cleric Inspires Terror*, N.Y. TIMES, Nov. 18, 2009, http://www.nytimes.com/2009/11/19/us/19awlaki.html [http://perma.cc/0exVmuFdKn8] [hereinafter Shane, *Born in U.S.*].

16. Shane, *Born in U.S.*, *supra* note 15; Greg Miller, *Muslim Cleric Aulaqi Is 1st U.S. Citizen on List of Those CIA Is Allowed to Kill*, WASH. POST, Apr. 7, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/04/06/AR2010040604121.html [http://perma.cc/0YhZwVnb5Nx].

17. Scott Shane, *Judging a Long, Deadly Reach*, N.Y. TIMES, Sept. 30, 2011, http://www.nytimes.com/2011/10/01/world/american-strike-on-american-target-revives-contentious-constitutional-issue.html [http://perma.cc/0dj8rD3wtrM].

18. David B. Rivkin Jr. & Lee A. Casey, Op-Ed., *Awlaki vs. Predator*, WALL ST. J., Aug. 13, 2010, http://online.wsj.com/news/articles/SB10001424052748704901104575423253031580156 [http://perma.cc/0f3sMg1cwHq].

19. Jo Ling Kent, *Paul Condemns "Assassinating" al-Awlaki*, NBC NEWS, Sept. 30, 2011, 10:02 AM), http://firstread.nbcnews.com/_news/2011/09/30/8059346-paul-condemns-assassinating-al-awlaki [http://perma.cc/0pSn3y6oUjE].

American whom he deems to present a threat to the country.[20]

Civil libertarian journalist Glenn Greenwald also condemned the Obama Administration for not providing al-Awlaki a "shred of due process" and for killing him "far from any battlefield."[21] In fact, on August 30, 2010, thirteen months before the strike, al-Awlaki's father, Nasser al-Awlaki, filed suit in federal court alleging that the government's targeting of his son was illegal based on these very arguments.[22] Nasser demanded an injunction that would prohibit the government from intentionally killing al-Awlaki "unless he presents a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat."[23] However, the judge dismissed the case in December 2010 based on the father's lack of "next-friend" standing,[24] Article III standing,[25] and alternatively, based on the political question doctrine.[26]

Some commentators defended the strike by pointing out that the "process" that is due does not have to be judicial process, especially since al-Awlaki was in a position which made his capture by either Yemeni or American forces infeasible.[27] The strike's defenders also claimed that because the war against al-Qaeda is not constrained to the borders of any specific country, the government was entitled to bring the fight to wherever al-Qaeda or its associated forces were located, including Yemen.[28]

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20. Suzanne Ito, *ACLU Lens: American Citizen Anwar Al-Aulaqi Killed Without Judicial Process*, ACLU (Sept. 30, 2011, 11:43 AM), https://www.aclu.org/blog/national-security/aclu-lens-american-citizen-anwar-al-aulaqi-killed-without-judicial-process [http://perma.cc/0GFVLwdZvK1].

21. Glenn Greenwald, *The Due-Process-Free Assassination of U.S. Citizens is Now Reality*, SALON (Sept. 30, 2011, 10:31 AM), http://www.salon.com/2011/09/30/awlaki_6/ [http://perma.cc/05ioWB1fbQW].

22. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 12 (D.D.C. 2010).

23. Complaint at 11, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469).

24. *Al-Aulaqi*, 727 F. Supp. 2d. at 24.

25. *Id.* at 28.

26. *Id.* at 52 (holding so because "decision-making in the realm of military and foreign affairs is textually committed to the political branches, and because courts are functionally ill-equipped to make the types of complex policy judgments that would be required to adjudicate the merits of plaintiff's claims").

27. *See, e.g.*, Benjamin Wittes, *What Process is Due?*, LAWFARE (Sept. 30, 2011, 11:45 AM), http://www.lawfareblog.com/2011/09/what-process-is-due/ [http://perma.cc/09L9mmDHjfZ]; Robert Chesney, *Al-Awlaki as an Operational Leader Located in a Place Where Capture Was Not Possible*, LAWFARE (Sept. 30, 2011, 11:02 AM), http://www.lawfareblog.com/2011/09/al-awlaki-as-an-operational-leader-located-in-a-place-where-capture-was-not-possible/ [http://perma.cc/0LkDCqo3Y4V].

28. Shane, *Born in U.S.*, *supra* note 15; Miller, *supra* note 16.

C. The Government's Response

The government's response to these criticisms was reflected in a speech given by John Brennan, President Obama's chief counterterrorism advisor at the time.[29] Although he did not explicitly acknowledge the government's role in the strike, Brennan justified targeted killing of civilians based on the Authorization of the Use of Military Force (AUMF), which allows the President "to use all necessary and appropriate force" against those individuals, nations, and groups responsible for the September 11 attacks.[30]

The government's legal justifications became more clearly understood when a sixteen-page Department of Justice (DOJ) "White Paper" was leaked to the media in February 2013.[31] In it, the government identified four criteria that must be met in order for a strike to occur on a U.S. citizen.[32] First, the individual must be a senior leader of al-Qaeda or an associated force.[33] Second, an informed, high-level official of the U.S. government must determine that the individual poses an imminent threat of violent attack against the United States.[34] Third, capture must be currently infeasible, with the United States continuing to monitor whether it becomes feasible.[35] Finally, the operation must be consistent with applicable law-of-war principles.[36] According to the White Paper, and later to Attorney General Eric Holder himself in a speech given on March 5, 2012, the establishment of these four factors is sufficient to satisfy any due process concerns.[37] Beginning in 2010, perhaps in response to criticism of the opacity with which it decides who goes on the kill

29. John Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012) (transcript available at http://www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100 [http://perma.cc/0Wa2pMC9bRz]).

30. *Id.*; Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

31. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 1 (2006), *available at* https://www.fas.org/irp/eprint/doj-lethal.pdf [http://perma.cc/8N8S-THM2] [hereinafter WHITE PAPER].

