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

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To quote Stevie Ray Vaughan, "there's floodin' down in Texas." The recent rain has raised riverbeds and reservoirs but has not fully restored the Great State to its normal water levels. Similarly, the Fifth Circuit's recent decision not to issue a stay on the temporary injunction blocking President Obama's Deferred Action for Parental Accountability (DAPA) initiative has softened the constitutional drought of the Obama Administration without fully solving it. Increasingly, legal and political storm clouds have resulted in welcome rainwater that is slowly restoring the rule of law to its old levels. Some storms, though, have caused metaphorical flood damage in areas with weakened legal infrastructure. Like Texans in the last few weeks, conservatives and libertarians are renewing their dedication to each other in a time of crisis. The *Review* is fortunate to have authors calling for unity, constitutionality, and sound policy.

These themes are the heart of *A Constitutional Conservatism for Our Time.* Senator Orrin Hatch calls on Americans—particularly conservatives—to come together to uphold the Constitution. He urges citizens to reign in the federal regulatory burden and demand accountability—not only from agencies, but also from Congress. Senator Hatch calls for a principled Judiciary to avoid making political decisions, and advocates jurisprudence with procedural requirements such as litigants with concrete interests at stake. This call to unified action should raise all ships as Republicans enter a long presidential election cycle.

Modeling principled and limited jurisprudence, the Fifth Circuit recently decided to neither stay the temporary injunction against DAPA nor reach the broad merits of the case. Anticipating the case on the merits later this summer, Professor Josh Blackman argues that President Obama violated his presidential duty to take care that the laws be faithfully executed. In *The Constitutionality of DAPA Part II: Faithfully Executing the Law,* Professor Blackman sets forth the legal test behind the Take Care Clause. Applying the test shows that the President failed even to act in good faith. Professor Blackman's tight legal analysis refuses to entertain policy preferences and will help reinforce the Constitution for years to come.

Professor John S. Baker Jr. takes readers to the Gulf of Mexico to explore the bizarre world of class settlement lawsuits. In *The BP Gulf Oil Spill Class Settlement: Redistributive "Justice?,"* Professor Baker explores the constitutional problems with class settlements generally and specifically. After the BP oil spill, BP agreed to a class settlement of the claims, only to find out that not every plaintiff had been injured by the spill. When BP tried to limit

payment to actual victims, it began a long and litigious journey that ended without a decision in its favor or Supreme Court review. Professor Baker analyzes the constitutional standing problems, including the legitimacy of allowing academics to direct litigation without a personal stake in the outcome. Years of "litigating for reform" have created an environment for class action lawsuits that is parched for a drop of constitutional requirements and no clouds seem ready on the horizon.

The BP oil spill was devastating, but nuclear war would be worse. Matthew Manning explains why nuclear nonproliferation has failed both practically and legally in *Peeking into the Abyss: What Pakistan and the A.Q. Khan Network Tell Us About the Future of Nuclear Nonproliferation.* Starting with the life and network of Pakistan's A.Q. Khan, Manning explains how lax security measures and corporate greed allowed a Pakistani metallurgist to build and sell nuclear weapons. Part patriotism, part ego, and part greed, A.Q. Khan created a world that the United Nation's Nonproliferation Treaty is ill-equipped to solve.

Although not nuclear, the dangerous proliferation of Internet pornography has harmed many sectors of society. In *Nudge, Don't Thrust: The Application of Behavioral Law and Economics to America's Porn Addiction,* yours truly proposes applying insights from behavioral law and economics to help individuals quit watching pornography. Sensitive to issues of liberty and overregulation, I explain how these policies are asymmetrically paternalistic, creating gains for those who want help without harming those who do not. Many concepts are already at work in the private sphere, avoiding controversial questions about overregulation and First Amendment case law. Instead, these insights properly protect both individuals and their liberty.

This semester the staff of the *Review* has implemented a small change in our citation format for websites. Each website now contains a shortened hyperlink and the vested "perma" citation. This saves space in footnotes, reduces printing costs, and increases readability while still providing direct and permanent links to online sources.

I hope these articles continue to replenish our discourse and our jurisprudence after the long draining of our constitutional reservoirs. I cannot sufficiently thank Adam Ross, Brantley Starr, Amy Davis, or the editors for the honor and joy of serving with them to publish the *Review.* I will miss you and the reddest office in the world.

Alexandra Harrison
Editor in Chief

Austin, Texas
June 2015

A CONSTITUTIONAL CONSERVATISM FOR OUR TIME

BY U.S. SENATOR ORRIN HATCH*

* U.S. Senator for Utah, 1977–present; Chairman of the Senate Finance Committee; member (and former Chairman) of the Senate Judiciary Committee; member (and former Chairman) of the Senate Health, Education, Labor, and Pensions Committee; and Vice Chairman of the Joint Committee on Taxation.

This article was adapted from a speech given at the Federalist Society National Lawyers Convention in Washington, D.C. on November 14, 2014.

I. INTRODUCTION

The Federalist Society has long been near and dear to my heart. I have been a proud member for decades. And contrary to some of the Left's more vivid fantasies, our society is not some secret right-wing cabal. It is a forum for vibrant debate among our diverse membership, made up of conservatives, libertarians, and moderates. The Federalist Society was born out of a reaction to the unbridled activism of the Supreme Court in the 1960s and '70s.[1] For decades, our mission has come from a shared antipathy to the policy-driven manipulation of the law in service of political ends.

Today, the society stands united against the current President's unprecedented executive overreach. We Federalists care deeply about the separation of powers and the rule of law, and these past six years have seen a myriad of abuses by this Administration.[2] Beyond the legal realm, dissatisfaction with the President has grown[3] as Americans increasingly worry that his policies have left us less prosperous at home and less secure in the world.[4]

The American people went to the polls in November and delivered a decisive blow to President Obama and his progressive agenda. They put conservative majorities in charge of the legislative branch,[5] and gave us the opportunity to steer the nation in a better direction.

But articulating the case against the Obama Administration is the easy part. Advancing our convictions through the constructive task of governing is much harder. This challenge is only made more difficult by the divisions we face as a conservative movement. Some commentators eagerly highlight divisions on the political Right—between Tea Party and the

1. MICHAEL AVERY & DANIELLE MCLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS 1–2 (2013).

2. *See, e.g.*, ERIC CANTOR, THE IMPERIAL PRESIDENCY: 2014 ADDENDUM *available at* http://bit.ly/1FAiQ33 [perma.cc/48KS-BCHF].

3. *See* Dan Balz & Scott Clement, *Poll Shows Obama Approval Low, GOP Enthusiasm Higher Than Democrats'*, WASH. POST, Oct. 15, 2014, http://wapo.st/1OFylA6 [perma.cc/VGT9-G27P] (noting polls showing President Obama's approval rating at an all-time low).

4. *See Presidential Ratings—Issues Approval*, GALLUP, http://bit.ly/1zem7Yg [perma.cc/A9FM-AXEU] (last visited Apr. 7, 2015) (showing disapproval ratings of 63% and 59% for President Obama's handling of the economy and foreign affairs as of November 2014).

5. David A. Fahrenthold, *GOP Dominates Midterms, Takes Control of Senate*, WASH. POST, Nov. 5, 2014, http://wapo.st/1DX0lnD [perma.cc/2XN9-AMAY].

establishment, purists and pragmatists, libertarians and social conservatives, populists and elites, hawks and isolationists.[6] It is incumbent upon those of us who seek to lead—especially those of us who hold elected office—to develop a positive, constructive agenda that can help unite such factions and present a compelling vision to Americans searching for a way out of our current problems. We must offer solutions, not shutdowns.[7]

Developing a shared national vision must involve more than simply identifying a set of policy proposals that satisfy various ideological constituencies. We must root our agenda in timeless principles and explain to the American people why those principles—and the policies that flow from them—offer the best way forward.

II. CONSERVATISM AND THE CONSTITUTION

Despite what some critics might say, I have been a committed conservative throughout my entire public life. Today, I still cherish the same principles that first brought me to Washington as the vanguard of the Reagan Revolution in the Senate. As a conservative, I have always been struck by how the fundamental insight of conservatism lies at the root of the word: conserve. To be a conservative means to be committed to preserving the institutions and traditions that make our nation so great and so free.

Conservatives recognize that our Constitution gave us a precious gift: a system of government that is both active and restrained.[8] The Constitution endows the federal government with the powers to confront inevitable challenges, but it also checks those powers.[9] This central thrust of the Constitution—the creation of a limited but capable government[10]—in turn helps to preserve a society in which families and communities have space to thrive. We conservatives revere and defend the Constitution, not merely because it protects individual liberty

6. *E.g.*, *GOP Divisions on Display at Conservative Conference*, USA TODAY, Mar. 6, 2014, http://usat.ly/1bfC598 [perma.cc/75R9-N5K4]; Jim Rutenberg, *Divisions in G.O.P. are Laid Bare on First Day of Conservative Conference*, N.Y. TIMES, Mar. 14, 2013, http://nyti.ms/1QLz7u4 [perma.cc/8KE9-ZUAG].

7. *See generally* Burgess Everett, *Dems Paint GOP as Shutdown Party*, POLITICO, Aug. 27, 2014, http://politi.co/1Q76YfB [perma.cc/BD3N-QCT2] (detailing Democrats' accusations and Republicans' defenses that Republicans are the "shutdown party").

8. *See* THE FEDERALIST NO. 46 (James Madison).

9. *Id.*

10. *Id.*

and self-government, but also because it helps make real the kind of society in which our civic and social institutions can flourish.

I have been greatly encouraged in recent years by the renewed focus among conservatives on the Constitution. As we seek to develop a positive, affirmative agenda, we must always keep the Constitution as our guide. By restoring the Constitution as our foundation, we remain true to the title: conservative. We conserve our founding principles and apply those principles to today's challenges. This must be an active process and one that each of us has an independent obligation to undertake.

A. Separation of Powers

For too long, most Americans have treated the Constitution as the exclusive province of the Judiciary,[11] but legislators like me cannot simply rely on judges to tell us whether our proposals are constitutional. This tendency to leave things to the courts diminishes the other branches' role in the constitutional system and overlooks the many lessons the Constitution has to teach. While the courts are charged with the important task of saying what the law *is*,[12] and not what the law *should be*, the Judiciary's role in assessing constitutionality is a narrow one. Judges ask primarily whether a law satisfies some legal rule announced in a previous case: Is the regulated activity commerce?[13] Is the punishment for noncompliance a tax or a penalty?[14]

But my role as a legislator is not about deciding questions of policy based on legalistic reasoning or seeking to restore the 1789 or 1868 status quo. For those of us in elected office, fidelity to the Constitution requires looking to the principles that undergird it—values like individual liberty, respect for civil society, and popular accountability—to determine whether a proposed course of action is wise.

Take Obamacare,[15] for example. I challenged the

11. *See* CHRISTOPHER WOLFE, HERITAGE FOUND., FROM CONSTITUTIONAL INTERPRETATION TO JUDICIAL ACTIVISM: THE TRANSFORMATION OF JUDICIAL REVIEW IN AMERICA 11 (2006), *available at* http://herit.ag/1EAldoe [perma.cc/4LSV-5H4H] (noting the view that protecting fundamental rights "had been entrusted to, and could only be adequately done by, the judiciary").

12. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

13. United States v. Lopez, 514 U.S. 549, 567–68 (1995).

14. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2583 (2012).

15. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119.

constitutionality of Obamacare from its inception.[16] Notwithstanding the Supreme Court's contortions,[17] the individual mandate undoubtedly exceeds Congress's powers under the Constitution. But that is not the only reason Obamacare conflicts with the Constitution—it also violates many of the enduring principles manifested in the Constitution. It erodes liberty by compelling individuals to purchase insurance against their will,[18] it undermines federalism by coercing state governments to expand Medicaid,[19] it dilutes the separation of powers by transferring vast legislative authority to the Executive,[20] and so on.

Whether a law meets the legal tests the Supreme Court has set forth does not end the inquiry for those of us who view the Constitution as our guide. Instead, we must practice what some call "political constitutionalism": the idea that political actors bear most of the burden in "making political decisions to protect and promote constitutional goals."[21] The Constitution contains many lessons that teach good lawmaking: checks on government power ensure accountability;[22] most decisions affecting Americans' lives should be made at the local level, rather than by some distant, federal bureaucracy;[23] and, consistent with the Constitution's many divisions of power, sudden lurches in policymaking should be avoided, while more modest improvements supported by broad coalitions should be encouraged.[24]

B. Prudence

Perhaps most fundamentally, the Constitution teaches the virtue of prudence. Prudence is a habit of mind that should

16. Press Release, Senator Orrin Hatch, President's Flawed Health Care Process Meets First Major Snag (June 15, 2009), *available at* http://1.usa.gov/1JFHqpp [perma.cc/V845-5URF].

17. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2583, 2594–95 (upholding the individual mandate as a valid exercise of Congress's taxing power while simultaneously viewing the mandate as a penalty and *not* a tax for purposes of the Anti-Injunction Act).

18. *See* 26 U.S.C. § 5000A (2013).

19. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2603–04.

20. *See* George F. Will, *Government by the 'Experts,'* WASH. POST, June 10, 2011, http://wapo.st/1E1JX5m [perma.cc/66U5-JTJJ].

21. James W. Ceaser, *Restoring the Constitution*, CLAREMONT REV. BOOKS, Spring 2012, *available at* http://bit.ly/1Jek1b9 [perma.cc/L9P2-W7AR].

22. *See* THE FEDERALIST NO. 51 (James Madison).

23. *See* THE FEDERALIST NO. 46 (James Madison).

24. *See* Phillip Wallach & Justus Myers, *The Conservative Governing Disposition*, NAT'L AFF., Summer 2014, at 136, *available at* http://bit.ly/1QTxA52 [perma.cc/3HT5-5V8D].

come naturally to conservatives. It restrains us from seeking immediate and complete vindication of a single abstract principle. It counsels us to work within our existing circumstances to advance the enduring principles upon which liberty depends. Prudent lawmakers make real-world experience, not abstract theory, their guide, and recognize that success requires harmonizing competing values. The Constitution is an exercise in such prudence. It contains within its structure a clash of many competing institutions: the democratic, majoritarian House; the deliberative Senate; the unified and energetic Executive; and the independent Judiciary. There is tension between individual rights and majority will; energy and stability; and limited powers and flexibility to act. The Constitution mediates many rival goods. It is founded on compromise, and it institutionalizes prudence as a signal virtue of our republic.

As conservatives, we have been most successful when we have tempered our ideological zeal with the prudence necessary to produce practical results. Many conservative leaders and thinkers eagerly wrap themselves in the mantle of Ronald Reagan.[25] But as time has passed, President Reagan's legacy has become increasingly prone to misappropriation and misuse. I recommend a recent essay in *Commentary* magazine by Henry Olsen and Peter Wehner that dispels some of the myths that have been perpetuated about Reagan, including claims that he was an inflexible ideologue.[26] I was a personal friend of President Reagan—a foot soldier of the Reagan Revolution in the Senate, and the recipient of what I am told was his only pre-primary endorsement ever.[27] I often feel duty-bound to remind my fellow conservatives that President Reagan never prized ideological purity over concrete results. When faced with divided government, President Reagan did not choose a my-way-or-the-

25. *See* Eric Ostermeier, *Win One for the Gipper: Invoking Reagan at the GOP Debates*, SMART POL. (Nov. 21, 2011), http://bit.ly/1I2VoBa [perma.cc/4SMW-C88H].

26. Henry Olsen & Peter Wehner, *If Ronald Reagan Were Alive Today, He Would Be 103 Years Old*, COMMENT., Nov. 1, 2014, http://bit.ly/1DP7ozw [perma.cc/8BEX-BKYP].

27. Ronald Reagan, *A Telegraph from Ronald Reagan to all the People of Utah*, SALT LAKE TRIB., Sept. 12, 1976, at 9, *available at* http://bit.ly/1Q78oH0 [perma.cc/YY9K-3X49?type=pdf] (telegraph from Ronald Reagan endorsing Orrin Hatch for the 1976 Utah Senate primary).

highway approach; instead, he searched for areas of agreement.[28] That meant accepting that some of our noble goals—such as restraining spending[29] and reforming the administrative state[30]—were out of reach at the time. But it enabled President Reagan to make meaningful progress in other, equally critical areas, like pro-growth tax relief[31] and bolstering our national defense.[32] This progress generated economic prosperity[33] and helped win the Cold War.[34]

Today, we honor President Reagan's legacy, not by mischaracterizing his record or engaging in idol-worship, but by seeking to thoughtfully emulate his leadership in a way that is adapted to current challenges. As in the age of Reagan, our task as conservatives today is to conserve—to retain what works and what is true to our constitutional structure as we work to correct the excesses of recent years and decades.

For some programs, such as Obamacare, this means seeking to repeal the program root-and-branch, and replacing it with one that is both more effective and more in line with limited government and a free society. For other programs that have become more embedded in the fabric of American society, advancing reforms consistent with the cause of constitutionalism will involve more incremental improvements.

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28. *See* RONALD REAGAN, AN AMERICAN LIFE 171 (1990) ("If you got seventy-five or eighty percent of what you were asking for, I say, you take it and fight for the rest later . . . ."); *see also* Mark Z. Barabak, *The Real Ronald Reagan May Not Meet Today's GOP Standards*, L.A. TIMES, Sept. 6, 2011, http://lat.ms/1Q78IW9 [perma.cc/F4GM-FT33] ("Reagan was a pragmatist, willing, when necessary, to cut a deal and compromise.").

29. *See* Hedrick Smith, *Reagan's Budget Stance; News Analysis*, N.Y. TIMES, May 19, 1983, http://nyti.ms/1Apxjww [perma.cc/WV3K-ZA2H] (noting that, according to an aide, President Reagan "was willing to take more on domestic spending than he wanted" for the sake of compromise).

30. *See* Thomas O. McGarity, *Regulatory Reform in the Reagan Era*, 45 MD. L. REV. 253, 261–70 (1986) (describing Reagan's early plans for regulatory reform and the subsequent pushback from the Legislative and Judicial Branches).

31. President Ronald Reagan, Remarks on Signing the Tax Reform Act of 1986 (Oct. 22, 1986), *available at* http://bit.ly/1zjYFJ3 [perma.cc/52MQ-KX9X] (describing the act as "the most sweeping overhaul of our tax code in our nation's history").

32. Tom Bowman, *Reagan Guided Huge Buildup in Arms Race*, BALT. SUN, June 8, 2004, http://bsun.md/1EAnzTZ [perma.cc/WAK6-BPUX] ("Reagan presided over the biggest peacetime defense buildup in history . . . .").

33. Peter B. Sperry, *The Real Reagan Economic Record: Responsible and Successful Fiscal Policy*, HERITAGE FOUND. (Mar. 1, 2001), http://herit.ag/1I2VLvp [perma.cc/VX2R-V9ZK] ("[Reagan's] policies resulted in the largest peacetime economic boom in American history and nearly 35 million more jobs.").

34. Bowman, *supra* note 32.

III. REGULATORY REFORM

Now that we have a renewed ability to pursue our legislative priorities, laying out a principled, forward-looking, conservative agenda is more important than ever. In a recent speech at the Reagan Ranch in California, I suggested several things that should be a part of this agenda, including patient-centered healthcare reforms to enhance choice and restrain costs, tax reform to spur economic growth and create jobs, an innovation agenda to build the economy of the future, and a social mobility agenda to help all of our fellow citizens live the American Dream.[35]

In my remaining time today, I want to discuss some ideas for regulatory reform—an issue of particular interest to Federalist Society members. In particular, I wish to suggest how the incoming Senate majority can model our legislative approach on the constitutional conservative vision I have just articulated.