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*; Attorney General Eric Holder, Address at Northwestern University School of Law (Mar. 5, 2012) (transcript available at http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html [http://perma.cc/0FSNVZoNXzC]).

list, the government, with Brennan at the helm, began reviewing and codifying the process, now named the "disposition matrix," in which targets are put on the kill list.[38]

On May 22, 2013, Holder finally admitted that the government purposely targeted al-Awlaki due to his direct involvement in planning attacks against the United States, such as the underwear bombing in December 2009 and an October 2010 plot to bomb cargo planes bound for the United States.[39] The next day, President Obama made a speech and released a fact sheet in which he more clearly defined the targeting criteria for lethal strikes. The fact sheet stated that to be targeted an individual must present a threat to "U.S. persons," not simply to U.S. interests, and that there must be a "near certainty" that non-combatants would not be harmed or killed.[40]

III. CAN CITIZENS BE CLASSIFIED AS ENEMY COMBATANTS?

One consequence of being labeled a combatant is that one is no longer treated as a civilian in the government's eyes. For example, a combatant does not have a right to a trial by a jury of his peers.[41] Thus, being labeled as a combatant seems to be the first necessary step before the government initiates a drone attack on a civilian in a wartime context.

A. Historical and Present-Day Use of the Term "Enemy Combatant"

Historically, the laws of war have distinguished between lawful and unlawful enemy combatants. The former may be detained to prevent them from returning to the battlefield. Once hostilities end, however, these prisoners of war must be released to their

38. Greg Miller, *Plan for Hunting Terrorists Signals U.S. Intends to Keep Adding Names to Kill Lists*, WASH. POST, Oct. 23, 2012, http://www.washingtonpost.com/world/national-security/plan-for-hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408fbe6a4b_story.html [http://perma.cc/0VZFsmpjmxY].

39. Letter from Attorney General Eric Holder to Senator Patrick J. Leahy (May 22, 2013), *available at* http://www.justice.gov/ag/AG-letter-5-22-13.pdf [http://perma.cc/YR2M-JAV3] (specifically stating, for example, that al-Awlaki "planned a suicide operation for Abdulmutallab, helped [him] draft a statement for a martyrdom video to be shown after the attack, and directed him to take down a U.S. airliner").

40. THE WHITE HOUSE, U.S. POLICY STANDARDS AND PROCEDURES FOR THE USE OF FORCE IN COUNTERTERRORISM OPERATIONS OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (2013), *available at* http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism [http://perma.cc/0fmS5aLdwGe].

41. *See, e.g.*, 10 U.S.C. § 948c (2012) (providing that alien unprivileged belligerents are subject to trial by military commission).

home country.[42] Unlawful enemy combatants, on the other hand, may be tried for their crimes against the laws of war.[43] Other terms may be used to refer to enemy combatants, both lawful and unlawful. In the Military Commissions Act of 2009 (MCA), Congress defined "privileged belligerent" as an individual who falls within one of the eight enumerated categories in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War.[44] An "unprivileged enemy belligerent" is one who is not a privileged belligerent and one who is either a part of al-Qaeda or engaged in or supporting hostilities against the United States.[45] Notwithstanding the MCA definitions, the term "enemy combatant" has, confusingly, been used to refer to individuals who fall into the definition of "unprivileged enemy belligerent."[46] Indeed, even federal courts

42. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention] ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."); Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004) (plurality opinion) ("It is a clearly established principle of the law of war that detention may last no longer than active hostilities.").

43. *See, e.g.*, *Hamdi*, 542 U.S. at 518 (2004) (plurality opinion).

44. 10 U.S.C. § 948a(6) (2012). These categories include, among others, "[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces," Geneva Convention, *supra* note 42, at art. 4, cl. 1, and "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power," *id.* at art. 4, cl. 3. In other words, it covers soldiers in the traditional sense—those who, for example, carry their arms openly and wear uniforms.

45. 10 U.S.C. § 948a(7) (2012). The full text is:

> Unprivileged enemy belligerent.—The term "unprivileged enemy belligerent" means an individual (other than a privileged belligerent) who—
> (A) has engaged in hostilities against the United States or its coalition partners;
> (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or
> (C) was a part of al Qaeda at the time of the alleged offense under this chapter.

46. *See, e.g.*, *Hamdi*, 542 U.S. at 516 ("There is some debate as to the proper scope of ['enemy combatant'], and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. . . . [H]owever . . . for purposes of this case, the 'enemy combatant' that it is seeking to detain is an individual who, it alleges, was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States.'"); Kiyemba v. Obama, 555 F.3d 1022, 1024 n.1 (D.C. Cir. 2009) ("An 'enemy combatant' is 'an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.'" (quoting Parhat v. Gates, 532 F.3d 834, 838 (D.C. Cir. 2008) (quoting Deputy Secretary, U.S. Dep't of Defense, Order Establishing Combatant Status Review Tribunal at 1 (July 7, 2004); Secretary, U.S. Navy, Implementation of Combatant Status Review Tribunal Procedures at E-1 § B (July 29, 2004)))), *vacated on other grounds*, 559 U.S. 131 (2010).

became frustrated with this situation.[47] Because of this lack of distinction in the cases (and media), this note will assume that "unprivileged enemy belligerent" is interchangeable with "enemy combatant."

B. Supreme Court Precedent: Hamdi, Quirin, *and* Milligan

The determination of who can be an enemy combatant and what legal consequences this labeling entails is worthy of an entire note by itself; the issues are complex and unclear. For example, notwithstanding the assertion made in the introduction to this Part, it is uncertain whether a citizen must be labeled an enemy combatant before being targeted by a drone strike.[48] And although Supreme Court precedent is relatively clear that citizens may be classified as enemy combatants, the lack of the majority in the most recent case to discuss this issue means that the debate is not necessarily closed.

In a major Supreme Court case that discusses this topic, *Hamdi v. Rumsfeld*,[49] the Court wrestled with the question of whether Yaser Esam Hamdi, a citizen combatant, had any right to challenge his classification as such.[50] The George W. Bush Administration advanced two independent theories justifying its view that Hamdi did not have the right to challenge his

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47. In a hearing on October 23, 2008, to determine the meaning of the term "enemy combatant," U.S. District Judge for the District of Columbia Richard J. Leon commented on its definition:

> We are here today, much to my dismay, I might add, to deal with a legal question that in my judgment should have been resolved a long time ago. . . . I don't understand, I really don't, how the Supreme Court made the decision it made and left that question open. . . . I don't understand how the Congress could let it go this long without resolving [the meaning of the phrase].

Farah Stockman, *Lawyers Debate "Enemy Combatant,"* BOSTON.COM (Oct. 24, 2008), http://www.boston.com/news/nation/washington/articles/2008/10/24/lawyers_debate_enemy_combatant/ [http://perma.cc/0oCbVp3zHtS] (second omission in original).

48. A close reading of the AUMF itself indicates that there may be no need to label an individual as a combatant in order to take actions upon him consistent with the AUMF. Section 2(a) of the AUMF states in full:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

AUMF, Pub. L. No. 107-40, 115 Stat. 224 (2001). There is no mention in the text that those individuals lawfully under the scope of the AUMF must also be enemy combatants; rather, the only thing necessary is the President's "determin[ation]." *Id.*

49. 542 U.S. 507 (2004).

50. *Id.* at 509.

classification. First, the President's inherent powers under Article II of the Constitution granted him the power to detain enemy combatants as allowed by customary rules of warfare, no matter Hamdi's citizenship.[51] Alternatively, the AUMF granted the President authority to detain Hamdi because it allows the President to "take action to deter and prevent acts of international terrorism against the United States . . . [using] all necessary and appropriate force . . . ."[52] A majority rejected the government's first argument, but a plurality accepted that the government was permitted to detain Hamdi based on the congressional grant of authority found in the AUMF.[53] It then went on to condone the labeling of a citizen as an enemy combatant.[54] For the purposes of this case, the definition of "enemy combatant" was determined to be an individual who was "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and "who engaged in an armed conflict against the United States there."[55] The plurality cited *Ex parte Quirin*[56] in concluding that there was no reason a citizen could not be included in this definition.[57] In that World War II-era case, German saboteurs were sent to the United States with plans to conduct bombings.[58] They were caught, and the Court found that the two Germans, who were also U.S. citizens, had no rights beyond those afforded to enemy soldiers; "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of . . . the law of war."[59]

The lack of a majority in *Hamdi* makes the question posed by this Part complex. Although *Quirin*'s language does seem to be clear, there are arguments that citizens cannot be named as combatants. First, the citizen in *Quirin* admitted to his enemy-combatant status; Hamdi did not.[60] The *Quirin* Court limited its

51. Brief for Respondent at 13, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696).
52. *Id.* at 20 (quoting AUMF, 115 Stat. 224) (internal quotation marks omitted).
53. *Hamdi*, 542 U.S. at 517 (plurality opinion).
54. *Id.* at 519.
55. *Id.* at 516 (quoting Brief for Respondent, *supra* note 51, at 3) (internal quotation marks omitted).
56. 317 U.S. 1 (1942).
57. *Hamdi*, 542 U.S. at 519.
58. *Quirin*, 317 U.S. at 21.
59. *Id.* at 37–38.
60. *Hamdi*, 542 U.S. at 571–72 (Scalia, J., dissenting).

decision "upon the conceded facts,"[61] meaning that where an accused citizen does not concede that he is an enemy combatant—like Hamdi—the holding in *Quirin* does not apply.[62] Second, *Ex parte Milligan*,[63] a Civil War-era case, is in tension with the plurality's opinion in *Hamdi*. In that case, the Court granted a writ of habeas corpus to a U.S. citizen who was tried by military commission.[64] It stated that the laws and usages of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[65] There is no debate today that U.S. courts are open and unobstructed in conducting their business, which suggests that citizen combatants should be brought to trial in civilian courts. Finally, as Justice Scalia argued in his *Hamdi* dissent, a citizen can only be detained if it is pursuant to criminal charges or if the writ of habeas corpus is suspended via the Suspension Clause.[66]

The *Hamdi* plurality responded to these arguments convincingly. First, it is not clear why a citizen may be found to be an enemy combatant only by his own admission rather than by some other process or judicial body engaged in a fact-finding mission.[67] Courts undertake these tasks regularly; indeed, our entire system of criminal law depends on the fact-finding abilities of lay juries. It is not unreasonable to have a court or other body determine whether a citizen is an enemy combatant. Second, there are significant differences between the facts in *Milligan* and those in *Hamdi*. In the former, the Court rested its decision on the fact that Milligan was not a prisoner of war, but simply a citizen and resident of Indiana when he was arrested.[68] Instead, "[h]ad Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different."[69] Therefore, if Hamdi had been captured in the United States rather than on the battlefield in Afghanistan, *Milligan*'s holding—requiring Hamdi be tried in a

61. *Quirin*, 317 U.S. at 46.
62. *Hamdi*, 542 U.S. at 571–72 (Scalia, J., dissenting).
63. 71 U.S. 2 (1866).
64. *Id.* at 131.
65. *Id.* at 121.
66. *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting).
67. *Id.* at 523 (plurality opinion).
68. *Milligan*, 71 U.S. at 118.
69. *Hamdi*, 542 U.S. at 522 (plurality opinion).

U.S. criminal court—may have applied. Third, there is no reason that holding a citizen pursuant to criminal charges or via a suspension of the writ of habeas corpus are the only avenues in which to hold a citizen. A third option—detention—should be acceptable after a determination of enemy-combatant status, as long as there is congressional authorization to do so.[70]

Although this issue may not be completely settled as a matter of law, the labeling of citizens as enemy combatants has more legal justification than not. Thus, it is likely that such a determination can take place.

IV. DOES DUE PROCESS MEAN JUDICIAL PROCESS?

In a speech given at Northwestern University Law School on March 5, 2012, Attorney General Eric Holder said, "'Due process' and 'judicial process' are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process."[71] He was responding to critics who claimed that only a judicial body could deprive a citizen like al-Awlaki of his life.[72] Accordingly, it becomes necessary to survey what is required by the Fifth Amendment's procedural due process guarantee in the targeted-killing context.

A. Legal Background

The general rule is that "the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures."[73] Furthermore, "[a]n essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case."[74] In the criminal context, this means that a defendant is entitled to a judicial hearing.[75] However, there are instances in which something less than judicial review suffices. In

70. *Id.* at 523; 18 U.S.C. § 4001(a) (2012) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.").

71. Holder, *supra* note 37.

72. *See, e.g.*, Greenwald, *supra* note 21.

73. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).

74. *Id.* at 542 (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)) (internal quotation marks omitted).

75. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 330 (1993).

disputes involving "public rights,"[76] an administrative hearing is usually sufficient.[77] For example, when a public employee has access to the material upon which the charge against him is based, and could respond orally and in writing and present rebuttal affidavits, procedural due process is satisfied by an administrative hearing.[78] Additionally, in wartime, the government may immediately seize enemy property as long as "adequate provision is made for a return in case of mistake."[79] However, these exceptions to the general rule are not very instructive here for two reasons. First, they focus on deprivations of one's property interest, an interest that is markedly less significant than the interest in life. Second, they provide for ex post facto relief; that is, as long as there is some way for the complainant to present his claims after the property was taken, procedural due process is satisfied. That is impossible in the targeted-killing scenario; the target cannot come to court for potential relief after he is dead.