A room such as this is full of separation-of-powers enthusiasts. At the mere mention of the monstrosity that is the current administrative state, many of you are ready to launch a crusade in the name of the nondelegation doctrine.[36] Let me assure you that I share your sentiments. Regulatory reform has been a focus for me since my early days in the Senate. Twice—in 1981 and again in 1995—I led comprehensive regulatory reform efforts that nearly became law.[37] Today, major reform is once again within reach, and it is more important now than ever.

But we must also acknowledge that many do not share our zeal for the finer points of structural constitutional law. Indeed, in the past, progressives have successfully labeled most regulatory reform efforts as attempts to discard even the most basic regulations, trotting out a parade of horribles like dirty air,

35. Senator Orrin G. Hatch, Remarks at the Reagan Ranch: Constitutional Conservatism and the Senate GOP Agenda (Oct. 8, 2014), *available at* http://1.usa.gov/1DHkNZl [perma.cc/VNM7-RFHG] at 6–10.

36. *See generally* Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the* Chevron *and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 938–40 (2006).

37. Regulatory Reform Act, S. 1080, 97th Cong. (1981); Comprehensive Regulatory Reform Act of 1995, S. 343, 104th Cong. (1995).

polluted water, and poisonous children's toys.[38] Such rhetoric holds great sway with the general public because most of us want clean air and water, safe children's toys, and the like.

As a society, we have come to expect and rely on a basic level of health and safety regulation. Though we may deplore the modern administrative state's constitutional infirmities, seeking to tear down the entire regulatory state in one fell swoop—or to end the federal government's power to regulate altogether—does not amount to a serious governing agenda. By instead crafting our proposals to respond to the most pressing problems presented by an overweening administrative state, I believe we can make serious progress in rolling back the regulatory menace.

Perhaps the two most troublesome features of the modern administrative state are the size of our regulatory burden and the lack of accountability in the regulatory process. The growing federal regulatory burden has been a concern for decades, but the problem is now worse than ever. The numbers of regulations and their combined cost have exploded in recent years.[39] The American people are now bound by more than one million individual restrictions in the Federal Register, with a total cost of around $1.86 trillion each year;[40] this makes up about 11 percent of our total GDP, amounts to around $15,000 per household, and totals over $300 billion more than the combined annual individual and corporate taxes.[41] In short, our regulatory burden is enormous.

Even as we resist President Obama's mad dash to add new

38. *E.g.*, S. REP. NO. 106–110, at 66 (1999), *available at* http://bit.ly/1OLWEfV [perma.cc/6KDN-QEWP] (minority views signed by Senators Joseph Lieberman, Daniel Akaka, Dick Durbin, Robert Torricelli, and John Edwards: "As elected representatives, we have an obligation to the people we serve to protect them from harm, and that includes protecting people from breathing polluted air, drinking poisonous water, eating contaminated food, working under hazardous conditions, exposing children to unsafe toys, and becoming victims of consumer fraud.").

39. *See* James L. Gattuso & Diane Katz, *Red Tape Rising: Five Years of Regulatory Expansion*, HERITAGE FOUND., (Mar. 26, 2014), http://herit.ag/1Q79UsF [perma.cc/29QX-BBA7] ("Issuing 157 new major rules at a cost to Americans approaching $73 billion *annually*, the Obama Administration is very likely the most regulatory in history.").

40. Wayne Crews & Ryan Young, *Twenty Years of Non-Stop Regulation*, AM. SPECTATOR, June 5, 2013, http://bit.ly/1E1KT9W [perma.cc/6Y7Q-FABS]; Clyde Wayne Crews, *Report Finds Regulation Compliance Costs Businesses $1.86 Trillion*, COMPETITIVE ENTERPRISE INST. (June 17, 2014) [hereinafter *Report Costs*], http://bit.ly/1GNbv5j [perma.cc/S8XQ-NNFF].

41. CLYDE WAYNE CREWS, JR., COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS: 2014, at 2 (2013), *available at* http://bit.ly/1eLiK1O [perma.cc/V3WG-S3HA]; *Report Costs*, *supra* note 40.

rules, our nation simply cannot afford to ignore the crushing burden of existing regulations. They weigh down our efforts to boost economic growth and make it impossible to get the country back on track. Every president from Jimmy Carter to Barack Obama embraced the notion that we should repeal outdated, unsuccessful, or otherwise ineffective regulations.[42] Nevertheless, the cumulative regulatory burden continues to expand year after year.[43]

To address this growing problem, I am partnering with Congressman Jason Smith to introduce the Senate version of the SCRUB Act—Searching for and Cutting Regulations that are Unnecessarily Burdensome.[44] This legislation creates a bipartisan commission to examine the entire administrative corpus in search of regulations that are obsolete, outdated, ineffective, overlapping, duplicative, or unjustified.[45] Its goal is to achieve a fifteen percent cost reduction in our nation's total regulatory burden.[46] The commission can recommend either immediate repeal or incremental reform through a flexible, cut-as-you-go procedure that ensures a smooth process for agencies, the regulated community, and the public.[47]

The SCRUB Act turns a long-standing bipartisan commitment to retrospective regulatory review from mere rhetoric into meaningful reality. It would result in lower prices, higher wages, and more job opportunities for hardworking Americans.[48] Such common-sense regulatory review poses no risk to our health, our safety, or our environment. It is the kind of legislation that can earn support from both sides of the aisle—and for which there is a realistic path to having it enacted into law. It is exactly the sort of reform that constitutional conservatives should champion because it restores individual liberty, fuels shared prosperity, and addresses many of our most pressing economic challenges.

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42. *See* PHILLIP J. COOPER, THE WAR AGAINST REGULATION: FROM JIMMY CARTER TO GEORGE W. BUSH 14–141 (2009); *see also* Nicholas Johnston & Mike Dorning, *Obama Orders Regulation Review to Boost U.S. Growth*, BLOOMBERG BUS., Jan. 18, 2011, http://bloom.bg/1bJLaYv [perma.cc/3USG-AC88].

43. *See* GATTUSO & KATZ, *supra* note 39.

44. SCRUB Act of 2014, S. 3011, 113th Cong. (2014); Lydia Wheeler, *Legislation Aimed at Eliminating Costly Regs Introduced in Senate*, HILL, Dec. 15, 2014, http://bit.ly/1GCfNHt [perma.cc/N5YB-AMAE].

45. S. 3011 § 101(h)(2).

46. *Id.* at § 101(h)(1).

47. *Id.* at § 201(a)–(b).

48. *See* Kevin R. Jenkins, *U.S. Rep. Smith Reintroduces SCRUB Act*, DAILY J., Mar. 5, 2015, http://bit.ly/1dAOKFl [perma.cc/9UXP-VYZX].

A second critical flaw in the current administrative state is a fundamental lack of accountability in how the federal government makes and enforces regulations. I hardly need to rehash how broken the regulatory process has become—how agencies and interest groups manipulate the rules and stack the deck against innovators, entrepreneurs, and ordinary citizens. Abuses of the regulatory process have become so commonplace that they have almost come to be expected and are often ignored.

Thankfully, there are a number of meaningful avenues for potential reform. I have been encouraged by the many good ideas for retooling the Administrative Procedure Act, including the latest iteration of the Regulatory Accountability Act, introduced by Senator Rob Portman.[49] This important legislation provides much-needed relief to individuals and businesses by restoring regulatory transparency, requiring evidence-based rulemaking, and ensuring that agencies comply with their basic duty to conduct cost-benefit analyses for the new burdens they seek to impose.[50]

One area that has thus far escaped much legislative attention is the role the federal Judiciary plays in the regulatory process. Given the broad authority that Congress has ceded to the administrative agencies, the courts often stand as the only true independent check on increasingly out-of-control regulators. But recent abuses by the political branches have created serious challenges for effective and appropriate judicial review of the regulatory process. By writing vague laws, Congress has created extraordinarily flexible grants of authority that are both unwise and constitutionally troublesome.[51] Judicial deference to agency interpretations of the law has magnified this power to an extreme degree. Although originally intended as a means of curtailing judicial activism, *Chevron*[52] and associated doctrines

49. Regulatory Accountability Act of 2013, S. 1029, 113th Cong. (2013).

50. *See id.*

51. *See* Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 304–07 (1988) (explaining that Congress deliberately avoids definitively resolving policy issues, making judicial review of Congress's resolutions of policy issues difficult).

52. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

have resulted in a gross misallocation of lawmaking authority.[53] Such doctrines consigned courts to be rubber stamps rather than effective checks on administrative overreach.

The threat of toothless judicial oversight of increasingly problematic regulatory action was only heightened when President Obama and his allies packed the D.C. Circuit with compliant judges even less inclined to engage in meaningful administrative review.[54] And Congress's creation of broadly available private rights of action—to challenge administrative decisions and regulatory activities[55]—has opened another avenue for abuse of the courts. While these provisions provide important opportunities for regulated parties to defend their liberties, too often they have allowed groups with no concrete stake in the process to use the courts as a means to drive their own ideological agendas.[56] Worse yet, inconsistent efforts by the Judiciary to define the constitutional limits on standing have inadvertently created a perverse environment in which businesses with real skin in the game are often shut out of court, while special-interest groups with no meaningful injury-in-fact are allowed to litigate.[57]

Restoring the constitutionally proper judicial role is vital to returning accountability to the regulatory process. In reviewing agency actions, courts should hear only real cases and controversies in which litigants have concrete interests at stake. But when courts do rule, they should say firmly what the law is and not simply ratify what the regulatory agencies argue that the law should be. Legislation to ensure meaningful reform on these fronts—and to thereby bring the administrative state more in line with the Constitution—will be one of my top priorities in the

53. *See generally* E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 16 (2005) (explaining that *Chevron* took policy-making authority away from the Judiciary and gave it to agencies, but disagreeing that this was harmful).

54. *See* Editorial, *Why Democrats Packed the Court*, WALL ST. J., Sept. 8, 2014, http://on.wsj.com/1OLXnO2 [perma.cc/F56J-KAGZ].

55. 5 U.S.C. § 702 (2013) ("A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof.").

56. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 571–78 (1992).

57. *Compare* Grocery Mfrs. Ass'n v. Envtl Prot. Agency, 693 F.3d 169 (D.C. Cir. 2012) (holding that engine manufacturers, petroleum suppliers, and food producers did not have standing to challenge agency action allowing introduction of new blend of gasoline and ethanol), *with* Natural Res. Def. Council v. Envtl. Prot. Agency, 464 F.3d 1 (D.C. Cir. 2006) (granting standing to an environmental group to challenge final rule governing critical use of methyl bromide based on a 1-in-200,000 generalized risk of developing nonfatal skin cancer).

coming Congress.

These are the kind of reforms that I believe conservatives should champion in the upcoming Congress and beyond. Unburdening Americans from a bloated, overweening regulatory state that seeks to police virtually every aspect of life will give citizens and communities room to thrive. It will also help lead us to a richer, more robust society.

IV. CONCLUSION

You may recall the *Life of Julia* ad from President Obama's reelection campaign, which tells the story of a young woman who graduates college, has a child, and works until retirement, all with nary a mention of a mother, father, brother, sister, husband, or other family member.[58] Instead, Julia owes all her successes and opportunities in life to the federal government, which is there to support her every step along the way.[59] The ad is a perfect distillation of the ultimate end of the progressive state—government as replacement for family and community, God and priest, mentor and friend.[60] That is neither the government our nation's founders envisioned, nor the one they created.[61]

Government's role is not to provide universal, social, and economic support, but rather to create opportunities and remove obstacles. A vigorous, dynamic constitutional conservatism that includes regulatory reform among its chief priorities will help return government to its proper role: that of supporter, not director. By keeping the Constitution as our guide and working to conserve our founding principles, we can offer an affirmative agenda to unite the conservative movement and win the hearts and minds of a broad majority of Americans looking for change.

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58. *See* DAVID B. MUHLHAUSEN, DO FEDERAL SOCIAL PROGRAMS WORK? 12 (2013) (explaining the Life of Julia slideshow). The slideshow, originally posted to www.barackobama.com/life-of-julia, has been removed.

59. *Id.*

60. *See* Yuval Levin, *The Life of Julia*, NAT'L REV. CORNER, May 3, 2012, http://bit.ly/1QTB9IK [perma.cc/QU5Q-2VLJ].

61. *See* Letter from Thomas Jefferson to William Ludlow (Sept. 6, 1824), *in* 16 THE WRITINGS OF THOMAS JEFFERSON 76 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903) ("I think, myself, that we have more machinery of government than is necessary, too many parasites living on the labor of the industrious.").

THE CONSTITUTIONALITY OF DAPA PART II: FAITHFULLY EXECUTING THE LAW

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* Assistant Professor, South Texas College of Law. This article profited greatly from comments and conversations with Nicholas Bagley, Randy Barnett, Peter Margulies, David Pozen, Zachary Price, Nicholas Quinn Rosenkranz, Timothy Sandefur, Ilya Shapiro, and Ilya Somin. My special thanks to Alexandra Harrison and the editors of TROLP, who skillfully published this article on a super-expedited calendar—from submission on December 26, 2014 to publication on April 25, 2015.

I. INTRODUCTION

Article II imposes a duty on the President unlike any other in the Constitution: he "shall take Care that the Laws be faithfully executed."[1] More precisely, it imposes four distinct but interconnected duties. First, the imperative "shall" commands the President to execute the laws. Second, in doing so, the President must act with "care." Third, the object of that duty is "the Laws" enacted by Congress. Fourth, in executing the laws with care, the President must act "faithfully." A careful examination of the four elements of the Take Care Clause provides a comprehensive framework to determine whether the executive has complied with his constitutional duty. This article assesses the constitutionality of President Obama's executive actions on immigration through the lens of the Take Care Clause.

Part II provides a textual exegesis of the Take Care Clause. Through references to common law doctrines, as well as background principles of the Supreme Court's separation-of-powers jurisprudence, I analyze the text and history of these four critical elements and the scope of the duty they impose on the President.

Part III introduces President Obama's two primary executive actions on immigration. First, Deferred Action for Childhood Arrivals (DACA) was a 2012 policy that suspended the deportations of roughly one million "Dreamers"—those who were brought to this country unlawfully as minors.[2] Second, Deferred Action for Parental Accountability (DAPA) was a 2014 policy that suspended the deportations of more than four million alien parents of minor U.S. citizens and lawful permanent residents.[3] Both policies, occasioned by the defeat of

1. U.S. CONST. art. II, § 3.

2. JANET NAPOLITANO, U.S. DEP'T OF HOMELAND SEC., EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN 1–3 (2012), *available at* http://1.usa.gov/1HhLmMa [perma.cc/4LUE-9QMK]; Miriam Jordan, *'Dreamers' Vow to Fight On for Their Illegal-Immigrant Parents*, WALL ST. J., Nov. 20, 2014, http://on.wsj.com/1cXJStJ [perma.cc/3DAJ-R2G9].

3. JEH CHARLES JOHNSON, U.S. DEP'T OF HOMELAND SEC., EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN AND WITH RESPECT TO CERTAIN INDIVIDUALS WHO ARE THE PARENTS OF U.S. CITIZENS OR PERMANENT RESIDENTS 4 (2014), *available at* http://bit.ly/1IESyiH [perma.cc/7TJ2-38JW]; *Executive Actions on Immigration*, USCIS, http://bit.ly/1HsiaR2 [perma.cc/G2R8-XCLK] (last updated Mar. 3, 2015) (estimating roughly 4.9 million individuals may be eligible for DAPA, but expecting fewer to come forward); Erica Werner & Jim Kuhnhenn, *White House Puts Immigration Plans on Hold After Ruling*, YAHOO!

legislation in Congress, were announced through executive memoranda.[4] The Office of Legal Counsel (OLC) issued an opinion justifying the legality of both policies, explaining that deferrals are presumptively lawful if made on a "case-by-case" basis and based on a policy that is "consonant" with congressional policy.[5] The remainder of the article demonstrates why neither of these principles holds true: DAPA neither employs an individualized, case-by-case analysis, nor is consonant with long-standing congressional policy.

Part IV turns to the imperative of the Take Care Clause: the President "shall" execute the laws. Although the Supreme Court has not directly addressed when this command is violated, it has held in the administrative-law context that an executive policy would be reviewable if an "agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."[6] This test, though framed in terms of reviewability, at its core parallels the failure of the Executive Branch to execute the laws. With respect to DAPA, the government adopted an extremely broad policy that restricts the ability of officers to enforce the immigration laws.[7] DAPA was not consciously and expressly adopted as a means to enforce the laws of Congress or to conserve limited resources. Instead, it was adopted to exempt nearly forty percent of all undocumented aliens in the United States, even those who were not previously subject to any enforcement action, from the threat of removal, and to provide them with work authorization.[8] While the policy is based on the selective enforcement of the immigration laws, it is unprecedented to excuse over four million people—a class Congress did not deem worthy of preferential treatment—from the scope of the naturalization power.[9]

Part V considers whether the implementation of DACA was

NEWS, Feb. 17, 2015, http://yhoo.it/1DAahmQ [perma.cc/M2SZ-J9GQ] (estimating four million individuals would be eligible for DAPA).

4. *See* JOHNSON, *supra* note 3; NAPOLITANO, *supra* note 2.

5. *See* KARL R. THOMPSON, OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, THE DEPARTMENT OF HOMELAND SECURITY'S AUTHORITY TO PRIORITIZE REMOVAL OF CERTAIN ALIENS UNLAWFULLY PRESENT IN THE UNITED STATES AND TO DEFER REMOVAL OF OTHERS 6–7 (2014), *available at* http://bit.ly/1Qh5mRF [perma.cc/NDX3-55G5].

6. Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985) (quoting Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).

7. *See* JOHNSON, *supra* note 3, at 4–5.

8. *See id.*; Werner & Kuhnhenn, *supra* note 3.

9. U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish a uniform Rule of Naturalization . . . .").

done with "care." Like the common law of torts, the Constitution imposes a particular standard of care. The President cannot act negligently or recklessly, but must act with caution toward the laws of Congress. DACA was designed with a disregard for the Immigration and Nationality Act[10] in at least three ways. First, the case-by-case discretion at the heart of all aspects of prosecution was supplanted by the Secretary's blanket policy. No deviations were allowed for individualized judgment. Second, through the so-called "lean and lite" review, the Department of Homeland Security (DHS) limited the depth of investigation that officers could employ to dig into an application.[11] In this sense, the officers were procedurally constrained from investigating various indicia of fraud that would normally counsel against providing relief.[12] Third, DHS weakened the scope of officer discretion by restricting officers' duty to checking boxes on a template.[13] Substantively, the Secretary's preferences prevailed, displacing any meaningful case-by-case review. A veteran United States Citizenship and Immigration Services (USCIS) officer declared that the Administration "has taken several steps to ensure that DACA applications receive *rubber-stamped approvals* rather than thorough investigations."[14] As the limitations on the officer's individual discretion show, and behind the pretense of conserving resources, DACA was not designed with "care" for the laws, but as a deliberate means to bypass them.

In part VI, I will employ Justice Jackson's tripartite prism in *Youngstown Sheet & Tube Co. v. Sawyer*[15] to shine some light on the legitimacy (or illegitimacy) of DAPA. DAPA is a perfect storm of executive lawmaking, and deflects the analysis to the bottom tier. First, the President is not acting in concert with Congress; Congress either rejected or failed to pass immigration reform

10. 8 U.S.C. §§ 1101–1537 (2013).

11. *Deferred Action on Immigration: Implications & Unanswered Questions: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. 9 (2015) (statement of Luke Peter Bellocchi, Former Deputy Ombudsman for Citizenship & Immigration Services) [hereinafter *Bellocchi Testimony*], *available at* http://1.usa.gov/1bhjmdM [perma.cc/FB9X-KHGM].

12. *Id.*

13. *See* JOHNSON, *supra* note 3, at 4–5.

14. Plaintiffs' Reply in Support of Motion for Preliminary Injunction, at Exh. 23, at app. 0854, Texas v. United States, No. 1:14-CV-254, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015) [hereinafter Plaintiffs' Reply] (emphasis added), *available at* http://bit.ly/1yNoEs9 [perma.cc/QX5N-ZRDP]. All exhibits are attached to Texas's Reply in Support of Motion for Preliminary Injunction and are available at http://bit.ly/1EcEyNp [perma.cc/5UUS-588K].

15. 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

bills reflecting his policy preferences numerous times. Second, Congress has not acquiesced in a pattern of analogous executive actions; previous uses were typically ancillary to statutory grants of lawful status or responsive to extraordinary inequities on a very limited scale.[16] Third, there is no murky "twilight" about congressional intent; both houses of Congress proactively sought to defund DAPA, as the President threatened to veto the appropriations bill.[17] In this bottom rung of authority, presidential power is at its "lowest ebb," without any presumption of constitutionality.[18]

Part VII completes the clause. If the President has disregarded the laws without care, the Constitution imposes one final hurdle: the President's mistakes must have been in good faith, not as pretext for unlawful actions. The former is regrettable, yet acceptable. The latter is unconstitutional. To assess the motives of the Executive in failing to comply with the law, this part first considers how, like the mythical phoenix, DACA and DAPA arose from the ashes of congressional defeat. Implementing executive action to achieve several of the key statutory goals that Congress voted *against* reflects a deliberate attempt to circumvent an uncooperative Legislature. This conclusion is bolstered by the fact that prior to the defeats of DACA and DAPA, President Obama—the "sole organ" of the Executive Branch—consistently stated that he lacked the power to defer the deportations of millions by himself.[19] Once the bills were voted down, however, he conveniently discovered new fonts of authority.

While flip-flops are par for the course in politics and usually warrant no mention in constitutional discourse, they are salient for the Take Care Clause. They establish a prima facie case of bad faith. The revised rationales speak directly to the Executive's motives and whether he mistakenly failed to comply with his constitutional duty or deliberately bypassed the Congress. All signs point toward the latter.

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16. *See* Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. ONLINE 96 (2015) [hereinafter *Constitutionality of DAPA Part I*], *available at* http://bit.ly/1brKPdo [perma.cc/E9EN-ZMCE].

17. Conn Carroll, *House Passes Spending Bill Defunding Obama's Amnesty*, TOWNHALL.COM, Jan. 14, 2015, http://bit.ly/1K3ghtN [perma.cc/3Y4G-7XBU].

18. *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring).

19. Leigh Ann Caldwell, *Obama Said He Can't Stop Deportations of Immigrants, But Maybe He Can*, CNN, Nov. 26, 2013, http://cnn.it/1ODI1FY [perma.cc/B5HJ-BG6W].

While no single factor renders DAPA unconstitutional, when viewed in its entirety, DAPA flouts the duties imposed by the Take Care Clause. Once antecedent legislation had been defeated, the President deliberately aimed to transform discretion into a rubber stamp—even though he previously disclaimed the authority to act unilaterally. This pattern of behavior amounts to a deliberate effort to undermine the laws of Congress, not to act in good faith. The President's duty under Article II has been violated, dislodging Article II's fulcrum, and knocking out of orbit this fixed star in our constitutional constellation.

II. FAITHFULLY EXECUTING THE LAW

Article II, Section III of the Constitution provides that the President "shall take Care that the Laws be faithfully executed."[20] A textual examination of the clause reveals that this constitutional duty entails four distinct but interconnected components. First, has the President conflicted with the "shall" command by declining to execute the law? If the President abdicates the duty entirely, there is a clear case of a constitutional violation. But typically the failure to execute the law falls along a spectrum. Second, is the President acting with "care" or "regard" for his duty? The more flagrant the lack of regard—evidenced by the scope of the deviation from the laws of Congress—the stronger the case that the actions were unconstitutional. Here, the statutes and policies of Congress determine the disjunction between the Legislative and Executive Branches. Third, do the laws of Congress vest the Executive with discretion to decline to enforce the statute, or has the Legislature given him an unambiguous directive? If the President violated an unambiguous directive, then the action is not entitled to a presumption of deference. Fourth and most importantly, the clause requires an investigation into whether the President executed the laws in good faith. Only when the first three factors point toward a constitutional violation should the President's motivations be brought into question. But at this

20. U.S. CONST. art II, § 3. For an analysis of the text, history, and structure of the Take Care Clause, see generally Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 688–715 (2014); for an analysis of the constitutionality of DACA, see generally Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013).

stage, it becomes the cornerstone of the Take Care Clause.

A. "Shall" Imposes an Imperative on the Executive

Our Constitution strikes a stark asymmetry with respect to the duties and obligations of Congress and the President. In Article I, Congress bears *no* affirmative duties.[21] "Congress shall have Power" to make a number of laws,[22] but need not do so. The only duties Congress owes to the other branches concern compensation for the President and federal judges—these commands appear in Article II[23] and Article III,[24] not in Article I.[25] This structure reflects the framers' design that the Congress need not, and indeed cannot, act unless majorities of the House and Senate agree.

Article II operates in a diametrically opposite manner on the unitary executive. While congressional power is bound in discretion and agreement, the Executive power bears heavy responsibilities. This philosophy is embodied in the constitutional duty to "take Care that the Laws be faithfully executed."[26] Section I vests the office of the Presidency and determines how he is elected.[27] Section II grants the President a number of authorities.[28] Virtually all of these duties are prefaced by *shall*: "shall be Commander-in-Chief" and "shall have Power to grant Reprieves and Pardons."[29] Several of the key "shall" duties may only be exercised "by and with the Advice and Consent of the Senate," such as the power to "make Treaties," and "nominate" ambassadors, ministers, judges, and officers of the United States.[30]

The Constitution does not simply vest the President with powers concerning his own office, but imposes a duty on the

21. *See* Josh Blackman, Gridlock and Executive Power 17 (Jul. 15, 2014) [hereinafter Gridlock and Executive Power] (unpublished manuscript), *available at* http://bit.ly/1yNp3uN [perma.cc/7JPW-2E3A].

22. U.S. CONST. art. I, § 8.

23. U.S. CONST. art. II, § 1, cl. 7.

24. U.S. CONST. art. III, § 1.

25. Notably, the Guarantee Clause does impose some duties on Congress. U.S. CONST. art. IV, § 4; *see also* Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) ("Under [art. IV, § 4] it rests with Congress to decide what government is the established one in a State.").

26. U.S. CONST. art. II, § 3.

27. U.S. CONST. art. II, § 1.

28. U.S. CONST. art. II, § 2.

29. *Id.*

30. *Id.*

President to *execute* the laws of Congress with those powers.[31] Specifically, Article II, Section III defines the scope of the President's affirmative obligations toward Congress. First, the President "shall from time to time give to the Congress Information of the State of the Union."[32] This is a duty the President cannot shirk; Congress must be apprised of the state of the nation to inform its governance.[33] Second, the President "shall receive Ambassadors and other public Ministers."[34] He must engage with this aspect of foreign diplomacy, which limits what is sometimes viewed as an unfettered power over foreign affairs. Third, the President "shall Commission all the Officers of the United States."[35] The President has an obligation to commission officers for whatever positions Congress creates. Fourth, "on extraordinary Occasions," the President "may"—not must—"adjourn" or "convene" Congress.[36] Indeed, so as not to unduly infringe on the separation of powers, the Framers limited that responsibility to circumstances where the President "shall think [it] proper," rather than at his whim.[37]

This background brings us to the all-important Take Care Clause. First, this is a duty the President *shall*—not may—perform or decline as he thinks proper. President George Washington wrote to Alexander Hamilton concerning the enforcement of unpopular tax laws that it was his "duty to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to it."[38] There is no other command in the Constitution that mandates that any branch execute a delegated power in a specific manner.

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31. U.S. CONST. art. II, § 3.

32. *Id.*

33. Arguably, the Constitution also imposes on Congress the duty to receive the President's State of the Union, as the President could not discharge his duties unless it was accepted. *See id.* ("He shall . . . give to the Congress Information of the State of the Union.").

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id. But see* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819) (construing the word "proper" in the Necessary and Proper Clause to mean "convenient").

38. Letter from George Washington to Alexander Hamilton (Sept. 7, 1792), *available at* http://1.usa.gov/1Fczt8A [perma.cc/H9PE-8DX8]. The Solicitor General has recently affirmed to the Supreme Court that the Take Care Clause imposes a "duty" on the President. *See* Brief for the Petitioner at 63, NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) (No. 12-1281) ("That result would directly undermine the President's *duty* to 'take Care that the Laws be faithfully executed' . . . .") (emphasis added).

As the Framers' progenitors recognized over three centuries ago, "the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal."[39] The Virginia Declaration of Rights, authored by George Mason a month before American independence was declared, prohibited suspension of law as a "basis and foundation of government." Virginia declared that "all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights and ought not to be exercised."[40] This history contributed to the development of the Take Care Clause.[41]

During the Constitutional Convention, on Monday, June 4, Pierce Butler of South Carolina proposed a resolution "that the National Executive have a power to suspend any legislative act."[42] Benjamin Franklin seconded the motion.[43] Elbridge Gerry retorted that "a power of suspending might do all the mischief dreaded from the negative [veto] of useful laws; without answering the salutary purpose of checking unjust or unwise ones."[44] On the question of "giving this suspending power," all states voted *no*.[45] The ability to dispense this power would throw a wrench in the interlocking gears that power our republic.

B. The Executive Must Act with "Care"

Second, the Constitution prescribes the manner in which the execution must be performed: the President shall "take care." Professor Natelson explains that the phrase "take care" was employed in "power-conferring documents" in which an official assigned a task to an agent, in both the Colonial Era and the Continental Congress.[46] Delahunty and Yoo reach a similar

39. ENGLISH BILL OF RIGHTS, 1 W. & M., 2d sess., c. 2 (1689) *available at* http://bit.ly/1aTHZMX [perma.cc/PNU2-2KX6]; *see also* Delahunty & Yoo, *supra* note 20, at 803 ("[S]cholars have argued that the Take Care Clause . . . is closely related to the English Bill of Rights of 1689.").

40. VIRGINIA DECLARATION OF RIGHTS § 7 (1776), *available at* http://1.usa.gov/1yPZMjW [perma.cc/T374-QUZZ].

41. Delahunty & Yoo, *supra* note 20, at 803; *see also* Price, *supra* note 20, at 692–93.

42. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 103 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS, VOL. 1], *available at* http://bit.ly/1PdMjX1 [perma.cc/D9HD-WSRU].

43. *Id.*

44. *Id.* at 104.

45. *Id.*; *see also* Price, *supra* note 20, at 693.

46. Robert G. Natelson, *The Original Meaning of the Constitution's "Executive Vesting*

conclusion, finding that the clause "charge[s] the President with the duty or responsibility of executing the laws, or at least of supervising the performance of those who do execute them."[47] The use of the passive voice supports the conclusion that the President need not execute all the laws personally.[48]

Today, "care" means something very similar to what it meant two centuries ago. Dr. Samuel Johnson's 1755 *Dictionary of the English Language* provides five definitions of "care," including "concern," "caution," "regard," "attention," and "object of care."[49] In several of the examples, the word "care" is prefaced with "take," as it is in the Constitution.[50] Noah Webster's 1828 *American Dictionary of the English Language* similarly defines the noun "care" as including "[c]aution; a looking to; regard; attention, or heed, with a view to safety or protection, as in the phrase, *take care* of yourself."[51] Webster, like Johnson, explained how the verb "care" could be prefaced by "to," as in "[t]o *take care*, to be careful; to be solicitous for" and "[t]o *take care* of, to superintend or oversee; to have the charge of keeping or securing."[52]

Read against this background, the Constitution imposes a presidential standard of care when the President executes his duties.[53] Providing meaning to the text of the Take Care Clause by reference to common law doctrines is consistent with originalist construction,[54] and reflects the "unwritten practices that shape interbranch struggle more generally."[55] Applying this

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Clause"—Evidence from Eighteenth-Century Drafting Practice, 31 WHITTIER L. REV. 1, 14 & n.59 (2009).

47. Delahunty & Yoo, *supra* note 20, at 799.

48. *Id.* at 800.

49. 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 328 (1755) [hereinafter JOHNSON'S DICTIONARY], *available at* http://bit.ly/1HSpS7x [perma.cc/9ZDN-SNQC].

50. *Id.*

51. 1 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) [hereinafter WEBSTER'S DICTIONARY] (emphasis added), *available at* http://bit.ly/1GgqAJz [perma.cc/2SLF-N4HS].

52. WEBSTER'S DICTIONARY, *supra* note 51 (emphasis added), *available at* http://bit.ly/1aQj90l [perma.cc/N4GE-4SEU].

53. RESTATEMENT (FIRST) OF TORTS § 283 (1934) ("Unless the actor is a child or an insane person, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.").

54. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 504 (2013) ("But suppose that 'due process of law' was a term of art that was understood by the linguistic subcommunity of persons learned in the law to refer to relatively specific features of the system of *procedure provided by common law and equity in the late eighteenth century*.") (emphasis added).

55. *See* David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 4 (2014)

approach yields a requirement that the President supervise his subordinates, ensuring that they enforce the law with "caution" or "regard to the law." This is a common feature of the law of agency,[56] whereby a "principal who authorizes his agent to so act 'on his behalf' consensually empowers the agent to exercise certain rights that the principal alone would normally exercise."[57] The officers of the United States—whom the President appoints and the Senate confirms—can complete these tasks. But the President's supervisory role is to ensure that the laws are "executed," and that he or his agents do so with "care."

C. The President Executes "The Laws" of Congress

Third, the President's duty extends not to his own powers or preferences, but to the "Laws." What are these laws that he is supposed to "execute"? Read in the context of Article II, Section III, which reflects the relationship between Congress and the Presidency, this phrase is most naturally read to refer to the "supreme Law of the Land."[58] Among these supreme laws are the laws of Congress, which the President must execute.[59] In this sense, "Congress is the first mover in the mechanism of United States law."[60] The President can only execute laws that Congress passed.[61]

Johnson's dictionary defines the verb "execute" with a direct reference to the principles of agency: "To put in act; to do what is planned or determined."[62] Planned by whom? Johnson explains with a theologically apt example from Richard Hooker's *Laws of the Ecclesiastical Polity*: "Men may not devi[s]e laws, but are bound for ever to u[s]e and execute tho[s]e which God hath delivered."[63] In other words, the agent, man, puts into effect the

(suggesting that private law and doctrines of public international law can inform our understanding of how the separation of powers has developed).

56. *See* Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1038 (2011).

57. Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CALIF. L. REV. 1969, 1981 (1987).

58. *See* U.S. CONST. art. II, § 3; U.S. CONST. art. VI.

59. Natelson, *supra* note 46, at 31; Price, *supra* note 20, at 688.

60. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1895 (2005).

61. *Id.*

62. JOHNSON'S DICTIONARY, *supra* note 49, at 736, *available at* http://bit.ly/1GhbFSt [perma.cc/ZLS6-DUF8].

63. *Id.* (quoting Hooker) (emphasis removed); *see also* Delahunty & Yoo, *supra* note

laws of the principal, God. In *The Federalist*, Hamilton similarly viewed the relationship between the branches in terms of agency: "every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. . . . To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master . . . ."[64]

In this sense, and akin to the law of agency,[65] the President serves as a faithful agent to Congress and to the people—the ultimate sovereigns and the residual of all legitimate governance.[66] The people elect Congress to write the laws and choose the President to enforce the laws on their behalf. The scope of this duty would "depend on an implicit understanding of the principal's expectations as much as on any explicit directives."[67] Specifically, "[w]hat exactly would Congress, or the public, consider a faithful performance of the President's duties?"[68]

Viewed this way, the Take Care Clause is the fulcrum that holds our entire system of governance together. The President always has an independent constitutional duty to not obey unconstitutional laws,[69] as well as the prerogative "to violate statutory law on the grounds of compelling public necessity."[70] But, he must remain a *faithful* steward of the laws of Congress, and cannot shirk that duty when he disagrees with them.[71]

20, at 799.

64. THE FEDERALIST NO. 78, at 492 (Alexander Hamilton) (Benjamin Fletcher Wright, ed., Barnes & Noble, Inc. 1996)(1961).

65. RESTATEMENT (FIRST) OF AGENCY § 20 (1933) ("A person who has capacity to affect his legal relations by the giving of consent has capacity to authorize an agent to act for him with the same effect as if he were to act in person.").

66. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 186–87 (1st ed. 2004).

67. Price, *supra* note 20, at 698.

68. *Id.*

69. To continue the analogies to the law of agency, the Constitution presents a superior interest, to which the agent is bound, above the principal's interests. The President cannot violate the Constitution, even if the Congress and the sovereign people instruct him to (at least absent a constitutional amendment). RESTATEMENT (FIRST) OF AGENCY § 383 (1933) ("Except when he is privileged to protect his own or another's interests, an agent is subject to a duty to the principal not to act in the principal's affairs except in accordance with the principal's manifestation of consent.").

70. Delahunty & Yoo, *supra* note 20, at 808.

71. *See* RESTATEMENT (FIRST) OF AGENCY § 23 (1933) ("One whose interests are adverse to those of another may be authorized to act on behalf of the other; it is a breach of duty for him so to act without revealing the existence and extent of such adverse interests.").

D. Executing the Laws in Good "Faith"

Fourth and most importantly, after imposing the imperative with the appropriate standard of care and specifying the subject of the action, the Constitution defines how the President's duty should be executed: "faithfully." This part of the article provides an in-depth examination of the text and history of the Take Care Clause, and its relationship to long-standing common-law notions of good faith.

1. The Faithful History of the Take Care Clause

The Take Care Clause draws from a rich pedigree of colonial-era constitutions limiting state executives from suspending the law. The post-revolutionary Constitutions of New York,[72] Pennsylvania,[73] and Vermont[74] employed similar standards to define the role of the Executive—all requiring faithful execution. By 1787, six states "had constitutional clauses restricting the power to suspend or dispense with laws to the [L]egislature."[75]

During the Constitutional Convention, the President's duty to execute the laws went through several evolutions. These changes highlight the importance the framers placed on the duty of faithfulness. An early version of the Take Care Clause appeared in the Virginia Plan on May 29, 1787. It vested the "National Executive" with the "general authority to execute the National laws."[76] On June 1, the Convention adopted a revised version of the clause: the executive was "with power to carry into execution the national laws."[77] At this point there were no qualifications for faithfulness. A proposal to give the President the power "to carry into execution the nationl. [sic] laws" was agreed to unanimously on July 17th.[78]

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72. N.Y. CONST. OF 1777, art. XIX.

73. PA. CONST. OF 1776, § 20.

74. VT. CONST. OF 1777, ch. 2, § XVIII.

75. Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1534 (2012) (citing early constitutions of Delaware, Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia).

76. FARRAND'S RECORDS, VOL. 1, *supra* note 42, at 21; *see also* Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 1001–02 (1993) (analyzing the history of the Take Care Clause).

77. FARRAND'S RECORDS, VOL. 1, *supra* note 42, at 63.

78. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 32 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS, VOL. 2], *available at* http://bit.ly/1yNpFk7 [perma.cc/LW8A-9GYJ].