Furthermore, even in situations where judicial review is not required—that is, when an administrative hearing is sufficient to satisfy due process principles—the Supreme Court has still allowed judicial review to determine whether those administrative hearings are constitutionally sufficient. For example, a court was not precluded from reviewing a claim that administrative hearings for deportation orders violated due process.[80]

Even when agencies are granted broad discretion, judicial review is available.[81] In fact, the Court seems to require judicial review particularly when non-judicial officials act in a judicial capacity regarding constitutional issues.[82] And the Court even suggests that "[j]udicial review may indeed be required by the Constitution."[83] Finally, the weightier the private interest, the

76. Generally, "public rights" refer to those rights that are created by the federal government, such as land grants. Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 769, 819 (1986).

77. Fallon, *supra* note 75.

78. Arnett v. Kennedy, 416 U.S. 134, 163 (1974).

79. Cent. Union Trust Co. of N.Y. v. Garvan, 254 U.S. 554, 566 (1921).

80. McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 492–93 (1991).

81. Fallon, *supra* note 75, at 333 n.140 (citing Bowles v. Willingham, 321 U.S. 503, 516 (1944)).

82. *Id.* at 334.

83. Estep v. United States, 327 U.S. 114, 120 (1946).

higher likelihood that judicial review is required.[84] Thus, while simple findings of fact can be relegated to an administrative arm of the Executive Branch, more substantial interests of constitutional concern, like those discussed below in *Hamdi*, most likely need a judicial forum.[85]

B. Hamdi *and Due Process*

In addition to touching upon the legality of labeling citizens as enemy combatants, the *Hamdi* plurality also discussed the due process rights afforded to a citizen in Hamdi's position. The government submitted a factual basis for Hamdi's detention, the Mobb's Declaration, which stated that Hamdi was found in a battlefield in Afghanistan, was armed, and was affiliated with the Taliban (a covered entity under the AUMF).[86] The government's first argument was that this declaration was all that was necessary to satisfy the due process required under a petition for a writ of habeas corpus given the sensitive nature of the case.[87] The plurality easily rejected this reasoning since Hamdi "ha[d] not been permitted to speak for himself or even through counsel" to respond to these allegations.[88] However, the plurality did spend some time analyzing the government's second argument that "respect for separation of powers and the limited institutional capabilities of courts" should restrict courts to "investigating only whether legal authorization exists for the broader detention scheme" under a "some evidence" standard.[89] It ultimately undertook a weighing of interests under *Mathews v. Eldridge*[90]—Hamdi's liberty interest on one hand and the government's national security interests on the other—to come to the conclusion that Hamdi, and any other detainee, was entitled to "receive notice of the factual basis for his classification [as an enemy combatant], and a fair opportunity to rebut the Government's factual assertions before a neutral

84. Fallon, *supra* note 75, at 335 n.150 (citing Wong Wing v. United States, 163 U.S. 228, 237–38 (1896)) (stating that a judicial trial is needed if illegal entry is to be punished by imprisonment or confiscation of property).

85. *Id.* at 336.

86. Brief for the Respondent, *supra* note 51, at 4.

87. Hamdi v. Rumsfeld, 542 U.S. 507, 526 (2004).

88. *Id.*

89. *Id.* at 527. Under a "some evidence" standard, a court does not engage in a weighing of evidence, but rather only assesses whether the government's articulated basis for detention is a legitimate one. *Id.* at 527–28.

90. 424 U.S. 319 (1976).

decisionmaker."[91] Thus, *Hamdi* held that due process *does* mean judicial process for detainees who dispute their enemy–combatant status.

C. Judicial Process Is Required

Although it is difficult to balance the Executive's valid and weighty national security concerns with an individual's utmost interest in life, due process in the targeted-killing scenario will require some sort of judicial process. *Hamdi* is the most instructive: if one's liberty interest is sufficient to trigger some basic judicial process, it is likely that one's life interest, which is the ultimate private individual interest, will require at least the same. To fully analyze this issue, however, the same *Mathews* balancing of interests that *Hamdi* undertook is required here.

In *Hamdi,* the plurality identified the substantial government interests at play, all of which are relevant in the targeted-killing scenario. First, "core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them."[92] Undoubtedly, determining who is a sufficient threat, especially an imminent threat,[93] to U.S. interests during wartime to merit a lethal strike is included in the scope of this statement. The President, as Commander-in-Chief, is in the best position to make these decisions.[94] Second, if it is infeasible to capture the targeted individual,[95] it is in the interest of the Executive to carry out the next-best action, which, if it so concludes, may be a targeted strike. Third, the burden a judicial process would impose on the government may be substantial.[96] Any sort of litigation process may risk exposing national security secrets that courts historically have had very little appetite for delving into.[97]

On the other hand, the individual interest of any targeted

91. *Hamdi,* 542 U.S. at 533 (plurality opinion).

92. *Id.* at 531.

93. WHITE PAPER, *supra* note 31.

94. *See Hamdi,* 542 U.S. at 531 (plurality opinion) (citing Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988)) (noting the reluctance of courts "to intrude upon the authority of the Executive in military and national security affairs").

95. WHITE PAPER, *supra* note 31.

96. *Hamdi,* 542 U.S. at 531 (plurality opinion).

97. *See, e.g.,* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 53 (discussing the state secret privilege, which protects information from disclosure "where there is a reasonable danger that disclosure would expose military matters which, in the interests of national security, should not be divulged").

civilian is at its zenith. The *Hamdi* plurality considered the interests of an *erroneously* detained individual;[98] analogously, in the targeted-killing scenario, the interests of an erroneously targeted citizen must be considered. In other words, any due process rights a targeted citizen has are not dependent upon the merits of his substantive assertions.[99] The *Hamdi* plurality identified Hamdi's liberty interest in being free from physical detention as "the most elemental."[100] It continued, "[i]n our society liberty is the norm, and detention without trial is the carefully limited exception."[101] Given this strong language, it is difficult to think of words to describe the importance of the interest in life. If the *Hamdi* plurality refused to deny any judicial process for someone whose liberty was at stake, it is troublesome for it to be denied for someone whose life is at stake, especially given the fact that even the existence of war or accusations of treason cannot minimize this interest.[102] Lastly, an unchecked system in which the Executive Branch is solely responsible for determining and reviewing which citizens are to be placed on a kill list may become "a means for oppression and abuse of others who do not present that sort of threat."[103] In other words, there may be a real danger that a targeted-killing program may morph in the future to target citizens who do not meet the perhaps stringent standards required today.