On July 26, this provision was sent to the Committee of Detail.[79] The Committee of Detail considered two different formulations: First, "He shall take Care to the best of his Ability."[80] Second, John Rutledge suggested an alternate: "It shall be his duty to provide for the due & faithful exec[ution] of the Laws."[81] The final version, reported out by the Committee on August 6, hewed closer to Rutledge's proposal: "He shall take care that the laws of the United States be duly and faithfully executed."[82] The Committee of Detail rejected a provision that would have been linked to the "best of" the President's "ability," which the Oath of Office ultimately adopted.[83] Rather, the Committee focused on "due" and "faithful" execution.

On September 8, the Committee of Style and Arrangement[84] received a draft that included the term "duly."[85] By September 12, however, the Committee had dropped the term "duly."[86] The final version read, "he shall take care that the laws be faithfully executed."[87] There is no recorded account of why "duly" was dropped, and the focus was placed solely on "faithfully."

The progression over the summer of 1787 speaks to the designs of the framers. The initial draft from the Virginia Plan imposed no qualifications. The President was simply to "execute the National laws."[88] The Committee of Detail considered

79. *See id.* at 115–16. The August Committee of Detail was chaired by John Rutledge (second Chief Justice of the United States), and included as members Edmund Randolph (first Attorney General of the United States), Oliver Ellsworth (third Chief Justice of the United States), James Wilson (one of the six original justices appointed to the Supreme Court), and Nathaniel Gorham (former President of the Continental Congress). Oak Hill Publ'g Co., *The Constitutional Convention,* CONSTITUTIONFACTS.COM, http://bit.ly/1yNpMvX [perma.cc/Z8NT-QG9P] (last visited Apr. 11, 2015); *America's Founding Fathers: Delegates to the Constitutional Convention,* THE CHARTERS OF FREEDOM, http://1.usa.gov/1yNpOE1 [perma.cc/X2JX-2T54].

80. FARRAND'S RECORDS, VOL. 2, *supra* note 78, at 137 n.6, 171.

81. *Id.*

82. *Id.* at 185. This resembles phrasing in the Charter of Massachusetts Bay, which required the Governor and his officers to "undertake the Execucon of their saide Offices and Places respectivelie, [and] take their Corporal Oathes for the due and faithfull Performance of their Duties in their severall Offices and Places." CHARTER OF MASS. BAY of 1629, *available at* http://bit.ly/1ODJsnP [perma.cc/8HVE-6CMF].

83. U.S. CONST. art. II, § 1, cl. 8.

84. The Committee of Style and Arrangement included Alexander Hamilton, William Johnson, Rufus King, James Madison, and Gouvernour Morris. *Committees at the Constitutional Convention,* U.S. CONST. ONLINE, http://bit.ly/1K3gMnJ [perma.cc/Q438-V9SE] (last updated Jan. 24, 2010).

85. FARRAND'S RECORDS, VOL. 2, *supra* note 78, at 554, 574.

86. *See id.* at 589–603.

87. *Id.* at 600.

88. FARRAND'S RECORDS, VOL..1, *supra* note 42, at 21; *see also* Prakash, *supra* note 76, at 1000–02 (analyzing the history of the Take Care Clause).

proposals that would restrict the duty to either (a) "the best of his Ability" or (b) "the due & faithful exec[ution] of the Laws."[89] The Committee chose the latter. Finally, the Committee of Style—staffed by Madison and Hamilton, two-thirds of Publius—narrowed the duty to focus only on "faithfully."[90] This account is confirmed by the Hamilton Plan, which though "not formally before the Convention in any way," was read on June 18 and proved to be influential.[91] His plan eliminated the word "duly" and only focused on "faithfully": that "He shall take care that the laws be faithfully executed."[92] A year later, Hamilton echoed this phrasing in Federalist No. 77, where he wrote about the President "faithfully executing the laws."[93]

What is the difference between "duly" and "faithfully"? Johnson's Dictionary defines "due" as "that which any one has a right to demand in con[s]equence of a compact."[94] Johnson defines duly with a reference to "due," as "properly, fitly, in the due manner."[95] The omission of "duly" and focus on "faithfully" suggests a shift away from mechanical legal obligations to a duty of faithfulness on the part of the President.

This construction was confirmed by the Oath Clause of Article II: "I do solemnly swear (or affirm) that I will *faithfully execute* the Office of President of the United States, and will to the *best of my Ability*, preserve, protect and defend the Constitution of the United States."[96] Again, the framers required the President to swear that he would "faithfully execute" those duties charged to him. But unlike the Take Care Clause, which is imposed without qualification, the Oath only binds the President "to the *best of [his] Ability*." In this sense, the command to "preserve, protect and defend the Constitution of the United States" exists to a lesser degree than the command to "faithfully execute the Office of President of the United States."[97] In contrast, the New York Constitution of 1777 required the governor "to take care that the

89. FARRAND'S RECORDS, VOL. 2, *supra* note 78, at 171.

90. *Id.* at 574.

91. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 617 (Max Farrand ed., 1911), *available at* http://bit.ly/1JrYeMR [perma.cc/5NSE-ASYK].

92. *Id.* at 624.

93. THE FEDERALIST NO. 77, *supra* note 64, at 488 (Alexander Hamilton).

94. JOHNSON'S DICTIONARY, *supra* note 49, at 659, *available at* http://bit.ly/1HsjhAg [perma.cc/WGE2-S4VE].

95. JOHNSON'S DICTIONARY, *supra* note 49, at 661, *available at* http://bit.ly/1bhjWrS [perma.cc/MTB6-DDYN].

96. U.S. CONST. art. II, § 1, cl. 8 (emphasis added).

97. *See* Delahunty & Yoo, *supra* note 20, at 801.

laws are faithfully executed to the best of his ability."[98] The federal formulation gives the Executive even less wiggle room. Further, unlike the Adjournment Clause, the Take Care Clause did not include discretionary language such as "shall think proper."[99] The duty is one of good faith. This understanding was further confirmed in the ratification conventions.

At the Pennsylvania Ratification Convention, James Wilson—a member of the Constitutional Convention and a future Supreme Court Justice—explained the relationship between the President and Congress: "It is not meant here that the laws shall be a dead letter; it is meant, that they shall be carefully and duly considered, before they are enacted; and that then they shall be *honestly and faithfully* executed."[100] Ten days later, Wilson stressed that the Take Care Clause was "another power of no small magnitude entrusted to [the President]."[101] A decade earlier, Wilson's native Pennsylvania had equated the duty of faithfulness with that of honesty.[102]

During the North Carolina Ratification Convention, delegate Archibald Maclaine stressed the importance of the Take Care Clause:

> One of the best provisions contained in it is, that he shall commission all officers of the United States, and *shall take care that the laws be faithfully executed.* If [he] takes care to see the laws faithfully executed, it will be more than is done in any government on the continent, for I will venture to say that our government, and those of the other states, are, with respect to the execution of the laws, in many respects, mere cyphers.[103]

The history of the Take Care Clause reveals a focused execution based on faith and honesty. As Prakash explains, "If

98. N.Y. CONST. OF 1777, art. XIX.

99. U.S. CONST. art. II, § 3; *see also* NLRB v. Noel Canning, 134 S. Ct. 2550, 2617 (2014) (Scalia, J., concurring).

100. Thomas Lloyd, Notes of the Pennsylvania Ratification Convention (Dec. 1, 1787) (emphasis added), *available at* http://bit.ly/1ODJQmr [perma.cc/2YVG-DUCT].

101. Thomas Lloyd, Notes of the Pennsylvania Ratification Convention (Dec. 11, 1787), *available at* http://bit.ly/1E98Osg [perma.cc/P4P3-JQ3B].

102. *See* PA. CONST. OF 1776, § 10 ("I do swear (or affirm) that . . . [I] will in all things conduct myself as a *faithful honest* representative and guardian of the people, according to the best of only judgment and abilities.") (emphasis added). The oath of office for a member of the assembly in Pennsylvania thus directly tied the notion of "faithful" execution of an oath to one of "honesty." *Id.*

103. North Carolina Ratification Convention Debates (July 28, 1788) (emphasis added), *available at* http://bit.ly/1bhjZE3 [perma.cc/5WRT-M5A3]; Jessica Lee Thompson, *Archiabld Maclaine (1728–1790),* N.C. HIST. PROJECT, http://bit.ly/1JrYUBS [perma.cc/G42D-N753] (last visited Apr. 11, 2015).

the officer performed his duties honestly, adequately, and within the boundaries of his statutory discretion, the presidential inquiry would end, for the President would have taken care that the laws were faithfully executed."[104]

2. The Duty of Good Faith

By embracing the term "faithfully," the framers seem to have adopted a standard stretching back to the times of Herodotus,[105] Roman law,[106] and Canon law.[107] The concept of good faith[108] was well-known in the seventeenth-[109] and eighteenth-century[110] English common law of contracts.[111] Johnson's dictionary defines "faithfully" as imposing a very precise standard: acting with "*[s]trict adherence* to duty and allegiance;" "*[w]ithout failure of performance*; hone[s]tly; exactly;" and "without fraud, trick or ambiguity."[112] Webster's offers a similar explanation: "In a faithful manner; with *good faith.*"[113] The second definition imposes an even higher standard: "With *strict adherence* to

104. Prakash, *supra* note 76, at 1000–01.

105. Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 80 & n.26 (1993) ("*Good faith* in dealings and negotiation practices was the element of binding value in these ancestral societies, and served as the religious basis for maintaining the word given.") (emphasis added).

106. Robert H. Jerry, II, *The Wrong Side of the Mountain: A Comment on Bad Faith's Unnatural History*, 72 TEX. L. REV. 1317, 1319 (1994) ("The essence of a duty of *good faith* existed at least two thousand years ago in the law of the Romans.") (emphasis added).

107. *Id.* at 1324 ("Under the influence of the Church, the ceremony of *fides facta* was transformed into the pledge of faith. In effect, the gage provided by the debtor was the debtor's Christian *faith* and his hope of salvation.") (emphasis added).

108. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness.").

109. Jerry, *supra* note 106, at 1327 ("[B]ut with ever-increasing monotony the plea is that the debtor has acted 'against good faith and conscience' or the petitioner prays that the debtor shall be compelled to do 'what *good faith* and conscience require.'") (emphasis added) (quoting Raphael Powell, *Good Faith in Contracts*, 9 CURRENT LEGAL PROBS. 16, 22 (1956)).

110. Carter v. Boehm, (1766) 97 Eng. Rep. 1162 (K.B.) 1164; 3 Burr. 1905, 1909 ("*Good faith* forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.") (emphasis added).

111. Palmieri, *supra* note 105, at 84 ("*[G]ood faith* and fair dealing increasingly became a part of the common law of contract performance and enforcement.") (emphasis added).

112. JOHNSON'S DICTIONARY, *supra* note 49, at 763 (emphasis added), *available at* http://bit.ly/1JrZ2Bq [perma.cc/JY24-MGVY].

113. WEBSTER'S DICTIONARY, *supra* note 51 (emphasis added), *available at* http://bit.ly/1zJ5DCh [perma.cc/L3RM-BLVR].

allegiance and duty."[114] Webster even offers an example with the same language as the Constitution: "The treaty or contract was *faithfully* executed."[115] Professor Price observes that "the term 'faithfully,' particularly in eighteenth-century usage, seems principally to suggest that the President must ensure execution of existing laws in *good faith.*"[116] Acting in good faith, however, does not require one-hundred-percent compliance with all legal duties.

Steven J. Burton's canonical work on the common-law duty to perform in good faith is consistent with the text and history of the Take Care Clause.[117] Burton sketches two views of failing to comply with a contract. First, a party may deviate from the terms of the contract, resulting in the deprivation of "anticipated benefits" based on a "legitimate" or "good faith" reason.[118] Here, there is no breach of contract, even though the party did not strictly comply with the contract. Second, however, the "same act will be a breach of the contract if undertaken for an illegitimate (or bad faith) reason."[119] How should we distinguish between the former, which is lawful, and the latter, which is not? It is not enough to focus on the contractual duties owed to the promisee, and what benefits he is due. Rather, to determine "good faith," an inquiry must be made into the *motivations* of the promisor's actions.

Burton explains that good faith performance "occurs when a party's discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation—to capture opportunities that were preserved upon entering the contract."[120] To put this in constitutional terms, we would ask whether the President is acting within the realm of possible discretion contemplated when Congress enacted a statute. If the answer is yes, the deviation from the law is in good faith, and thus is permissible. However, if the departure from the law is "used to recapture opportunities forgone upon contracting," then the action is not in good faith.[121] As Randy

114. *Id.* (emphasis added).
115. *Id.*
116. Price, *supra* note 20, at 698 (emphasis added).
117. *See* Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 373 (1980).
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*

Barnett explains, "According to Burton, when a contract allows one party some discretion in its performance, it is bad faith for that party to use that discretion to get out of the commitment to which he consented."[122] To put this dynamic in constitutional terms, when the President bypasses a statute by relying on a claim to authority Congress withheld from him, the action is in bad faith—and is therefore unlawful.

Under this theory, what "matters is the purpose or motive for the exercise of discretion."[123] Good faith deviations that "honor the spirit" of the law or rely on "scarcity of enforcement resources" are valid motives for discretion.[124] But the same action is unlawful when it is "intended to evade the commitment" and based on a "disagreement with the law being enforced."[125] It is not the case that any deliberate deviation is presumptively forbidden. Rather, the deviation must be done in bad faith, as an intentional means to bypass the Legislature.

Burton's conclusion provides further insights into the Committee of Style's decision to amend the Take Care Clause. First, by eliminating the reference to "duly," the framers moved away from focusing on which formalistic obligations the President owes Congress. Instead, they focused on "faithfully" alone. This inquiry directs attention to the President's motivations, rather than his legal duties to Congress in the abstract. The important qualification "faithfully" vests the President with additional discretion, so long as he acts with good faith.

A careful examination of the four elements of the Take Care Clause provides a comprehensive framework to determine whether the President has complied with his constitutional duty. I should stress that looking to the President's state of mind is a last resort in this balancing test. Only after the President (1) fails to comply with the "shall" command, (2) does not act with "care," and (3) disregards "the Laws," should we inquire into his motivations for acting contrary to the Constitution.

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122. Randy Barnett, *The President's Duty of Good Faith Performance*, WASH. POST, Jan. 12, 2015, http://bit.ly/1zJ5LSf [perma.cc/MK6E-2KTJ].

123. *Id.*; Delahunty & Yoo, *supra* note 20, at 847 (noting that the "motivation and intent behind nonperformance may also be relevant to its evaluation").

124. Barnett, *supra* note 122.

125. *Id.*

III. DEFERRED ACTION FOR PARENTAL ACCOUNTABILITY (DAPA)

On November 20, 2014, the Department of Homeland Security (DHS), through an executive memorandum by Secretary Jeh Johnson, announced a policy that came to be known as Deferred Action for Parental Accountability (DAPA).[126] DAPA was built on DHS's 2012 Deferred Action for Childhood Arrivals (DACA) initiative.[127] DAPA established a new class of eligible beneficiaries for deferred action. DACA was limited to certain minors who entered the country without authorization—Dreamers—regardless of whether the children were related to a citizen.[128] DAPA continued this policy by covering the parents of U.S. citizens and lawful, permanent residents, who would be eligible for deferred action, work authorization, and other benefits such as social security.[129] The memorandum indicated that local Immigration and Customs Enforcement (ICE) officers had discretion to grant deferred action upon consideration of all relevant factors, including the eligibility criteria.[130]

Before announcing DAPA, the Obama Administration made public a legal opinion from the Office of Legal Counsel, opining that "DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be permissible exercises of DHS's discretion to enforce the immigration laws."[131] Extrapolating from Supreme Court and court of appeals precedent about the scope of enforcement discretion the Take Care Clause permits, the opinion established a four-factor inquiry to determine the legality and constitutionality of any particular discretionary initiative.[132] "First, enforcement decisions should reflect 'factors which are peculiarly within [the enforcing agency's] expertise.'"[133] Second, the exercise of discretion cannot

126. *See* JOHNSON, *supra* note 3.

127. DACA was an initiative of DHS, not of the whole federal government. *But cf.* Ariz. Dream Act Coal. v. Brewer, 757 F.3d 1053, 1057 (9th Cir. 2014) (misleadingly referring to DACA as a program enacted by the federal government, though only one federal agency actually instituted this policy).

128. JOHNSON, *supra* note 3, at 3.

129. *Id.* at 3–4.

130. *Id.* at 5 ("Under any of the proposals outlined above, immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.").

131. THOMPSON, *supra* note 5, at 2.

132. *Id.* at 5–7.

133. *Id.* at 6 (quoting Heckler v. Chaney, 470 U.S. 821, 831 (1985)).

constitute an effective rewrite of the law so as to "match [the executive's] policy preferences."[134] Practically, this means that "an agency's enforcement decisions should be *consonant with, rather than contrary to,* the congressional policy underlying the statutes the agency is charged with administering."[135] Third, and as an effective corollary to the second factor, the executive cannot "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an *abdication of its statutory responsibilities.*"[136] Fourth, nonenforcement decisions are most comfortably characterized as proper "exercises of enforcement discretion when they are made on a case-by-case basis."[137] I previously addressed the second factor in Part I of this series.[138] This article's analysis will focus on the third and fourth factors. (The first factor is not in dispute).

IV. FAILING TO ENFORCE THE LAWS

The first step in the Take Care Clause analysis is to determine whether the President is complying with the Article II "shall" imperative. Is he executing the laws or suspending them? In most cases, nonenforcement falls along a spectrum from a categorical refusal to enforce the law[139] to a perfect enforcement—which is impossible because of time and resource constraints. While the line is invariably fuzzy,[140] this inquiry can and should be completed to determine whether the President has complied with his constitutional duty.[141]

The federal courts have addressed this separation-of-powers conflict through the framework in the Administrative Procedures Act (APA) for the nonenforcement of agency action.[142] In this arena, the Supreme Court has stated that an executive policy would be reviewable in federal court if "the agency has 'consciously and expressly adopted a general policy' that is so

134. *Id.*
135. *Id.* (emphasis added).
136. *Id.* at 7 (quoting *Heckler,* 470 U.S. at 833 n.4) (emphasis added).
137. *Id.*
138. *Constitutionality of DAPA Part I, supra* note 16.
139. Price, *supra* note 20, at 705.
140. *Id.* at 706.
141. *Id.* at 677–79.
142. *See* 5 U.S.C. § 701 (2013) (establishing presumption of judicial review except where statute precludes it); *see also* 5 U.S.C. § 706(2)(B) (2013) ("[T]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity.").

extreme as to amount to an *abdication of its statutory responsibilities.*"[143] If reviewable, nonenforcement would be contrary to law if it is "arbitrary, capricious, or an abuse of discretion."[144] The D.C. Circuit's decision in *Crowley Caribbean Transport, Inc. v. Peña*[145]—favorably cited by the OLC opinion—added some flesh to the bones of *Heckler*'s footnote. The court held that a "broad policy against enforcement poses *special risks* that [the agency] 'has consciously and expressly adopted a general policy that is so extreme as to amount to an *abdication* of its statutory responsibilities.'"[146]

The APA is not the Take Care Clause, and vice versa. This test, though framed in terms of reviewability, at its core parallels the failure of the Executive Branch to execute the laws. In such a case, the courts have a role to set aside the unlawful agency actions. The President's duty here, as always, derives from the Take Care Clause. The agency "*shall* take Care that the Laws be faithfully executed."[147] With this understanding, *Heckler* is the closest facsimile we have in the Court's jurisprudence to determine whether DAPA is lawful. In the OLC opinion, the Obama Administration seemingly agreed.