The above suggests that the basic requirements of procedural due process—notice and an opportunity to be heard[104]—are required before a lethal strike takes place. Practical considerations, however, foreclose the traditional application of these prerequisites.[105] It is difficult to think of a scenario in which notice could be sent to a wanted terrorist. In fact, if the government is able to send notice to a citizen combatant, it is

98. *Hamdi*, 542 U.S. at 530 (plurality opinion).

99. *Id.* (quoting Carey v. Piphus, 435 U.S. 247, 266 (1978)) ("[T]he right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions.").

100. *Id.* at 529.

101. *Id.* (internal quotation marks omitted).

102. *See id.* at 530 ("[C]ommitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection . . . .") (internal quotation marks omitted).

103. *Id.*

104. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985).

105. *Cf. Hamdi*, 542 U.S. at 533 (plurality opinion) (recognizing that "the exigencies of the circumstances may demand that, aside from these core elements [of opportunity to be heard and notice], enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict").

likely able to capture him as well, mooting the issue. Given the military nature of this issue, then, a less stringent standard, such as constructive notice, is likely acceptable. But there is the concern that without actual notice, a senior member of al-Qaeda who is otherwise a legitimate target but who has renounced his evil ways would be unaware that the United States is still actively targeting him. In evaluating proper due process standards, however, weighing of interests must occur. The possibility of this scenario happening is vanishingly small, both due to the unlikelihood that a senior member of al-Qaeda would in reality renounce terrorism, and the fact that U.S. intelligence would likely become aware of it if he did. Practical considerations thus force a lower notice standard in this situation.

The traditional requirement of an opportunity to be heard must also be modified in this context. A traditional opportunity to be heard would require that the citizen combatant be afforded the opportunity to make his case in court or in some sort of hearing.[106] This scenario also moots the issue because the government can simply apprehend a citizen combatant who decides to defend himself via judicial process.[107] Theoretically, a third party may be able to satisfy Article III and "next-friend" standing in order to litigate the issue on the citizen combatant's behalf.[108] However, it is unlikely that these relatively stringent standards can be satisfied.[109] In the unlikely event a person can satisfy both, a court may be required to rule on the merits; however, the plaintiff would only be able to bring very narrow claims given the political question doctrine, discussed in Part VI.B, *infra*. Thus, practical considerations suggest that an opportunity to be heard should consist of an ex parte hearing. This balances the citizen combatant's interest in having some judicial process with the Executive's interest in an efficient process. Alternatively, a more adversarial approach could involve an advocate, appointed by the government, who represents the interests of the targeted citizen combatant against the government, not unlike an appointed public defender in the criminal-law context.[110] But this procedure may raise

106. *Id.*
107. *Id.*
108. *See, e.g.*, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 15 (D.D.C. 2010).
109. *See id.* at 23–35.
110. *Cf.* ANDREW NOLAN, RICHARD M. THOMPSON II, & VIVIAN S. CHU, CONG. RESEARCH SERV., INTRODUCING A PUBLIC ADVOCATE INTO THE FOREIGN INTELLIGENCE

constitutional questions itself, which is beyond the scope of this note.[111]

To summarize, some sort of judicial process is required. This conclusion is reached by considering the constitutional issues at stake, the very weighty individual interests at stake, and the holding in *Hamdi* requiring review of enemy-combatant determinations by a neutral fact finder. Because a court is often available to review Executive Branch procedures even when judicial review is not required, at the very minimum, some sort of judicial review must be provided to at least determine the sufficiency of the procedure currently provided to targeted citizens, which is discussed below. It is likely however, that judicial review is required to assess more than simply the sufficiency of the Executive Branch's already-existing procedures because of the heavy private interest at stake. Of course, any judicial review must take into account the political question doctrine, which reflects the Judicial Branch's reluctance to wade into policy matters more appropriate for the Executive or Legislative Branches.[112] This concern is discussed further in Part VI.A, *infra.*

V. WHAT IS THE PROCESS THE GOVERNMENT ALREADY PROVIDES TO TARGETED CITIZENS?

Given the above discussion on when judicial process is required, the next step is to determine what process the government already provides those citizens placed on kill lists and whether that comports with the judicial process requirement. Surprisingly little research has been done on the process that goes into the government placing an individual on a kill list. However, Gregory McNeal, an expert in national security law at Pepperdine University School of Law, has provided an in-depth review of this issue, which will inform much of the

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SURVEILLANCE ACT'S COURTS: SELECT LEGAL ISSUES (2013), *available at* http://justsecurity.org/wp-content/uploads/2013/10/CRS-Report-FISC-Public-Advocate-Oct.-25-2013.pdf [http://perma.cc/LR5G-EQN3] (discussing this proposal in the context of Foreign Intelligence Surveillance Courts).

111. *See id.*; *but see* Marty Lederman & Steve Vladeck, *The Constitutionality of a FISA "Special Advocate,"* JUST SECURITY (Nov. 4, 2013, 1:34 PM), http://justsecurity.org/2013/11/04/fisa-special-advocate-constitution/ [http://perma.cc/0JKGewUYSVk] (stating that most of the constitutional issues are "insubstantial or inapposite" and explaining why).

112. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

following discussion.[113]

A. The General Contours of the Strike Program

There is an intricate bureaucratic process that is involved before placing names on a kill list.[114] Both the military and the CIA maintain separate kill lists, with the former's processes thought to be more transparent than the latter's.[115] These two programs, however, are by no means completely distinct; they often share information with each other and are thought to follow similar procedures.[116]

As an initial matter, international law demands that the targeted individual be a member of an organized armed group.[117] Although some commentators believe that only those in a "continuous combat function" within that group can be targeted, the United States only requires sufficiently reliable evidence that the person is a member of that group.[118] In other words, individuals may be targeted based merely on their status, rather than their role, in an armed group.[119] However, this is unlikely to pose a problem in the citizen-combatant context in light of two of the prerequisites for a citizen to be targeted: first, he must be a senior al-Qaeda leader, and second, he must pose an imminent threat of violent attack against the United States,[120] which necessitates that he also serve a continuous combat function.

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113. Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. (forthcoming 2014) (on file with author) (abstract available at http://ssrn.com/abstract=1819583 [http://perma.cc/SJX2-28C8]).

114. *Id.* at 22–23.