As the following analysis in Parts V–VII demonstrates, DHS has adopted an extremely broad policy that restricts the ability of officers to enforce the immigration laws. The policy cabins their discretion both procedurally (requiring less thorough review of applications) and substantively (eliminating grounds for denial beyond the Secretary's preferences).[148] Second, the policy was deliberately crafted in this manner. It was "consciously and expressly adopted" to exempt nearly forty percent of all undocumented aliens in the United States—even those who were not previously subject to any enforcement action—from the threat of removal.[149]

Third, the decision to defer deportations by itself is not enough to "amount to an abdication of its statutory

143. Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985) (emphasis added) (citations omitted).

144. *Id.* at 826 (citing 5 U.S.C. § 706(2)(A) (2013)) (further citations omitted).

145. 37 F.3d 671 (D.C. Cir. 1994).

146. *Id.* at 677 (citing *Heckler*, 470 U.S. at 833 n.4) (emphasis added).

147. U.S. CONST. art. II, § 3 (emphasis added).

148. Bellocchi Testimony, *supra* note 11, at 9; THOMPSON, *supra* note 5, at 11; *see* discussion *infra* Part V.A.

149. *Heckler*, 470 U.S. at 833 n.4; THOMPSON, *supra* note 5, at 30–31.

responsibilities."[150] In all likelihood, the overwhelming majority of the four million aliens exempted would not have been removed anyway. Rather, the decision to establish a program to solicit registrations for deferrals as a means to provide work authorization to bring these aliens "out of the shadows" elevates the policy to the level of disregarding the law.[151] Exacerbating this policy is the fact that the aliens selected by the President—parents of minor U.S. citizens and lawful permanent residents—were never deemed by Congress to be worthy of such relief.[152]

Fourth, the size and scope of those exempted from the laws greatly exceeds any previous class-wide deferrals by several orders of magnitude.[153] While the policy is based on the selective enforcement of the immigration laws, it is entirely without precedent to excuse a class of over four million people from the scope of the naturalization power. Professor Zachary Price observed that DACA—DAPA's progenitor—"amounts to a categorical, prospective suspension of both the statutes requiring removal of unlawful immigrants and the statutory penalties for employers who hire immigrants without proper work authorization."[154] By waiving myriad legal requirements, the "action thus is presumptively beyond the scope of executive authority: to be valid, it requires a delegation from Congress."[155] The OLC opinion acknowledged that "deferred action programs depart in certain respects from more familiar and widespread

150. *Heckler*, 470 U.S. at 833 n.4.

151. JOHNSON, *supra* note 3, at 3.

152. *Constitutionality of DAPA Part I*, *supra* note 16.

153. The OLC opinion repeated an oft-cited, but incorrect statistic that President George H.W. Bush's "Family Fairness" program deferred the deportation of 1.5 million aliens. *See* THOMPSON, *supra* note 5, at 14. This statistic has been repeated by the President. *'This Week' Transcript: President Obama*, ABCNEWS, Nov. 23, 2014, http://abcn.ws/1yNqAkj [perma.cc/BN4G-KYAW] ("If you look, every [P]resident—Democrat and Republican—over decades has done the same thing. George H.[]W. Bush—about 40 percent of the undocumented persons, at the time, were provided a similar kind of relief as a consequence of executive action."). The actual estimate was roughly 100,000. Glenn Kessler, *Fact Checker: Obama's Claim that George H. W. Bush Gave Relief to '40 Percent' of Undocumented Immigrants*, WASH. POST, Nov. 24, 2014, http://wapo.st/1JrZM9Q [perma.cc/B99Z-KMSL]. The origin of this false number is subject to some dispute, and seems to be based on an error in congressional testimony. *Id.* INS Commissioner Gene McNary himself told the *Washington Post*, "I was surprised it was 1.5 million when I read that . . . . I would take issue with that. I don't think that's factual." *Id.* Ultimately, by October 1 of 1990, INS had received *only 46,821 applications*. *Id.* The next month, President Bush signed the Immigration Act of 1990, which ended the temporary Family Fairness program. *Id.*

154. Price, *supra* note 20, at 760.

155. *Id.*

exercises of enforcement discretion."[156] In a word, this action is *unprecedented.*

Finally, the presumption of reviewability should be strongest when the nonenforcement of the law amounts not only to a disagreement about policy, but also to a violation of the Constitution. In his concurring opinion in *Heckler v. Chaney*, Justice Marshall elaborated on the Court's framework concerning the "complete abdication of statutory responsibilities."[157] He wrote:

> If inaction can be reviewed to assure that it does not result from improper abnegation of jurisdiction, from complete abdication of statutory responsibilities, from *violation of constitutional rights*, or from factors that offend principles of rational and fair administrative process, it would seem that a court must always inquire into the *reasons for the agency's action* before deciding whether the presumption applies.[158]

According to this view, courts have a role to determine if the rationales behind the inaction are pretextual. The violation of the structure of the Constitution is of equal or greater magnitude to the violation of constitutional rights.

At issue with DAPA is not a mere disagreement about how an agency enforces its priorities, but a knowing disregard for the limits imposed by Congress. While the D.C. Circuit decision reversed by *Heckler* was a "clear intrusion upon powers that belong to Congress, the Executive Branch and the states,"[159] the review of DAPA would serve to reinforce the powers of Congress to limit the President's power.[160]

V. DAPA WAS NOT DESIGNED WITH "CARE" TO THE LAWS

Second, our inquiry turns to whether the President's agencies have executed the law with "care." With respect to DAPA, the case-by-case discretion at the heart of all aspects of prosecution

156. THOMPSON, *supra* note 5, at 24.

157. Heckler v. Chaney, 470 U.S. 821, 853 (1985) (Marshall, J., concurring).

158. *Id.* (emphasis added).

159. Chaney v. Heckler, 718 F.2d 1174, 1192 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd*, 470 U.S. 821 (1985).

160. Arizona v. United States, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., concurring in part and dissenting in part) ("But there has come to pass, and is with us today, the specter that Arizona and the States that support it predicted: A Federal Government that *does not want to enforce the immigration laws as written*, and leaves the States' borders unprotected against immigrants whom those laws would exclude.") (emphasis added).

was supplanted by the Secretary's priorities.[161] No deviations were allowed for individualized judgment, despite the OLC's assurances to the contrary.[162] These policies represent a deliberate effort to undermine the discretion of officers, both procedurally and substantively. By restricting the scope of their reviews of applicants and limiting the grounds for denial to those identified by the Secretary, DAPA deliberately hobbles immigration law enforcement. These steps are taken not to conserve resources (they actually increase the agency's workload and budget), but as a means to bypass the laws of Congress.

A. The Secretary's Policy Displaces Individualized Officer Discretion

To analyze the constitutionality of DAPA, we must first address its progenitor: DACA. Secretary Johnson, in establishing DAPA, "direct[ed] USCIS to establish a process, *similar to DACA*, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis."[163] Secretary Johnson's memorandum mirrors that of his predecessor, Secretary Janet Napolitano, and her invocation of discretion. It begins: "DHS must exercise *prosecutorial discretion* in the enforcement of the law."[164] Further, the OLC opinion bases the legality for DAPA in large part on the legality of DACA. By the government's own arguments, both in the OLC opinion and during the course of litigation, DACA is the touchstone for DAPA. There are certainly differences between DACA and DAPA, namely the category of aliens who will apply. But on the whole, DAPA was designed to mirror the implementation strategies of DACA. While DAPA has not yet gone into effect (as of the date of publication), it is safe to assume that it will adopt priorities and guidelines similar to those of DACA—but on a much larger scale. This section will determine the degree of discretion inherent in DACA, draw parallels to how the government has described DAPA, and discuss how DAPA will likely be implemented.[165]

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161. JOHNSON, *supra* note 3, at 3–4.

162. *See* THOMPSON, *supra* note 5, at 11 (claiming the policy uses "a broad standard that leaves *ample room* for the exercise of individualized discretion by responsible officials") (emphasis added).

163. JOHNSON, *supra* note 3, at 4 (emphasis added).

164. *Id.* at 1 (emphasis added).

165. While this article does not address whether DAPA is subject to the notice-and-comment procedures of the APA, allowing this policy to go through the notice-and-comment process would offer an opportunity to understand how it will be implemented. Because of the pre-enforcement challenge at hand, the closest analogue is DACA. *See*

Secretary Napolitano's memorandum announcing DACA employs an oxymoronic understanding of discretion. On the one hand, the memo directs USCIS to "establish a clear and efficient process for exercising *prosecutorial discretion*, on an *individual basis*, by deferring action against individuals who meet the above criteria."[166] The memo adds that all "requests for relief pursuant to this memorandum are to be decided on a case[-]by[-]case basis."[167]

However, it is the Secretary's discretion, not the discretion of officers, that determines who does and does not receive deferred action. The very first sentence gives away the whole game: "By this memorandum, *I* am setting forth how, in the exercise of *our* prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws . . . ."[168] There is no room for "discretion, on an individual basis" outside the Secretary's broad criteria. The final sentences of the memorandum drive the point home. It is not discretion for the officers to exercise, but for the Secretary to impose: "It remains for the [E]xecutive [B]ranch, however, to set forth policy for the exercise of discretion within the framework of the existing law. *I have done so here.*"[169]

This process amounts to discretion in name only—or more precisely, discretion in the Secretary's name only. This philosophy is encapsulated in Slide 31 of a training presentation provided to agents, released through FOIA.[170] "Deferred action," it begins, "is discretionary."[171] But this is not the case-by-case discretion in the hands of the officer that the Secretary described in her memorandum.[172] Rather, this discretion comes from the Secretary herself. "In setting the guidelines, *the Secretary* has determined how this discretion is to be applied for individuals

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Texas v. United States, No. 1:14-CV-254, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015). For purposes of full disclosure, I joined an amicus brief on behalf of the Cato Institute in support of Texas's constitutional challenge to DAPA. Brief as Friends of the Court Supporting Plaintiffs of the Cato Institute and Law Professors at 12, Texas v. United States, No. 1:14-CV-254 (S.D. Tex. Feb. 16, 2015).

166. NAPOLITANO, *supra* note 2, at 2–3 (emphasis added).

167. *Id.* at 2.

168. *Id.* at 1 (emphasis added).

169. *Id.* at 3 (emphasis added).

170. Plaintiffs' Reply, *supra* note 14, at Exh. 10.h, at app. 0444, *available at* http://bit.ly/1DbEGHF [perma.cc/V7K7-HN2Y].

171. *Id.*

172. *See* NAPOLITANO, *supra* note 2, at 2.

who arrived in the United States as children."[173] In case anyone did not get the memo, literally and figuratively, the slide states it clearly for the officers: "Although discretion to defer removal is applied on a case-by-case basis, according to the facts and circumstances of a particular case, *discretion should be applied consistently.*"[174] *Consistent discretion* is oxymoronic and inconsistent with the individualized discretion extolled by the memorandum as the constitutional basis for DACA. There are no doubt countless other instances where prosecutors are instructed to apply discretion consistently, but in those cases, they are acting pursuant to clear delegations of power from Congress. DACA's saving grace, in light of the direct statutory authority, was that there was *actual* discretion employed on a case-by-case basis.

The slide explains further, "Absent unusual or extenuating circumstances, similar fact patterns should yield similar results."[175] That alone seems reasonable enough—if the policy actually granted the agents leeway to enforce the laws of Congress. But it does not. The policy guidelines *only* allow officers to deny deferred action in cases where the Secretary's guidelines are not met—so much so that "[t]o facilitate consistent review and adjudication, a series of . . . templates have been developed and *must* be used."[176] Specifically, a "standard denial template in checkbox format *will* be used by officers."[177] Again, there are countless other instances where heads of agencies offer checklists and other tools to ensure the consistent application of the laws. But in those cases, the Secretary is acting pursuant to clearly delegated powers, and does not need to worry about constitutional charges of "abdication." Here, the veneer of discretion is just that—a façade.[178]

Recently, at an immigration town hall meeting in Miami, Telemundo host José Díaz-Balart asked the President what would happen if a Dreamer were deported during the application process.[179] The President acknowledged that while "implementing a new prioritization . . . there may be individual

173. Plaintiffs' Reply, *supra* note 14, at Exh. 10.h, at app. 0444 (emphasis added).
174. *Id.* (emphasis added).
175. *Id.*
176. *Id.* (emphasis added).
177. *Id.* (emphasis added).
178. *See* Delahunty & Yoo, *supra* note 20, at 845.
179.. Press Release, The White House Office of the Press Secretary, Remarks by the President in Immigration Town Hall—Miami, FL (Feb. 25, 2015) (emphasis added), *available at* http://1.usa.gov/1GnKfu7 [perma.cc/HNS2-BEXV].

ICE officials or Border Patrol who aren't paying attention to our new directives."[180] Contrary to the individualized assessment OLC extolled, the President countered that these officers are "going to be answerable to the head of the Department of Homeland Security, because he's been very clear about what our priorities should be. And I've been very clear about what our priorities should be."[181] Stated simply, the Secretary's priorities—not the determinations of individual officers—matter. Officers who attempt to exercise discretion will be subject to discipline. Díaz-Balart asked what the consequences are for "ICE agents or Border Patrol" who do not comply.[182] "The bottom line," the President answered, "is that if somebody is working for ICE and there is a policy and they don't follow the policy, there are going to be consequences to it."[183] The message could not be clearer. Rather than praising the discretion inherent in each officer, the President compares immigration officials to soldiers in the military: "In the U.S. military, when you get an order, you're expected to follow it. It doesn't mean that everybody follows the order. If they don't, they've got a problem. And the same is going to be true with respect to the policies that we're putting forward."[184]

A detailed study of how DACA has been implemented confirms the Secretary's admonition. DACA is a blanket policy, and a "broad policy against enforcement."[185] Individual officers cannot exercise judgment on a case-by-case basis beyond the Secretary's criteria. Although each case is analyzed individually, officers can only proceed along a predefined template where the only ground for denial is the failure to meet the Secretary's criteria. This schizophrenic approach to discretion reveals that individualized judgment is a mirage. It shows the "special risks" posed by a "general policy" that seeks an "abdication of [the agency's] statutory responsibilities."[186] As the D.C. Circuit warned, this "general policy" reflects a deliberate effort to disregard the law.[187] The Secretary no doubt crafted these

180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. Crowley Caribbean Transp., Inc. v. Peña, 37 F.3d 671, 677 (D.C. Cir. 1994).
186. *Id.*
187. *Id.*

policies to ensure that the grant rate was as high as possible, and that there were minimal deviations from individualized assessments.

As the Supreme Court recognized two centuries ago, it is "the peculiar province of the [L]egislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."[188] When the executive fails to apply the rules to individuals, his actions blur with those of the Legislature.

B. The USCIS Policy Undermines the Role of Officer Discretion

USCIS, the agency charged with administering DACA and DAPA for aliens not yet subject to enforcement actions, took the Secretary's lead in confining the inherent case-by-case discretion officers traditionally exercise. A series of FOIA requests forced USCIS to release internal policy documents, standard operating procedures, and training manuals.[189] These documents reveal how the government has restricted the scope of discretion both procedurally and substantively.[190] First, through the so-called "lean and lite" review, DHS limited the depth of investigation that officers could employ to dig into an application.[191] In this sense, the officers were procedurally constrained from investigating various indicia of fraud that would normally counsel against providing relief. Second, DHS weakened the scope of officer discretion by limiting the grounds for denial to checking boxes on a template.[192] These grounds were the exact criteria set by the Secretary's policy. Substantively, discretion was confined to the Secretary's preferences, displacing any meaningful case-by-case review. This discretion is nothing more than a veneer to justify awarding benefits to millions.

1. Transitioning to Lean and Lite Review Limits Discretion Procedurally

Procedurally, the DHS prevented its officers from conducting

188. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).

189. *See Judicial Watch: Homeland Security Documents Reveal DHS Abandoned Required Illegal Alien Background Checks to Meet Flood of Amnesty Requests Following Obama's Deferred Action for Childhood Arrivals Directive*, YAHOO! FIN., Jun. 11, 2013, http://bit.ly/1bhkii4 [perma.cc/XU2K-4D5F].

190. *Id.*; *see also* Plaintiffs' Reply, *supra* note 14, at Exh. 23, at app. 0854.

191. Bellocchi Testimony, *supra* note 11, at 9.

192. Plaintiffs' Reply, *supra* note 14, at Exh. 10.h, at app. 0444.

a thorough review of each DACA applicant. This was done by design; DACA was crafted as a means to provide relief to as many applicants as possible, not as a way to conserve resources. The decision to cast the criteria so widely, and not include any hardship requirement, is a testament to this desired outcome. Denials were meant to be the rare exception, rather than the rule. These priorities are reflected in a September 14, 2012 memorandum to field officers that explains the new lean and lite process of reviewing applicants.[193] Under this policy, the National Benefits Center (NBC) takes the lead in the preliminary step of reviewing all initial evidence, with field officers following up.[194]

The memo notes that certain "changes will occur in this process" that diminish the discretion of the individual officers in the field.[195] First, where before a "case might have gone to an officer for more detailed review and/or application of *officer discretion* (ORB) before RFE [Request for Evidence], instead the case will [now] go to the field for officer review and adjudication."[196] The primary review would now be conducted by the national office, removing individual officers from the process.[197] Second, where before a "case would have gone to an officer for further review, possible denial, or application of officer discretion (Failed Validation)," under the lean and lite process, "if the RFE is NOT sufficient," the case will instead "go to the field for officer review and adjudication."[198]

Third, NBC will "no longer have officers review cases where the applicant might currently be in proceedings to determine if USCIS has jurisdiction over their I-485."[199] Under the new streamlined approach, "these cases will go to the field for review and adjudication."[200] At every juncture, the USCIS guidelines diminished officer discretion in the field and consolidated the authority in the national office.

Chapter 8 of USCIS's National Standard Operating Procedures handbook for DACA provides guidance for the

193. Plaintiffs' Reply, *supra* note 14, at Exh. 9.a, at app. 0189–91, *available at* http://bit.ly/1ODLAfz [perma.cc/KQ2G-5TBD].

194. *Id.*

195. *Id.* at Exh. 9.a, at app. 0191.

196. *Id.* (emphasis added).

197. *See id.* at Exh. 9.a, at app. 0190.

198. *Id.* at Exh. 9.a, at app. 0191.

199. *Id.*

200. *Id.*

adjudication of the DACA request.[201] The second paragraph makes clear the officer understands the thrust of the policy: "Officers will **NOT**"—the word "NOT" is capitalized and bolded in the original—"deny a DACA request solely because the DACA requestor failed to submit sufficient evidence with the request (unless there is sufficient evidence in our records to support a denial)."[202] The memo explains where the discretion lies—not with the officer, but with the agency: "As a matter of policy, officers will issue an RFE or a Notice of Intent to Deny (NOID)" prior to denying a DACA request.[203]

These standard operating procedures further minimize the scope of individual discretion. "When articulable fraud indicators exist," the guide provides, "the officer should refer the filing with a fraud referral sheet prior to taking any adjudication action."[204] This is so "even if there are other issues which *negate the exercise of prosecutorial discretion* to defer removal."[205] Further, if an application has "discrepancies [that] still don't add up," and the "DACA requestor's attempts to explain" fail, the officer is not to deny the request, but "refer the case to [the Center for Fraud Detection Operations] for further research."[206] Officers should take the hint that the answer should never be "deny."

Even when the officer determines that an applicant should be denied, she must "obtain supervisory review before issuing the denial" if the denial "involves" one of the five broad grounds covering the eligibility criteria for DACA.[207] A guidance PowerPoint slide reiterates that an "officer *must* obtain supervisory review before entering the final determination" of a denial.[208] Even where the officer determines the applicant committed an adult crime "before reaching age 18," has been "convicted of a 'significant misdemeanor,'" "poses a threat to national security or public safety," or has not "met the educational guideline[s]," the officer is not allowed to deny the

201. *Id.* at Exh. 10.c, at app. 0318, *available at* http://bit.ly/1Hsk2t3 [perma.cc/GT6V-35YR].
202. *Id.*
203. *Id.*
204. *Id.* at Exh. 10.e, at app. 0363, *available at* http://bit.ly/1Eqh5dr [perma.cc/GWK5-8LS2].
205. *Id.* (emphasis added).
206. *Id.* at Exh. 10.h, at app. 0426.
207. *Id.* at Exh. 10.e, at app. 0370.
208. *Id.* at Exh. 10.m, at app. 0596, *available at* http://bit.ly/1E9azpn [perma.cc/GN7A-8PJ5].

application on her own.[209] The application must be turned over to the supervisor.[210] Slide 208 of the training presentation poses what must be a rhetorical question: "When is supervisory review required before issuing a denial?"[211] The answer: virtually always.

These restrictions were not lost on the employees of USCIS. The field office director in St. Paul noted that applications generated under the lean and lite process are not "as complete and interview[-]ready as we are used to seeing."[212] Stressing that the DACA guidelines represented a departure from standard operating procedures, she added, "This is a temporary situation—I just can't tell you when things will revert back to the way they used to be."[213] Kenneth Palinkas, the president of the National Citizenship and Immigration Services Council (the USCIS union), and a decade-plus veteran at the agency, submitted a sworn declaration in Texas's lawsuit on behalf of twenty-six other states challenging the legality of DAPA.[214] Rather than allowing the officers to exercise independent judgment, Palinkas claimed that the Administration had "taken several steps to ensure that DACA applications receive *rubber-stamped approvals* rather than thorough investigations."[215] The system promulgated "is designed to automatically approve applications rather than adjudicate each application with all the tools necessary to reach a fair and equitable decision."[216]

Palinkas further observed that the Administration has taken away the key tools that officers have traditionally employed in enforcing the immigration laws through a case-by-case approach. For example, "USCIS management routes DACA applications to [national] service centers instead of field offices. But USCIS

209. *Id.* at Exh. 10.e, at app. 0370.

210. *Id.*

211. *Id.* at Exh. 10.m, at app. 0602.

212. *Id.* at Exh. 8, at app. 0129, *available at* http://bit.ly/1DfcPHZ [perma.cc/X8DE-DM8R].

213. *Id.*

214. *Id.* at Exh. 23, at app. 0853. As of the date of publication, the following states are parties to the case: State of Texas; State of Alabama; State of Georgia; State of Idaho; State of Indiana; State of Kansas; State of Louisiana; State of Montana; State of Nebraska; State of South Carolina; State of South Dakota; State of Utah; State of West Virginia; State of Wisconsin; Paul R. LePage, Governor, State of Maine; Patrick L. McCrory, Governor, State of North Carolina; C.L. "Butch" Otter, Governor, State of Idaho; Phil Bryant, Governor, State of Mississippi; State of North Dakota; State of Ohio; State of Oklahoma; State of Florida; State of Arizona; State of Arkansas; Attorney General Bill Schuette [State of Michigan]; State of Nevada; and the State of Tennessee.

215. *Id.* at Exh. 23, at app. 0854 (emphasis added).

216. *Id.* at Exh. 23, at app. 0855.

officers in service centers (as opposed to those in field offices) do not interview applicants."[217] Palinkas stressed that "An interview is one of the most important tools in an officer's toolbox because it is one of the most effective ways to detect fraud and to identify national-security threats."[218] He adds that this process "further erodes and inhibits an officer's ability to root out fraud and screen out national security threats."[219] Logistically, it would have been impossible to interview one million people and grant them all benefits in a manner of months. The lean and lite process was necessary in order to push through as many grants as possible.

In addition, Palinkas stated that USCIS officials had discretion to waive the $465 application fee, which was required under DACA.[220] This was directly contrary to the public affairs guidance memo signed by Secretary Napolitano on July 25, 2012, which advised the media that fee waivers were not available.[221] This $465 barrier proved to be short-lived. The only exercise of "discretion" Palinkas identified was waiving the fees that DACA applicants were originally required to pay.[222] As a preview of things to come, Secretary Johnson's memo also claims that there "will be no fee waivers and, like DACA, very limited fee exemptions."[223] If the past is prologue, we should expect this barrier to also be significantly relaxed.

USCIS's external guidance reflects the nature of lean and lite review. On the USCIS's FAQ section explaining DACA, Question 21 asks: "Will USCIS verify documents or statements that I provide in support of a request for DACA?"[224] Rather than providing an unequivocal yes, the answer suggests that individual documents need not be verified to qualify for deferred action. "USCIS has the authority to verify documents, facts, and statements that are provided in support of requests for DACA. USCIS may contact education institutions, other government

217. *Id.*

218. *Id.* at Exh. 23, at app. 0854.

219. *Id.* at Exh. 23, at app. 0855.

220. *Id.*; *see also* Press Release, Am. Fed'n of Gov't Emps., USCIS Union President: Lawmakers Should Oppose Senate Immigration Bill, Support Immigration Service Officers (May 20, 2013), *available at* http://nyti.ms/1J8HDko [perma.cc/CT5V-XP2Z].

221. Plaintiffs' Reply, *supra* note 14, at Exh. 9.b, at app. 0222, *available at* http://bit.ly/1aQkDYL [perma.cc/69ZF-GS6H].

222. *Id.* at Exh. 23, at app. 0855.

223. JOHNSON, *supra* note 3, at 5.

224. *Frequently Asked Questions*, USCIS, http://1.usa.gov/1OczEGF [perma.cc/8AW6-PUQU] (last updated Oct. 23, 2014).

agencies, employers, or other entities in order to verify information."[225] The leading Republicans on the House and Senate Judiciary Committees, Senator Chuck Grassley and Representative Bob Goodlatte, were concerned about the message the government's answer to Question 21 sent to potential applicants. In a letter to DHS Secretary Jeh Johnson, they faulted the government for publicly "assuring potential DACA applicants that USCIS has no plans to actually verify the validity of any evidentiary documents submitted in support of an application."[226] In response, USCIS Director Leon Rodriguez replied, "USCIS immigration officers are trained to evaluate evidence submitted to satisfy the DACA guidelines on a case-by-case basis and to identify indicators of fraud."[227] This training did not matter, however, as the lean and lite approach cut out individual officers from the process of providing a comprehensive review and removed their tools to identify fraud.[228] Indeed, Congress's alarms were well-founded. Procedurally, officers were prohibited from conducting full investigations and exercising the type of discretion that would satisfy the concerns and laws of Congress.[229] These facts are sufficient to rebut the generally warranted presumption that "executive enforcement discretion extends only to case-specific considerations."[230]

2. Restricting Grounds for Denial Substantively Limits Discretion for DACA

In addition to procedurally preventing officers from conducting comprehensive reviews of applicants, the lean and lite policy also restricts their discretion substantively: the only grounds for denial are those selected by the Secretary. In the

225. *Id.*; *see also* Tex. Children's Hosp. v. Burwell, No. 14-2060 (EGS), 2014 WL 7373218, at *12 (D.D.C. Dec. 29, 2014) (holding that DHS had "likely" taken a final agency action through an FAQ without fulfilling the required notice-and-comment procedures). The court enjoined the agency from "enforcing, applying or implementing FAQ No. 33." *Id.* at *17.

226. Plaintiffs' Reply, *supra* note 14, at Exh. 17, at app. 0807, *available at* http://bit.ly/1PdQFNE [perma.cc/Z53E-XB6M].

227. *Id.* at Exh. 29, at app. 0985, *available at* http://bit.ly/1OczKhB [perma.cc/6GDM-3RBY].

228. *Documents Reveal DHS Abandoned Illegal Alien Background Checks to Meet Amnesty Requests Following Obama's DACA*, JUD. WATCH, June 11, 2013, http://jwatch.us/5a [perma.cc/F4V9-VVCT].

229. *See* Plaintiffs' Reply, *supra* note 14, at Exh. 9.a, at app. 0189–91.

230. Price, *supra* note 20, at 705.

rare event that the "supervisor concurs with the issuance of a denial, the officer shall check the appropriate box on the denial template."[231] This "DACA denial template," as it is called, permits the agent to deny an application on eleven possible grounds, all of which repeat criteria established by the Secretary.[232]

Here, discretion would mean figuratively and literally thinking outside the [check]box. Under DACA, no such judgment is allowed. The only reason for denying an application is that an alien fails to meet the broad criteria selected by the Secretary. Any two agents would have to arrive at the exact same conclusion. Palinkas noted, "USCIS management, however, has undermined immigration officers' abilities to do their jobs."[233] The Secretary's policy was designed to exempt a very specific group of aliens—over one million Dreamers—from the scope of the immigration laws. Agents are only allowed to deny relief to those who fall outside that class. For everyone who fits the criteria, the officer must use a rubber stamp.

Director Rodriguez's letter to Congress reveals the grounds on which applications were "rejected" or "terminated," but unfortunately does not address the reasons why applications were "denied."[234] In explaining that 42,906 requests were rejected between August 15, 2012 and August 31, 2014, he cited

231. Plaintiffs' Reply, *supra* note 14, at Exh. 10.e, at app. 0370. Stephen H. Legomsky, Chief Counsel of USCIS from 2011–2013, testified before Congress in February 2015. He noted that the "DACA denial template has gone through several iterations," and "subsequent versions of the checkbox style template" have an "explicit inclusion of an option for discretionary denials." *Hearing Before the H. Comm. On the Judiciary*, 114th Cong. 13–14 (2015) (statement of Stephen H. Legomsky, The John S. Lehmann University Professor, Washington University School of Law), *available at* http://1.usa.gov/1E9boP9 [perma.cc/AZP7-ZDCZ]. In one example Legomsky located—after DHS released Exhibit 10.e through FOIA—a new checkbox read, "You have not established that you warrant a favorable exercise of prosecutorial discretion." DEP'T OF HOMELAND SEC., NATIONAL STANDARD OPERATING PROCEDURES: VERSION 2.0 (Apr. 4, 2013), *available at* http://bit.ly/1yNrAVB [perma.cc/BT8M-8UHV]. Legomsky added that at some point, USCIS had "switched from a checkbox format to a narrative format." Legomsky, *supra*, at 14. Notwithstanding the nature of the checkboxes or the narratives, there are no grounds for a "favorable exercise of prosecutorial discretion" beyond the Secretary's criteria.

232. Plaintiffs' Reply, *supra* note 14, at Exh. 10.m, at app. 0594–95. The grounds are that the applicant (1) is "under age 15," (2) "failed to establish [arrival before] the age of sixteen," (3) "failed to establish [being] under age [thirty-one] on June 15, 2012," (4) "failed to establish [continuous residence] since June 15, 2007," (5) had "one or more absences" during the "period of residence," (6) "failed to establish [unlawful presence] in the United States on June 15, 2012," (7) "failed to establish" educational criteria, (8) was "convicted of a felony or a significant misdemeanor," (9) "failed to pay the fee," (10) "failed to appear for the collection of biometrics," or (11) "failed to respond to a Request for Evidence."

233. *Id.* at Exh. 23, at app. 0854.

234. *Id.* at Exh. 29, at app. 0978–79.

the top four rejection reasons: (1) "Using an expired version of the Form I-821D," (2) "Failure to provide a valid signature," (3) "Failure to file the Form I-765," and (4) "Filing while under the age of 15."[235] None of these grounds for rejection would exhibit any actual discretion on the part of the agent. These are ministerial facts that can be checked fairly easily. Similarly, 113 cases were terminated based on purportedly non-exclusive factors—consistent with the Secretary's guidance.[236] It is difficult to determine that discretion was present in any of these decisions.

A training presentation given to officers explains that using "this denial template is *mandatory. Individualized,* locally created denials shall not be used."[237] This training should make abundantly clear to individual officers that they are not to deviate from the template. The guidance stresses: "When an officer encounters an issue for which there is no [checkbox] on the denial template, the officer must work through his/her supervisor to identify the issue for SCOPS [Service Center Operations] so that the template can be amended."[238] Palinkas speaks to this change: "Leadership has intentionally stopped proper screening and enforcement, and in so doing, it has guaranteed that applications will be *rubber-stamped* for approval, a practice that virtually guarantees widespread fraud and places public safety at risk."[239]

That these checkboxes mirror the Secretary's DACA memo is no accident. The Agency's guidance makes clear that it is the Secretary's discretion to set the policy, and not the officer's judgment, that drives the granting of DACA applications. The "Objectives and Key Elements" PowerPoint slide wants officers to understand "the Secretary's specific guidelines for DACA."[240] Additionally, while Agency guidance includes a reference to the

235. *Id.* at Exh. 29, at app. 0978.

236. *See id.* at Exh. 29, at app. 0979. Among the reasons listed are DUI convictions (eleven cases), felony convictions (five cases), drug-related convictions (three cases), aggravated assault conviction (one case), and gang membership (one case).

237. *Id.* at Exh. 10.m, at app. 0594 (emphasis added).

238. *Id.* To the extent that subsequent checklists had an "other" box, Legomsky cited this as evidence that officers were given discretion concerning the grounds to deny DACA benefits. But the only grounds for permissible discretion still existed within the Secretary's criteria.

239. *Id.* at Exh. 23, at app. 0855 (emphasis added).

240. *Id.* at Exh. 10.g, at app. 0415, *available at* http://bit.ly/1brQjow [perma.cc/DJ2X-QNEE].

authority for exercising discretion,[241] and cites the "discretionary nature of deferred action,"[242] every step of the tutorial is aimed at eliminating any deviation from the Secretary's specific guidelines.[243]

Secretary Napolitano's memo lists the five "criteria [that] should be satisfied before an individual is considered for an exercise of prosecutorial discretion."[244] This isn't exactly right. First, they aren't just eligible—they will receive deferred action automatically. Second, if they receive deferred action automatically, the appearance of a case-by-case analysis is mere window dressing. There is no discretion of any sort. If the five criteria—selected solely by the Secretary without any reference to Congress's statutes—are present, then the officer cannot deny deferred action.

There is no evidence that *anyone* who met these criteria was denied deferred action. In a declaration, Donald Neufeld, the Associate Director for SCOPS for USCIS offered insights into the low denial rate for DACA. He explained that although determining "whether a requestor has been convicted of a felony is straightforward, determining whether a requestor 'poses a threat to national security or public safety' necessarily involves the exercise of the agency's discretion."[245] However, during the litigation in *Texas v. United States*, the government was unable to offer any evidence during the case that such discretion was employed. To demonstrate this discretion, the government introduced two Notices of Intent to Deny (NOIDs): In the first case, the applicant at age sixteen "committed Robbery and Grand Theft." In the second case, the applicant "committed multiple felonies as a juvenile and ha[s] been involved in the sale of illegal drugs."[246] Both instances involved felonies, were categorical violations of DACA, and would also violate DAPA.[247]

241. *See id.*

242. *Id.* at Exh. 10.h, at app. 0441.

243. *See id.* at Exh. 10.g, at app. 0415.

244. NAPOLITANO, *supra* note 2, at 1.

245. Defendants' Sur-Reply in Opposition to Plaintiffs' Motion for Preliminary Injunction, at Exh. 44, at 7, Texas v. United States, No. 1:14-CV-254, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015) [hereinafter Neufeld Declaration], *available at* http://bit.ly/1aQl84P [perma.cc/VH48-Q7R6].

246. Josh Blackman, *Government Sur-Reply Part 9: The Case-By-Case Inquiry is a Façade*, JOSH BLACKMAN'S BLOG (Feb. 7, 2015), http://bit.ly/1HhVynQ [perma.cc/7G38-EBUJ].

247. JEH CHARLES JOHNSON, U.S. DEP'T OF HOMELAND SEC., POLICIES FOR THE APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS 3 (2014) [hereinafter JOHNSON-WINKOWSKI MEMO], *available at* http://1.usa.gov/1HskCXz

If this was the best the government could muster to show that agents exercised discretion beyond enforcing the categories, it failed to meet its burden.

Further, Neufeld also asserts that "USCIS has denied DACA even when all the DACA guidelines, including public safety considerations have been met," where the "DACA requestor is believed to have submitted false statements or attempted to commit fraud in a prior application or petition," and the "DACA requestor falsely claimed to be a U.S. citizen and had prior removals."[248] Submitting false statements on a federal application is a felony, rendering the applicant categorically ineligible.[249] The most charitable reading of the Neufeld Declaration is that the applicant was only "*believed* to have submitted false statements," and that the person was not convicted of this offense. If this and the juvenile offenses discussed earlier are the strongest instances of prosecutorial discretion the government can identify, then there isn't much discretion here. Agents are limited to denying DACA where the person engaged in felonies, or very likely committed fraud against the United States. In response to my testimony before the House Judiciary Committee,[250] Stephen Legomsky conceded that beyond discretion concerning "public safety and national security determinations," the DHS process "admittedly . . . didn't confirm that discretionary denials could also be based on other grounds."[251]

In a stunning declaration, Neufeld explained that "[u]ntil very recently, USCIS lacked any ability to automatically track and sort the reasons for DACA denials, and it still lacks the ability to do so for all DACA denials except for very recent ones."[252] (The two Notices of Intent to Deny were from June and September of

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[perma.cc/5WMU-79Q5] (prioritizing prosecution against "aliens convicted of an offense classified as a felony in the convicting jurisdiction," that does not include immigration status as an essential element).

248. Neufeld Declaration, *supra* note 245, at 8.

249. 18 U.S.C. § 1001 (2013) (creating an offense when anyone, "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry," punishable by fine and up to five years imprisonment).

250. *Hearing Before the H. Comm. On the Judiciary*, 114th Cong. (2015) (statement of Josh Blackman, Assistant Professor of Law, South Texas College of Law), *available at* http://1.usa.gov/1brRofX [perma.cc/ZUJ5-4BCP].

251. Legomsky, *supra* note 231, at 13 n.11.

252. Neufeld Declaration, *supra* note 245, at 10–11.

2014, two years after DACA began). That USCIS didn't even bother to develop such a tracking feature offers further proof that they weren't particularly concerned with denials.

3. Restricting Grounds for Denial Substantively Limits Discretion for DAPA

With respect to DAPA, Secretary Johnson's memo says that applicants who meet the requirements are eligible for "deferred action, on a case-by-case basis," so long as the applicant "present[s] *no other factors* that, in the exercise of discretion, make[] the grant of deferred action inappropriate."[253] But if DAPA employs a similar denial template, there is no option for discretion. The template for denial makes clear that the only grounds for denial are those identified by the Secretary's policy—there are *no other factors* that an agent could rely on to exercise discretion.

The OLC opinion begrudgingly countenances this omission of individualized discretion, explaining that the "proposed policy does not specify what would count as [a factor that would make a grant of deferred action inappropriate]; it thus leaves the relevant USCIS official with *substantial discretion* to determine whether a grant of deferred action is warranted."[254] But, as DACA has demonstrated, individual USCIS officials have *virtually no* discretion to determine if deferred action is warranted. All of the heavy lifting is done by the Secretary with the policy memo, and everyone down the line merely picks up the rubber stamp and slams it down on the application.

In *Arpaio v. Obama*, a constitutional challenge to DACA, the district court explained that even though "the challenged deferred action programs represent a large class-based program, such breadth does not push the programs over the line from the faithful execution of the law to the unconstitutional rewriting of the law" because they "still retain provisions for meaningful case-by-case review."[255] This echoes Secretary Johnson's memo, which stated that as "an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis."[256] The memo reiterates that "the ultimate judgment as to

253. JOHNSON, *supra* note 3, at 4 (emphasis added).
254. THOMPSON, *supra* note 5, at 29 (emphasis added).
255. Arpaio v. Obama, 27 F. Supp. 3d 185, 209 (D.D.C. 2014).
256. JOHNSON, *supra* note 3, at 2.

whether an immigrant is granted deferred action will be determined on a case-by-case basis."[257] But this simply *isn't true* of DACA or DAPA. The entire scope of the case-by-case review *is* the criteria of the large class-based program.