115. *Id.* at 24. *See also* Gordon Lubold & Shane Harris, *Exclusive: The CIA, Not The Pentagon, Will Keep Running Obama's Drone War*, FOREIGN POLICY (Nov. 6, 2013), http://killerapps.foreignpolicy.com/posts/2013/11/05/cia_pentagon_drone_war_control [http://perma.cc/0zvPLKEv7Nn] (reporting that the planned migration of the CIA's drone program into the military's is stalled and unlikely to be completed).

116. McNeal, *supra* note 113, at 24–25.

117. *Id.* at 25 (citing Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, 57, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I], and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1(2), 13(3), June 8, 1977, 1125 U.NT.S. 609). There is a second accepted category: those who are directly participating in hostilities. Because this is a "fleeting, time delimited categorization," however, only those in the former category would most likely be added to a kill list. *Id.* at 25–26.

118. *Id.* at 27–28.

119. *Id.* at 28.

120. WHITE PAPER, *supra* note 31.

Next, when placing a name on a kill list, analysts adhere to the doctrine of effects-based targeting.[121] This entails analyzing the long- and short-term effects of targeting the individual, often recursively, to determine whether a strike advances U.S. strategic objectives.[122] The positive effects on U.S. strategic objectives of killing citizen combatants are obvious, as are the negative effects on enemy groups.[123] Because any targeted citizen combatant must be high-level al-Qaeda operatives,[124] they are often central nodes in the terrorist network, and eliminating them would be especially harmful to the network.[125] Thus, it is likely that any citizen placed on a kill list will fall within the doctrine relatively easily.

Although the DOJ White Paper gave a cursory view of which citizens the government considers dangerous enough to put on a kill list,[126] an analyst deciding who is worthy to be the target of a drone strike considers four specific factors: value, depth, recuperation, and capacity.[127] Value measures the "military, economic, political, psychological, informational, environmental, cultural, or geographic importance" an individual presents to his organization.[128] Depth measures the time between the strike and its effect on the organization, while recuperation represents the cost and amount of time required for an organization to recover from the strike.[129] Finally, capacity measures both the current and maximum "output" of the target.[130] Again, any citizen who is worthy enough to be placed on a kill list is likely to satisfy all of these criteria relatively easily since he would be required to be a senior al-Qaeda leader.[131]

Information about potential targets is collected in target folders, which are continuously updated with intelligence from a variety of sources, including human and signals intelligence

121. McNeal, *supra* note 113, at 29.
122. *Id.*
123. *Id.* at 29–32 (citing John Hardy & Paul Lushenko, *The High Value of Targeting: A Conceptual Model for Using HVT Against a Networked Enemy*, 12 DEFENCE STUDIES 413, 421 (Sept. 10, 2012)) (noting that, among other effects, "the constant removal of leadership impedes consistent guidance and coherent strategic communication, which weakens and delegitimizes leadership").
124. WHITE PAPER, *supra* note 31.
125. McNeal, *supra* note 113, at 38.
126. *See supra* text accompanying notes 32–36.
127. McNeal, *supra* note 113, at 36.
128. *Id.*
129. *Id.*
130. *Id.*
131. WHITE PAPER, *supra* note 31.

reports.[132] Analysts not involved in its collection review this information to ensure accuracy and reduce the likelihood of mistakes.[133] The target folders are maintained in a database that is now called the "disposition matrix."[134] The matrix is thought to include

> biographies, locations, known associates and affiliated organizations . . . strategies for taking targets down . . . capture operations and drone patrols . . . an operational menu that spells out each agency's role in case a suspect surfaces in an unexpected spot . . . [and] plans, including which U.S. naval vessels are in the vicinity and which charges the Justice Department should prepare.[135]

Gaps in intelligence are also included, and analysts can request more information they believe is necessary before targeting occurs.[136] A related database called "the playbook" contains the procedures on how to select and target suspects from the disposition matrix.[137]

B. Assessing and Approving Targets

Before targeting an individual for a strike, "members of agencies from across the government . . . comment on the validity of the target intelligence and any concerns related to targeting an individual. At a minimum, the vetting considers . . . target identification, significance, collateral damage estimates, location issues, impact on the enemy, environmental concerns, and intelligence gain/loss concerns."[138] There is also discussion about whether the strike will advance U.S. strategic interests, whether it will comport with any authority the Executive has to carry out such an action, such as the AUMF or a covert action finding, and whether the agency charged with carrying out the strike has the authority to do so.[139]

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132. McNeal, *supra* note 113, at 42–43 & n.169 (citing *Inside the CIA's "Kill List,"* PBS (Sept. 6, 2011), http://www.pbs.org/wgbh/pages/frontline/iraq-war-on-terror/topsecretamerica/inside-the-cias-kill-list/ [http://perma.cc/0YVhZB5a2vg]) (recounting that "[e]very name on the list had to be reviewed by the lawyers every six months, and some people were taken off it because the information became outdated").

133. *Id.* at 43.

134. *See supra* text accompanying note 38.

135. McNeal, *supra* note 113, at 44 (quoting Miller, *supra* note 38).

136. *Id.* at 44.

137. *Id.* at 43.

138. *Id.* at 45.

139. *Id.*

Furthermore, the legality of the strike is analyzed in light of the rules of armed conflict and rules of engagement.[140]

It is helpful to look at a real-life example illustrating some of these processes. Sheikh Mukhtar Robow was the third in command of al-Shabaab, a Somali terrorist group with al-Qaeda ties.[141] During the vetting process, State Department Legal Adviser Harold Koh and Department of Defense (DOD) General Counsel Jeh Johnson disagreed about targeting Robow.[142] Koh believed it would be unlawful to kill Robow, who seemed to oppose attacking the United States.[143] His name was removed from the kill list after secret meetings were convened to discuss the disagreement.[144]

When the time comes to finally place names on the kill list, senior administration officials gather weekly to vote; these weekly meetings are known as "Terror Tuesdays."[145] The officials are presented with a "baseball card" of information about the target: physical characteristics, rank in the terror organization, specific intelligence to support his nomination to the kill list, and the source of that information.[146] The officials may vote to concur, concur with comment, not concur, or abstain.[147] A unanimous decision is not always required; rather, concurrence with comment, non-concurrence, and abstention are all signals of greater risk factors the ultimate decision-maker must take into account when making the final decision to kill.[148]

In summary, various military and intelligence agencies compile information about potential targets from a variety of sources and make a recommendation.[149] These recommendations then go to a centralized location, usually the National Counterterrorism Center, which further vets the names on the list.[150] Next, the President's counterterrorism advisor (or

140. *Id.* at 45–46.

141. *Id.* at 47 (citing DANIEL KLAIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY 221 (2012)).

142. *Id.*

143. *Id.* at 48.

144. *Id.*

145. *Id.* at 49.

146. *Id.* Other information that may be included is a map of the target's activity, his cell phone number, his vehicle, and his patterns of life. *Id.*

147. *Id.* at 50. An abstention indicates the official has not independently reviewed the intelligence and thus cannot make a determination one way or another. *Id.*

148. *Id.*

149. *Id.* at 51.

150. *Id.*

other designee) convenes a meeting with the National Security Council (NSC), which includes top lawyers from various agencies (CIA, FBI, DOD, etc.) who offer their opinions on the legality of the strike.[151] If the NSC approves, final approval is sought from the President, and the target is once again evaluated before the strike finally occurs.[152]

C. Executing the Attack

When it comes time to actually execute the attack on the target, the administration claims to adhere to the laws of armed conflict, which include the principles of distinction, precautions, and proportionality.[153] These principles are not necessarily helpful in the procedural due process analysis of the targeted citizen combatant. Rather, they exist largely to ensure civilians are not harmed during the attack.[154] Nevertheless, it is helpful to understand the complete process that the government undertakes when carrying out a targeted killing.

The principle of distinction demands that the targeted individual is positively identified as the individual on the kill list in order to ensure that civilians who are not targeted will not be killed.[155] Precaution demands that the government mitigate the attack as much as is reasonable so there will not be an unreasonable amount of collateral damage.[156] Finally, proportionality prohibits attacks that will cause collateral damage that would be "excessive" compared to the military advantage presented.[157]

VI. WHAT CHANGES SHOULD BE MADE TO COMPORT WITH PROCEDURAL DUE PROCESS?

The conclusion reached in Part IV.C requires some sort of judicial process in the citizen-combatant, targeted-killing scenario. However, Part V above shows that the process currently given to targets clearly lacks a judicial component. Thus, there must be some changes in order to comply with procedural due

151. *Id.* Usually, an objection from one of these top lawyers would prevent an attack. *Id.* at 51–52.
152. *Id.* at 52.
153. *Id.* at 57 (citing AP I, *supra* note 117, at art. 51).
154. *Id.*; *id.* at 70 (citing AP I, *supra* note 117, at art. 57).
155. *Id.* at 57 (citing AP I, *supra* note 117, at art. 48).
156. *Id.* at 68–69.
157. *Id.* at 76 (citing AP I, *supra* note 117, at arts. 51, 57).

process. Even so, these changes must take into account courts' longstanding hesitancy to act on these matters per the political question doctrine.

A. The Political Question Doctrine

As discussed above in Part II.C, one of the bases of the district court's holding in *Al-Aulaqi v. Obama* was the political question doctrine.[158] That case, along with the earlier *El-Shifa Pharmaceutical Industries Co. v. United States*,[159] lays out the framework of the political question doctrine in the context of targeted strikes.

In 1998, under the direction of then-President Clinton, the United States launched a missile strike against a factory in Sudan thought to be involved in the production of weapons for Osama bin Laden and his network.[160] It became apparent, however, that the targeting was likely in error.[161] The owners of the factory sued the government, first demanding just compensation in the Court of Federal Claims pursuant to the Takings Clause and, when that case was dismissed on appeal in the Federal Circuit, demanding damages based on negligence, defamation, and destruction of property under the law of nations in the D.C. District Court, and eventually in the D.C. Circuit.[162]

Both courts of appeals dismissed the case based on the political question doctrine. The D.C. Circuit stated that hearing the plaintiffs' claims would necessarily require the court to determine that the bombing was "mistaken and not justified," an issue that the Judicial Branch is not equipped to answer: "[w]hether an attack on a foreign target is justified—that is whether it is warranted or well-grounded—is a quintessential policy choice and value determination constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[163] Even if the strike was in complete error, courts cannot engage in hindsight analysis in order to "guess[] how [the political branches] would have conducted the nation's foreign policy had they been better informed."[164] Put

158. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 52 (D.D.C. 2010).
159. 607 F.3d 836 (D.C. Cir. 2010).
160. *Id.* at 838.
161. *Id.* at 839.
162. *Id.* at 839–40.
163. *Id.* at 844–45 (internal quotation marks omitted).
164. *Id.* at 845.

bluntly, "courts cannot assess the merits of the President's decision to launch an attack on a foreign target."[165]

The *Al-Aulaqi* court engaged in a very similar analysis. It specifically identified four questions it would have to decide:

> (1) the precise nature and extent of Anwar Al-Aulaqi's affiliation with AQAP; (2) whether AQAP and al Qaeda are so closely linked that the defendants' targeted killing of Anwar Al-Aulaqi in Yemen would come within the United States's current armed conflict with al Qaeda; (3) whether . . . Anwar Al-Aulaqi's alleged terrorist activity renders him a concrete, specific, and imminent threat to life or physical safety; and (4) whether there are means short of lethal force that the United States could reasonably employ to address any threat that Anwar Al-Aulaqi poses to U.S. national security interests.[166]

It determined that these questions were non-justiciable under the political question doctrine since it would require the court to engage in an analysis more properly suited for the political branches.[167]

B. Addressing Political Question Concerns

It is possible, however, to give proper respect to the Executive Branch in national security matters while still fulfilling procedural due process requirements.

1. Separation of Powers Concerns

The basic concern under the political question doctrine is a judiciary that violates the separation of powers established in the Constitution, which charges the Executive Branch with leading military affairs.[168] It is true that the Executive has broad war powers, but the Supreme Court has long held that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[169] Thus, questions that relate to or involve war can nevertheless require judicial determination. For example, the Second Circuit has held that U.S. Foreign Intelligence Surveillance Courts (FISCs), which grant

165. *Id.* at 844.

166. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 46 (D.D.C. 2010) (internal citations and quotation marks omitted). AQAP refers to al-Qaeda in the Arabian Peninsula. *Id.* at 8.

167. *Id.* at 46.