Compare DACA with an earlier memorandum from ICE Director John Morton, explaining the exercise of "prosecutorial discretion" for officers.[258] Morton explains that when "weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to" nineteen different factors.[259] They range from "the agency's civil immigration enforcement priorities" to "the person's ties and contributions to the community" to "whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, [or] human trafficking."[260]

The memo further lists both "positive factors" and "negative factors" that "prompt particular care and consideration."[261] While the agency's priorities and policies are stated, ultimately the discretion inheres in the officer. Unlike the DACA memo, the factors in Morton's earlier memo are not "exhaustive," and they allow officers to "consider prosecutorial discretion on a case-by-case basis . . . based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities."[262] No two officers are likely to come to the same conclusion in considering these nineteen factors. The same cannot be said for DACA's formulaic approach. With DACA, the agency's priorities *are* the totality of the circumstances.

While the "categorical" enforcement of policies may indeed be salutary,[263] and "reasonable presumptions and generic rules" are generally considered valid, DACA fails to accord *any* "level of

257. *Id.* at 5.

258. JOHN MORTON, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, EXERCISING PROSECUTORIAL DISCRETION CONSISTENT WITH THE CIVIL IMMIGRATION ENFORCEMENT PRIORITIES OF THE AGENCY FOR THE APPREHENSION, DETENTION, AND REMOVAL OF ALIENS (2011), *available at* http://bit.ly/1J8Kn1g [perma.cc/9BB8-TFXU].

259. *Id.* at 4.

260. *Id.*

261. *Id.* at 5.

262. *Id.* at 4.

263. Gillian Metzger, *Must Enforcement Discretion be Exercised Case-by-Case?*, BALKINIZATION (Nov. 24, 2014, 1:30 PM), http://bit.ly/1Qh93qw [perma.cc/S9EA-78GH].

individualized determination" to officers.[264] Even the questions identified in *Reno v. Flores*, that the Supreme Court recognized as exhibiting sufficient "particularization and individuation"—such as whether there is "reason to believe the alien deportable" or if "the alien's case [is] exceptional"—entail judgment calls that could reasonably go either way.[265] Two officers may differ about what amounts to an "exceptional" case. But there can be no grounds for disagreement among officers implementing DACA: either the alien meets the criteria, or he does not. Even the examples identified by the government—juvenile felons and making false statements on government documents—seem pretty clear-cut. It is a binary choice between yes and no, and the answer is seldom the latter.

The policy seeks to impose the oxymoronic standard of consistent discretion.[266] With DACA, there is no "particularization and individuation" beyond checking the right boxes. The Court's decision in *Arizona v. United States* acknowledged that "[d]iscretion in the enforcement of immigration law embraces immediate human concerns," but it stressed that the "equities of an *individual case* may turn on many factors."[267] Here, there is no analysis of the equities of an *individual case.* A clerk, with no discretionary duties, could make the same judgment calls as a trained immigration officer. Such a "categorical and prospective nonenforcement of statutes is impermissible without statutory authorization."[268] This blanket policy amounts to lawmaking in and of itself.

C. The Denial Rate Is Not an Accurate Measure of Prosecutorial Discretion

In a decision rejecting a constitutional challenge to DACA, the District Court for the District of Columbia praised the initiative because "[s]tatistics provided by the defendants reflect that such case-by-case review is in operation."[269] Specifically, as of "December 5, 2014, 36,860 requests for deferred action under DACA were denied and another 42,632 applicants were rejected

264. *See* Reno v. Flores, 507 U.S. 292, 313 (1993).
265. *Id.* at 313–14.
266. *See* Plaintiffs' Reply, *supra* note 14, at Exh. 10.h, at app. 0444.
267. Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) (emphasis added).
268. Price, *supra* note 20, at 746.
269. Arpaio v. Obama, 27 F. Supp. 3d 185, 209 n.13 (D.D.C. 2014).

as not eligible."[270] Out of the total 719,746 individuals who made initial requests for deferred action, this amounts to roughly a five percent denial rate.[271]

As far as exercises of discretion go, five percent is a fairly low denial rate for such a significant benefit. But this bottom line hardly tells the whole story. Focusing on a five percent denial rate as a measure of whether DACA amounts to a case-by-case review is the wrong inquiry. The staggeringly low denial rate is a function of the Secretary's blanket policy and the stripping of any discretion from individual agents to actually assess aliens on a case-by-case basis. Indeed, the OLC opinion acknowledged that DAPA offers absolutely no guidance about what the exercise of discretion should consist of, or what the grounds are for rejecting an application.[272]

Further, the applicant pool for DACA was self-selecting. Aliens who knew they would not qualify—either because they were felons, or were not present long enough—would not apply and pay the application fee. In this sense, the five percent denial rate is subject to a selection bias. However, that only tells half the story. The categories were set by the administration knowing that only those who would qualify would apply. In other words, DACA and now DAPA were structured to entice the very people who would otherwise meet the eligibility criteria, which are clearly publicized in advance. At the margins, there will be some aliens who may think they will be eligible, but do not meet the criteria. But these are the outliers. The five percent denial rate attests to this fact. In contrast, dangerous felons will be the *last* aliens to apply for DACA, because they know they will be identified and prioritized for removal. DACA and DAPA will do little to identify the most dangerous aliens, and will only make it easier to identify those who are on the lowest priority for removal.

Perversely, the Obama Administration has asserted that DAPA actually operates the other way around. The government argued that offering work authorization is a necessary "incentive" to

270. *Id.*

271. Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction at 29 n.23, *Arpaio*, 27 F. Supp. 3d 185 (No. 14–01966 (BAH)), *available at* http://bit.ly/1brSicp [perma.cc/ZHF5-8MX7].

272. THOMPSON, *supra* note 5, at 29 (The "proposed policy does not specify what would count as [a factor that would make a grant of deferred action inappropriate]; it thus leaves the relevant USCIS official with substantial discretion to determine whether a grant of deferred action is warranted.").

encourage aliens to register for DAPA.[273] But this "incentive" makes little sense, because only those who are likely to qualify will apply. A convicted felon who comes "out of the shadows" and signs up will be added to the top deportation category. In reality, DACA and DAPA were created to identify those who were already the lowest priorities—and least likely to be removed—and grant them work authorization and other benefits.

Finally, it is not a reply to the "abdication" claim to assert that the President is still deporting roughly 400,000 aliens each year.[274] The policy being challenged is not the removal of 400,000, but the decision to prospectively license up to five million from that removal. To take this argument seriously, there would not be a complete abdication so long as the President deports one person, or so long as the President spends whatever money is appropriated for deportations—whether or not any aliens are actually deported. The abdication arises from the specific memorandum that grants deferred action to DAPA beneficiaries.

DAPA is a "general enforcement policy," with a very modest consideration of case-by-case factors. The eligibility criteria are extremely broad: entry into the U.S. by a certain date and children who are U.S. citizens.[275] Applicants are neither required to show an extreme hardship to become U.S. citizens, nor to show one of the other compelling circumstances that Congress has required to limit the availability of statutory relief, such as cancellation of removal or waivers of certain exclusion grounds.[276] The disqualifying criterion—criminal record—is narrow. While the OLC opinion casts DAPA as case-by-case decision-making, DAPA will operate as a general grant of immigration benefits.

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273. Josh Blackman, *Obama: Giving Immigrants Work Permits is Vital for National Security*, NAT'L REV. ONLINE, Mar. 24, 2015, [hereinafter *Giving Work Permits*] http://bit.ly/1brSokb [perma.cc/S244-WL3Z] (quoting Obama Administration attorney Kathleen Hartnett) ("The president chose to offer work authorization to millions to 'provide an *incentive* for people to come out and identify themselves.' The lawyer repeated that 'work authorization is a large *incentive* for getting people to be able to come out of the shadows, as it said, and to identify themselves.' In other words, an assurance to not deport an immigrant who is here unlawfully was not a sufficient justification—it was necessary for the president to hand out 5 million new work authorizations.").

274. Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Deportations of Immigrants Reach Record High in 2013*, PEW RES. CENTER FACT TANK, Oct. 2, 2014, http://pewrsr.ch/1yQ78ni [perma.cc/J8NE-YJAY].

275. *See* JOHNSON, *supra* note 3, at 4.

276. *See id.* at 2; *Constitutionality of DAPA Part I*, *supra* note 16, at 102–06.

D. DAPA Redirects Resources Away from Congress's Mandates and Toward the President's Policies

An oft-cited rationale for DACA, as well as DAPA, is that it amounts to a re-allocation of resources from low-priority to high-priority cases.[277] But this assertion is not supported by the impact of the policy.[278] Secretary Napolitano wrote in her memorandum that DACA was "necessary to ensure that our enforcement resources are not expended on these low priority cases[,] but are instead appropriately focused on people who meet our enforcement priorities."[279] DACA was not limited to conserving resources for already-existing cases. Rather, it required the government to expend new resources to provide benefits for its "customers."[280]

Secretary Napolitano's memorandum allows for three situations where the Dreamers will receive deferred action: (1) "individuals who are encountered by" immigration officials, (2) "individuals who are **in** removal proceedings but not yet subject to a final order of removal," and (3) "individuals who are **not** currently in removal proceedings."[281] Deferring the deportations of aliens in the first two categories would conserve resources, as these are people already in the removal pipeline. Failing to remove them could be conceived as mere prosecutorial discretion.

But the third category consists of aliens who remain in the proverbial "shadows," and are effectively unknown to the government. These are people who otherwise *would not and could not* be removed, because the government has not yet even "encountered" them. If this is not the case, they would be in either of the first two categories. By allowing those "customers" in the third category to register for DACA, the Administration is intentionally attempting to defer removal for over one million aliens.[282] Further, the act of registration, and its corresponding

277. Miriam Jordan, *Immigration-Policy Details Emerge*, WALL ST. J., Aug. 3, 2012, http://on.wsj.com/1DfeYDr [perma.cc/3ZM3-598N].

278. Delahunty & Yoo, *supra* note 20, at 848–49.

279. NAPOLITANO, *supra* note 2, at 1.

280. Plaintiffs' Reply, *supra* note 14, at Exh. 23, at app. 0854 ("Aliens seeking benefits are now referred to as 'customers.'").

281. NAPOLITANO, *supra* note 2, at 2.

282. *See* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 520 (2009) ("For many years, for example, the INS and ICE initiated proceedings mostly against immigrants who had had a run-in with the criminal justice system. Unlawful entrants who managed to avoid criminal arrest or conviction were

receipt of benefits, results in immediate work authorization.[283] The size of the class of aliens in the first two categories, where there could be a plausible case made for prosecutorial discretion and conservation of resources, is dwarfed by the gigantic third class.[284] DACA brings aliens into the immigration system for the purpose of deferring nonexistent deportations and conferring the benefit of work authorization. A program limited to the first and second categories could stake a more plausible claim to conserving resources, because those aliens are already in the pipeline.[285] But the third category gives the game away.

Further, DACA's grant of benefits to the third category of aliens will require expending additional resources to process the two-year deferrals, which will soon have to be renewed. USCIS had to rearrange staffing to accommodate the influx of new applicants under DACA.[286] Gary Garman, the associate regional director of operations, observed that resources needed to shift because of DACA: "As you may recall, this work is transitioning from the Service Centers to the field as a result of the [D]eferred [A]ction for [C]hildhood [A]rrivals process."[287] Another officer stressed that the "process has changed recently to accom[m]odate the additional work coming in from DACA-related shifts of resources."[288] An assistant regional director for adjudications confirmed that the lean and lite NBC process was "due to the workload shift" concerning DACA.[289] The field office director for USCIS in St. Paul wrote that because of "the volume of DACA work at the Service Center, it has been determined that the field will be sent I-130 [forms] to adjudicate."[290] She added that there had been a "workload shift from the NBC to the field. NBC is seeking to bring on additional staff to assist with their

extremely unlikely to be deported.").

283. JOHNSON, *supra* note 3, at 4.

284. Cox & Rodriguez, *supra* note 282, at 520 (discussing pre-DACA rareness of deportation for individuals who had not encountered immigration officers).

285. *See* Delahunty & Yoo, *supra* note 20, at 848.

286. *See Executive Actions on Immigration*, *supra* note 3 ("USCIS will need to adjust its staffing to sufficiently address this new workload. Any hiring will be funded through application fees rather than appropriated funds.").

287. Plaintiffs' Reply, *supra* note 14, at Exh. 9.a, at app. 0181–82.

288. *Id.* at Exh. 8, at app. 0129.

289. *Id.* at Exh. 9.a, at app. 0188.

290. *Id.* at Exh. 9.a, at app. 0180. Form I-130 is a form for a "citizen or lawful permanent resident of the United States to establish the relationship to certain alien relatives who wish to immigrate to the United States." *I-130, Petition for Alien Relative*, USCIS, www.uscis.gov/i-130 [perma.cc/W9J2-7F6K] (last updated July 5, 2013).

increased workload due to DACA."[291] A USCIS district director wrote that in order to prepare for DACA, "We have been challenged with doing everything we can to eliminate older cases and continued pending cases so that more time can be devoted to these petitions."[292] He explained that "additional overtime funds have been made available to USCIS staff, and there is a likelihood that more may be available" for DACA processing.[293] Specifically, Palinkas asserted that the "agency has been buried in hundreds of thousands of DACA applications since 2012."[294] DACA was not about re-organizing priorities to conserve resources. Additional resources were focused on processing the DACA applicants.

Secretary Johnson's DAPA memo makes a similar point: "in the exercise of that *discretion*,[]DHS can and should develop smart enforcement priorities, and ensure that use of its *limited resources* is devoted to the pursuit of those priorities."[295] But DAPA does no such thing. It requires DHS to use more resources. Nearly 1,000 new employees were hired in Crystal City, Virginia, to deal with the influx of four million new cases resulting from DAPA.[296] The policy states its ultimate goal directly: DAPA "encourage[s] these people to come out of the shadows."[297] While this is a laudable humanitarian goal, which I agree with as a matter of policy, the act of bringing them "out of the shadows" through deferring deportations and granting work authorizations is no longer an exercise of prosecutorial discretion and conserving resources. Rather, it requires expending new resources.

Finally, DAPA represents only a temporary reprieve from deportation, which can be renewed.[298] Of course, the unstated hope is that by deferring the deportations for two years, Congress will pass some sort of comprehensive legislative reform,

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291. Plaintiffs' Reply, *supra* note 14, at Exh. 9.a, at app. 0188.

292. *Id.* at Exh. 9.a, at app. 0192.

293. *Id.* at Exh. 9.a, at app. 0193.

294. *Id.* at Exh. 23, at app. 0854.

295. JOHNSON-WINKOWSKI MEMO, *supra* note 247, at 2 (emphasis added).

296. Michael D. Shear, *U.S. Agency Hiring 1,000 After Obama's Immigration Order*, N.Y. TIMES, Dec. 25, 2014, http://nyti.ms/1Js4AvE [perma.cc/TRJ2-7SRT] ("In a crucial detail that Mr. Obama left out, the Citizenship and Immigration Services agency said it was immediately seeking 1,000 new employees to work in an office building to process 'cases filed as a result of the executive actions on immigration.' The likely cost: nearly $8 million a year in lease payments and more than $40 million for annual salaries.").

297. JOHNSON, *supra* note 3, at 3.

298. *Id.* at 3–4.

providing DAPA beneficiaries a permanent reprieve from removal. In the absence of legislation, deferred action merely kicks the can of removal costs down the road. It may be true that the aliens will pay a fine, work, pay taxes, and get right with the law. But in the interim two-year period, these four million people—who were previously not within the government's sights—represent an increased cost and drain on DHS's resources.

The aliens who would have most likely been deported before DACA, such as felons, will still be the bulk of aliens deported after DACA. And because felons will not come "out of the shadows" to register—knowing they will be denied and lumped into the top prioritization category—DACA does little to identify those who should be deported. In response to this argument, the government asserts that by applying, DACA and DAPA beneficiaries will receive a biometric identification card that will make it easier for immigration officials to identify them during an encounter. But providing these biometric identification cards can be done without granting work authorization to millions.[299] Whatever marginal benefit this expedited identification offers, this goal could be accomplished without such questionable means. As the tail wags the dog, this policy borders on pretext.

Justice Marshall explained in his concurring opinion in *Heckler* that when "an agency asserts that a refusal to enforce is based on enforcement priorities, it may be that, to survive summary judgment, a plaintiff must be able to offer some basis for calling this assertion into question or for justifying his inability to do so."[300] Six decades earlier, Justice Brandeis made a similar point about the interaction between inadequate funding and faithful execution: "The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his *best endeavors to secure the faithful execution* of the laws enacted."[301] Marshall and

299. *Giving Work Permits, supra* note 273 ("[Judge] Hanen parried with a devastatingly simple question: 'Why aren't you doing that now? I didn't enjoin you from doing that.' He noted that the government could offer some other form of identification that would allow aliens to prove they are not dangerous, but *without* granting them work authorization and myriad other benefits. 'There's nothing that's stopping the Department of Homeland Security from saying: All right . . . We're going to do a background check on you, and we'll give this card that says for three years we're not prosecuting you.'").

300. Heckler v. Chaney, 470 U.S. 821, 853 n.12 (1985) (Marshall, J., concurring).

301. Myers v. United States, 272 U.S. 52, 292 (1926), *overruled by* Free Enter. Fund v.

Brandeis agree that a president's failure to enforce the law is permitted only when there is a genuine lack of resources, he uses his "best endeavors to secure the faithful execution of the laws," and does not attempt to bypass Congress.[302] DHS's claim about conserving resources through rearranging priorities does not stand up to scrutiny: many more additional resources have to be added to provide deferred action for DACA and DAPA. As Professors Delahunty and Yoo observe, the "contours of [DACA] dovetailed so neatly with those of the DREAM Act . . . [t]hat [it] could hardly have been a pure coincidence; rather, it was proof by a kind of *res ipsa loquitur* that the Administration's true purpose was not that of economizing or prioritizing."[303]

The limitations on the individual officer's discretion show that behind the pretense of conserving resources, DAPA was not designed with "care" for the laws, but as a deliberate means to bypass them.

VI. PRESIDENTIAL POWER AT "LOWEST EBB" WHEN ACTING CONTRARY TO CONGRESS'S "LAWS"

DAPA conflicts with the express and implied will of Congress, placing the policy in Justice Jackson's bottom tier, and presidential power at its "lowest ebb." The axiomatic holding of *Youngstown* is that the Legislature writes the laws and the President must comply with them—not rewrite them to fit his policy preferences. Like President Truman before him, President Obama must comply with the laws of Congress, not create new fonts of his own authority.

A. Congressional Acquiescence and the Zone of Twilight

To assess the conjunction or disjunction between the Congress and the President, we turn to the cornerstone of the Court's separation-of-powers jurisprudence—*Youngstown Sheet & Tube Co. v. Sawyer*—and in particular, the tripartite framework advanced by Justice Robert H. Jackson.[304]

In a fractured opinion, a majority of the Court found that

Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2012) (Brandeis, J., dissenting) (emphasis added).

302. *Id.*

303. Delahunty & Yoo, *supra* note 20, at 848.

304. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

President Truman could not rely on his inherent powers to seize steel mills in the face of imminent labor strikes.[305] Justice Jackson concurred, finding the executive power is at its "lowest ebb" when the actions the President takes are "measures incompatible with the expressed or implied will of Congress."[306] In such cases, Jackson explained, the President "can rely *only* upon his own constitutional powers minus any constitutional powers of Congress over the matter."[307] With this limited Article II arsenal, the President's "claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[308] In this lowest zone, presidential power is "most vulnerable to attack and [is] in the least favorable of possible constitutional postures."[309] Jackson's framework has become the canonical holding of the case, and of separation-of-powers jurisprudence as a whole.