168. U.S. CONST. art. II, § 2.

169. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion) (citing Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 587 (1952)).

surveillance warrants against suspected foreign intelligence agents inside the United States,[170] do not violate the political question doctrine by determining what information is "necessary to . . . the conduct of the foreign affairs of the United States"[171]—a definition of "foreign intelligence information" found in the Foreign Intelligence Surveillance Act.[172] This determination did not involve "ephemeral concepts" or political content, but rather involved "findings of objective fact not unlike those made in courtrooms every day."[173]

The targeted killing scenario presents a similar situation. Of the four questions identified by the *al-Aulaqi* court, the first two are suited to judicial determination. Rather than dealing with political or strategic military issues, a court deals with objective questions when asking if the target is affiliated with a terrorist group and if that terrorist group is sufficiently affiliated with al-Qaeda. For example, terrorist groups often publicly declare allegiance to al-Qaeda, a fact that can be determined in a court or tribunal.[174] Of course, there will be times where the connection is subtler and requires more fact-finding by the judicial body. On the other hand, the latter two questions—whether a citizen should be targeted and whether there is anything else the government can do to capture rather than kill—are purely political questions that courts are not equipped to handle. These involve judgments of a military nature and are properly reserved for the Executive Branch.

2. Confidentiality Concerns

Determining the extent of al-Awlaki's participation with AQAP will undoubtedly force a court or tribunal to analyze potentially confidential information that the Executive Branch has reason to keep confidential. Yet courts have developed processes for dealing with sensitive information. FISCs, for example,

170. 50 U.S.C. § 1805 (2011).

171. United States v. Duggan, 743 F.2d 59, 74 (2d Cir. 1984). Despite its age, *Duggan* is still binding precedent in the Second Circuit. United States v. Stewart, 590 F.3d 93, 126 (2d Cir. 2009).

172. 50 U.S.C. § 1801(e)(2)(B) (2011).

173. *Duggan*, 743 F.2d at 74 (internal quotation marks omitted).

174. *See, e.g.*, Saad Abedine & Jason Hanna, *Syrian Jihad Group Pledges Allegiance to al Qaeda, Denies Merger*, CNN, Apr. 10, 2013, http://www.cnn.com/2013/04/10/world/meast/syria-al-nusra-front [http://perma.cc/0GPsNx9ujs2] (reporting that al-Nusra Front, a jihadist group fighting in the Syrian civil war, has pledged allegiance to al-Qaeda leader Ayman al-Zawahiri).

constantly deal with sensitive information and have evolved to basically become "secret courts." Their proceedings are done on an in camera and ex parte basis, so there is no danger that sensitive information is exposed to a party opposing the government.[175] Similarly, a court or tribunal with these procedures can be convened to determine the question of whether a citizen combatant is sufficiently affiliated with a terrorist organization. Given the significant national security interests at stake, the burden of proof on the government need not—and should not—be stringent. A probable cause standard similar to that practiced in the FISCs can be sufficient to satisfy due process.

3. Timeliness Concerns

Another potential concern with a judicial process overseeing some aspect of the targeted-killing program of citizens is the fact that judicial review inevitably takes time that military commanders cannot afford to spend. But these concerns are exaggerated. For instance, the government placed al-Awlaki on a kill list in April 2010, first attempted an actual strike more than one year later in May 2011,[176] and was finally able to kill him four months later in September 2011.[177] The thirteen-month lag between the time the U.S. placed al-Awlaki on the kill list and when it first attempted a strike suggests that the standard of "imminence" explained in the DOJ White Paper has a broad, flexible meaning.[178] Thus, the Executive would only have to deal with minimal hurdles in terms of timeliness. It would not be forced to call a "drone judge" for last-minute approval to carry out a strike; rather, it would present evidence to a judge months or years in advance of any actual strike in order to get approval to place a citizen on the kill list. Once approval is given, the government would have the authority to strike at a time of its discretion, provided that it engages in the intelligence review described in Part V, *supra*.

175. 50 U.S.C. § 1806(f) (2011).

176. Miller, *supra* note 16 and accompanying text.

177. *Islamist Cleric Anwar al-Awlaki Killed in Yemen*, *supra* note 1 and accompanying text.

178. *See supra* text accompanying note 31.

C. The Sufficiency of the Process Already Afforded, Regardless of Venue

Notwithstanding the lack of *judicial* process, the actual process the Executive already undertakes before placing a name on a kill list seems to be sufficient to comply with due process requirements. The Executive performs a weighing of interests as demanded by *Hamdi*, albeit in a roundabout way. For example, to determine whether the government's national security interests are sufficient, the Executive analyzes the long- and short-term effects of a lethal strike on U.S. strategic objectives,[179] considers four specific factors that illuminate whether a target is dangerous enough to be placed on a kill list,[180] and continually updates intelligence on the target from a variety of sources.[181] Thus, if a court were to review the process (without reviewing the actual merits of the government's arguments),[182] it would likely find the process sufficient.

VII. CONCLUSION

It is a difficult question whether judicial process is necessary before the government can lethally target a U.S. citizen who has joined enemy forces abroad with a drone strike, especially given the political question doctrine. But a careful analysis of the issues suggests that some sort of judicial process is necessary. First, Supreme Court precedent suggests that citizens can be named enemy combatants, a threshold question in analyzing this issue. Next, due process in the targeted-killing scenario likely means judicial process, which the government does not currently provide to targeted citizens. Rather, only the Executive Branch analyzes whether a citizen should be placed on a kill list, a process that would likely be constitutional if a court were performing the analysis. A court engaging in this analysis, however, must not decide any questions beyond those absolutely necessary. Thus, for example, while it is proper for a court to determine whether a citizen is sufficiently linked to a terrorist group, and whether that group is sufficiently linked to al-Qaeda (giving the government authority to act under the AUMF), it would be improper for it to determine whether the citizen posed an imminent threat or if capture was infeasible. The latter

179. *See supra* text accompanying notes 121–25.
180. *See supra* text accompanying notes 127–30.
181. *See supra* text accompanying notes 132–36.
182. *See supra* text accompanying note 80.

questions are ones that the judicial system is not suited to handle.

President Obama has recently begun reviewing proposals to establish a "special court to evaluate and authorize lethal action."[183] And increasing public awareness of the possible effects of drone strikes will only further the "drone court" debate.[184]

183. President Barack Obama, Remarks of President Barack Obama (May 23, 2013) (transcript available at http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama [http://perma.cc/84WJ-PD93]).

184. *See* Melinda Henneberger, *From Pakistan, Family Comes to Tell of Drone Strike's Toll*, WASH. POST, Oct. 29, 2013, http://www.washingtonpost.com/world/national-security/from-pakistan-family-comes-to-tell-of-drone-strikes-toll/2013/10/29/453fb990-4025-11e3-a751-f032898f2dbc_story.html [http://perma.cc/0gcc8vkK27n] (reporting on a Pakistani family, survivors of a drone strike, who spoke before Congress about their experience).


TEXAS REVIEW OF
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