Justice Rehnquist—who clerked for Jackson the year *Youngstown* was decided[310]—applied this framework in *Dames & Moore v. Regan* to find that Congress had effectively authorized the President to nullify Iranian assets under the International Emergency Economic Powers Act (IEEPA).[311] In recent years, Chief Justice Roberts,[312] Justice Alito,[313] Justice Sotomayor,[314] and Justice Kagan[315] all reaffirmed the vitality of *Youngstown*, and in particular, Justice Jackson's concurring opinion.

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305. *Id.* at 582–83, 588–89 (majority opinion).

306. *Id.* at 637 (Jackson, J., concurring).

307. *Id.* (emphasis added).

308. *Id.* at 638.

309. *Id.* at 640.

310. Josh Blackman, *From Jackson to Rehnquist to Roberts on* Youngstown Sheet & Tube *and* Dames & Moore v. Regan, JOSH BLACKMAN'S BLOG (Feb. 14, 2014), http://bit.ly/1IF2tEP [perma.cc/7BCQ-UDZU].

311. Dames & Moore v. Regan, 453 U.S. 654, 668–690 (1981).

312. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 152 (2005) (statement of John G. Roberts, Jr., Nominee), *available at* http://1.usa.gov/1J8LwpL.

313. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 323 (2006) (statement of Samuel A. Alito, Jr., Nominee), *available at* http://1.usa.gov/1HhXQDu.

314. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 353 (2009) (statement of Sonia Sotomayor, Nominee), *available at* http://1.usa.gov/1Hslsnj.

315. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 99 (2010) (statement of Elena Kagan, Nominee), *available at* http://1.usa.gov/1E9dBtI.

The OLC opinion justifying the legality of DAPA sounds in Justice Jackson's *Youngstown* decision, and roughly sketches the three zones of his opinion. First, deferred action programs cannot be deemed per se impermissible, because congressional authorization and recognition of such programs indicate *some* level of consistency with congressional immigration policy.[316] This is the first tier. If Congress has supported the President's actions, then the President is presumptively acting lawfully.

The OLC opinion explains that the Executive does not possess a blank check to promulgate deferred action initiatives, despite the permissibility of such programs at a certain level of generality.[317] This is the third tier. If Congress has not authorized the President to grant deferred action, then the President acts unlawfully because these actions amount to lawmaking. There is not an unconstitutional *delegation*, but an unconstitutional *usurpation* of power.

The OLC takes a very nuanced approach to the middle tier—the so-called "zone of twilight."[318] The opinion explains that a "particularly careful examination is needed to ensure that any proposed expansion of deferred action," beyond that which was done by previous executive actions, "complies with these general principles, so that the proposed program does not, in effect, cross the line between executing the law and rewriting it."[319] These "general principles" are not only congressional statutes, but include congressional acquiescence to or rejections of past actions. This inquiry is not as simple as parsing the plain text of the statute and determining whether the President has complied with the law. It is this sense of "the Laws" (which I will refer to as congressional policy) with which the President must comply.

B. Congress Has Not Acquiesced to DAPA

How does DAPA fare under this framework? The OLC opinion acknowledged that DAPA "depart[s] in certain respects from more familiar and widespread exercises of enforcement

316. THOMPSON, *supra* note 5, at 23.

317. *Id.* at 24 ("Congress's apparent endorsement of certain deferred action programs does not mean, of course, that a deferred action program can be lawfully extended to any group of aliens, no matter its characteristics or its scope, and no matter the circumstances in which the program is implemented.").

318. *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

319. THOMPSON, *supra* note 5, at 24.

discretion."[320] But the opinion looked to consistency with congressional policy as a significant touchstone of the program's legality:

> [T]he proposed deferred action program would resemble in material respects the kinds of deferred action programs Congress has implicitly approved in the past, which provides some indication that the proposal is consonant not only with interests reflected in immigration law as a general matter, but also with congressional understandings about the permissible uses of deferred action.[321]

This admission, based on implicit rather than express approval, would seem to put the policy slightly below the first tier, rendering the policy presumptively lawful.

Based on these considerations, the OLC concluded that DAPA "is consistent with congressional policy, since it focuses on a group—law-abiding parents of lawfully present children who have substantial ties to the community—that Congress itself has granted favorable treatment in the immigration process."[322] This conclusion, coupled with DHS's expertise in resource allocation, leads the OLC to opine that DAPA is "a permissible exercise of DHS's discretion to enforce the immigration laws."[323]

But the factual predicates of this "particularly careful examination" yield a very different result, dropping DAPA to the third tier. Determining "the degree of Congress's acquiescence in policy-based nonenforcement requires a sensitive examination of the particular statutory context."[324] The four programs the OLC opinion identifies as precedents for DAPA fail to justify this unprecedented expansion of executive power.[325]

First, DAPA does not "resemble" previous deferred actions "in material respects."[326] These previous programs acted as a *temporary bridge* from one status to another, where benefits were construed as arising immediately after deferred action. Second, Congress has not "implicitly approved" such deferred action in

320. *Id.*
321. *Id.* at 29.
322. *Id.* at 31.
323. *Id.* at 1.
324. Price, *supra* note 20, at 747.
325. Part I of this series explored these precedents at length. I have only included a summary here. See *Constitutionality of DAPA Part I*, *supra* note 16, for a full discussion.
326. *See* THOMPSON, *supra* note 5, at 29; *see also Constitutionality of DAPA Part I*, *supra* note 16, at 119–21.

the past.[327] This claim is demonstrably false because the programs cited all countenanced some form of immediate relief, with the deferred action serving as a temporary bridge to permanent residence or lawful presence.

Third, DAPA is not "consonant" with "interests reflected in immigration law as a general matter."[328] OLC's review of existing statutory law regarding the relief available to the parents of U.S. citizens and lawful permanent residents is superficial and ignores the very limited nature of any "family unity" policy present in the INA. Fourth and finally, DAPA is not consistent with "congressional understandings about the permissible uses of deferred action."[329] The scope of Congress's acquiescence in the Executive's use of deferred action is far more constrained than the OLC opinion suggests. Specifically, when not approved by Congress, the Executive Branch's discretion to cancel removals is capped at 4,000 annually.[330] This is several orders of magnitude smaller than the more than four million covered by DAPA. The closing argument for this case is that Congress took affirmative steps to defund DAPA because of the constitutional violations.[331] By every measure, DAPA flunks the very test the OLC offered.

Without Congressional acquiescence—by OLC's own standard—DAPA falls into Jackson's third tier, where the executive's power is at its "lowest ebb." First, the President is not acting in concert with Congress; Congress rejected or failed to pass immigration reform bills reflecting this policy numerous times.[332] Second, there is no murky "twilight" about congressional intent; the House of Representatives recently passed a resolution opposing the policy.[333] Third, Congress has not acquiesced in a pattern of analogous executive actions. Previous uses of deferred action were typically ancillary to statutory grants of lawful status or responsive to extraordinary

327. *See id.* at 111–19.

328. *See id.* at 102–10.

329. *See id.*

330. 8 U.S.C. § 1229b(e)(1) (2013) ("[T]he Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status . . . of a total of more than 4,000 aliens in any fiscal year.").

331. *See* Jennifer Rubin, *What Will be Plan B for Immigration?*, WASH. POST, Jan. 14, 2015, http://wapo.st/1ODPXXZ [perma.cc/VMX7-JKS3].

332. *See* Elisha Barron, Recent Development, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 631–38 (2011) (describing failed attempts to enact various versions of the DREAM Act between 2001 and 2010).

333. Seung Min Kim, *House Sends Obama Message with Immigration Vote*, POLITICO, Dec. 4, 2014, http://bit.ly/1J8LUoc [perma.cc/LXX3-6U2W].

equities based on the extreme youth, age, or infirmity of the recipient.

Additionally, DAPA is even less related to foreign affairs than the actions at issue in *Youngstown.* Justice Black's majority opinion recognized that the domestic matter at the steel mills was outside the "theater of war," and was a "job for the Nation's lawmakers, not for its military authorities."[334] Justice Jackson observed that it was "sinister and alarming" to think "that a President whose conduct of foreign affairs is so largely uncontrolled . . . can vastly enlarge his mastery over the *internal affairs* of the country by his own commitment of the Nation's armed forces to some foreign venture."[335] In domestic matters, he cannot rely on his commander-in-chief powers.[336]

That DAPA applies equally to all nations makes it more difficult to square with the President's broad powers over foreign affairs.[337] Previous presidents have used deferred action for humanitarian purposes, targeting aliens from specific countries for specific foreign policy goals. For example, in 1990, following the Tiananmen Square massacre, President George H. W. Bush deferred the prosecution of Chinese nationals who were in the United States at the time of the massacre in Beijing.[338] Two years later, Congress ratified that order with the Chinese Student Protection Act of 1992.[339] These and other similar exercises of executive action are bolstered by the President's foreign affairs powers. In contrast, DAPA, which treats unlawful aliens from Mexico and Canada alike, makes no pretense of relying on the President's constitutional authority over foreign affairs. The entirety of the OLC memo is based on domestic authority.

These efforts to enact substantive policies in the face of congressional intransigence must be viewed skeptically. The President is sidestepping Congress because the Legislative

334. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 587 (1952).

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

336. *See* Delahunty & Yoo, *supra* note 20, at 826.

337. *See, e.g.*, U.S. Const. Art. II, § 2; United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320–21 (1936) ("It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the *sole organ* of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.").

338. Exec. Order No. 12,711, 3 C.F.R. 283 (1991).

339. Pub. L. No. 102–404, 106 Stat. 1969.

Branch has refused to enact his preferred policies. But Justice Jackson's framework for the separation of powers has no place for unilateral executive action based solely on Congress's resistance to presidential preferences—even if those preferences reflect sound policy choices. The Constitution shows that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[340] Overall, DAPA is a perfect storm of executive lawmaking, descending to the lowest depths of *Youngstown,* beyond the "zone of twilight," and even below the "lowest ebb."[341]

VII. DELIBERATE EFFORT TO BYPASS CONGRESS IS NOT IN GOOD FAITH

The final element in the Take Care Clause is the most important. Has the President acted in good "faith" to execute the laws of Congress, or is he taking proactive steps to bypass laws he disfavors? This is by far the most difficult aspect of the Take Care Clause to judge, because presidential acts are usually presumed lawful. But if the Executive has turned away from his constitutional duty, as evidenced by the preceding three factors, his state of mind is the only way to separate a good-faith mistake from a bad-faith deliberate deviation. The former is regrettable, but acceptable. The latter is pretextual and unconstitutional.

A. DACA and DAPA Arose from the Ashes of Congressional Defeat

Like the mythical phoenix, DACA and DAPA arose from the ashes of congressional defeat. The DREAM Act would have provided a form of permanent residency and work permits for certain immigrants who were brought to the United States as minors.[342] Though the bill received bipartisan support in both houses, a Republican-led filibuster killed the bill in the Senate.[343] In response to this defeat, in June 2012, the President took matters into his own hands.[344]

340. *Youngstown,* 343 U.S. at 587.

341. I have previously argued that such actions fall into a fourth tier where the "Court must assess the limits of the President's unenumerated Article II authority" and declare whether the President is rightly acting within his own independent powers. *See* Elizabeth Bahr & Josh Blackman, *Youngstown's Fourth Tier: Is There a Zone of Insight Beyond the Zone of Twilight?,* 40 U. MEM. L. REV. 541, 544–45 (2010).

342. *See generally* DREAM Act of 2010, S. 3992, 111th Cong. (2010).

343. Scott Wong & Shira Toeplitz, *DREAM Act Dies in Senate,* POLITICO, Dec. 18, 2010, http://politi.co/1IF375c [perma.cc/9R4T-PPY7].

344. *See* Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals,* N.Y. TIMES,

As part of his "We Can't Wait" campaign, the President announced the policy that came to be known as DACA.[345] His remarks directly linked the defeat of the DREAM Act to his new executive action: "Now, both parties wrote this legislation. And a year and a half ago, Democrats passed the DREAM Act in the House, but Republicans walked away from it. It got 55 votes in the Senate, but Republicans blocked it."[346] He made clear that in "the absence of any immigration action from Congress to fix our broken immigration system," he would act without Congress.[347] DACA accomplished several of the key statutory objectives of the DREAM Act—a law Congress expressly declined to enact—without bicameralism and presentment.[348] Deportations were deferred for the so-called Dreamers, and they were entitled to legal work authorization.[349]

This pattern would repeat itself over the next two years. On June 27, 2013, the Senate passed the "Border Security, Economic Opportunity, and Immigration Modernization Act," commonly known as "comprehensive immigration reform," by a bipartisan vote of 68–32.[350] Over the next year, the President lobbied House Republicans to take up the measure for a vote. But this effort proved unsuccessful. In June of 2014, after much debate within his caucus, House Speaker John Boehner announced that the House would not bring an immigration bill to a vote in 2014.[351]

That same day, in impromptu remarks delivered in the Rose Garden, the President explained why he would take unilateral executive action on immigration reform notwithstanding the House's decision. He said, "I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing. . . . [I will] fix as much of our immigration system as

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Apr. 22, 2012, http://bit.ly/1cXQQPs [perma.cc/H52B-P2PE] ("The Obama administration started down this path [of unilateral executive action] soon after Republicans took over the House of Representatives.").

345. Frank James, *With DREAM Order, Obama Did What Presidents Do: Act Without Congress*, NPR IT'S ALL POLITICS, June 15, 2012, http://bit.ly/1Eqk85l [perma.cc/N8ZH-2CEN].

346. President Barack Obama, Remarks on Immigration (June 15, 2012), *available at* http://bit.ly/1aQmDAe [perma.cc/6ZZX-5S2C].

347. *Id.*

348. *Id.*

349. *Id.*

350. S. 744, 113th Cong. (2013).

351. Steven Dennis, *Immigration Bill Officially Dead: Boehner Tells Obama No Vote This Year, President Says*, ROLL CALL, June 30, 2014, http://bit.ly/1OcChZ5 [perma.cc/5R7F-LRH8].

I can on my own, without Congress."[352] In earlier remarks, the President cited congressional gridlock as a reason why "[*w*]*e can't afford to wait* for Congress," and a justification for why he was "going ahead and moving ahead without them."[353] The President explained that "as long as they insist on [obstruction], *I'll keep taking actions on my own . . . . I'll do my job.*"[354] Five months later, after the midterm elections, the President announced DAPA.[355] In both cases, the laws were born despite express repudiations by Congress.

The pattern has become predictable: (1) Congress votes against granting the President new power; (2) the President explains he will exert power, even though Congress denied it to him; and (3) through an executive policy, the President exerts power that Congress denied him. Such behavior cannot be viewed as a good faith—just mistaken or misguided—effort to comply with the law. Rather, it amounts to an open and notorious decision to disregard the democratic process, based on pretextual legal justifications. Implementing DACA and DAPA after Congress voted down their antecedent bills is a bad-faith effort to comply with the Take Care Clause. As discussed in the next section, this conclusion is even stronger because the President repeatedly insisted that he lacked the authority to act alone—until Congress handed him a defeat. Then, he suddenly and unconvincingly discovered new fonts of power.

B. Dr. Jekyll and Mr. Hyde Approach to Executive Powers Reflects Bad Faith Motivation

To ascertain if the Executive's non-compliance with the law is still in good faith, we must look to the state of mind of the

352. President Barack Obama, Remarks on Immigration (June 30, 2014), *available at* http://wapo.st/1Eqkhpj [perma.cc/H49J-8N2L].

353. Jeffrey Sparshott, *Obama Blames Congress for Lack of Economic Progress*, WALL ST. J., June 27, 2014, http://bit.ly/1yQ8Q8l [perma.cc/XZD2-FMME] (emphasis added). Senate Democrats have voiced similar ideas. Mike Lillis, *Democrats: No Bluff, Obama Will Go it Alone on Immigration*, THE HILL, June 26, 2014, http://bit.ly/1FcC6Hn [perma.cc/DE72-6525].

354. President Barack Obama, Weekly Address: Focusing on the Economic Priorities for the Middle Class Nationwide (June 28, 2014) (emphasis added), *available at* http://1.usa.gov/1HslNGw [perma.cc/NWR4-G4XF]. The President's lack of respect for the separation of powers is striking, particularly because only two days earlier the Supreme Court made abundantly clear in *Noel Canning* that congressional intransigence does not strengthen executive powers or give the President a license to redefine his authority. NLRB v. Noel Canning, 134 S. Ct. 2550, 2557 (2014).

355. *Executive Actions on Immigration*, *supra* note 3.

President: the "sole organ" of the Executive Branch.[356] In contrast to that of Congress—which is a *they*, not an *it*[357]—the intent of the President can be more easily gleaned. A careful study should be made of all official and unofficial administration statements, particularly if they are against interest. The President speaks individually and releases OLC opinions and other memoranda so the American people understand why he is acting. Professors Delahunty and Yoo add that a careful study should be made of the Executive's "reasoned public explanation and defense" to determine "whether the excuse [for unlawful actions] is factually true or not."[358] Even if it is not true, the excuse need not be rejected after an examination of the "motivation and intent" behind the nonperformance.[359] A good faith mistake will be saved. An excuse that is not made in good faith is pretextual and must be rejected.

With respect to the scope of his executive powers, President Obama has been both Dr. Jekyll and Mr. Hyde. While congressional reform remained a viable option, the President repeated over and over again that he could not grant the scope of temporary relief that advocates sought. But this measured President vanished once Congress ultimately rebuffed his efforts. The transformed Mr. Hyde took matters into his own hands and granted the very relief Dr. Jekyll once claimed impossible.[360] These sudden position reversals attest to President Obama's bad faith.

1. The President Consistently Disclaimed Authority to Defer Deportations of Dreamers

Before the defeat of the DREAM Act, the President

356. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (describing the President as "the sole organ of the federal government" in international relations).

357. Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent As Oxymoron*, 12 INT'L REV. L. & ECON. 239, 254 (1992) ("Individuals have intentions and purpose and motives; collections of individuals do not. To pretend otherwise is fanciful."); *see also* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870–71 (1930); Josh Blackman, *This Lemon Comes as a Lemon: The Lemon Test and the Pursuit of a Statute's Secular Purpose*, 20 GEO. MASON U. C.R. L.J. 351, 366–73 (2010).

358. Delahunty & Yoo, *supra* note 20, at 847.

359. *Id.*

360. This pattern of behavior is not limited to immigration. Brief of *Amici Curiae* Cato Institute & Professor Josh Blackman In Support of Petitioners at 26–34, King v. Burwell, No. 14-114 (U.S. Dec. 29, 2014) (discussing rule of law violations attending the implementation of the Affordable Care Act), *available at* http://bit.ly/1DKUUeC [perma.cc/4JBX-9JSM].

consistently explained that he lacked the power to unilaterally suspend deportations. "With respect to the notion that I can just suspend deportations through executive order," he said, "that's just not the case, because there are laws on the books that Congress has passed."[361] He repeated this point many times, almost verbatim.

At a Cinco De Mayo celebration, the President stressed that he could not fix the immigration laws himself. "Comprehensive reform, that's how we're going to solve this problem.... Anybody who tells you ... that I can wave a magic wand and make it happen hasn't been paying attention to how this town works."[362] On Univision, he explained "I am [P]resident, I am not king. I can't do these things just by myself.... [T]here's a limit to the discretion that I can show because I am obliged to execute the law.... I can't just make the laws up by myself."[363] At a town hall meeting, he added, "I can't solve this problem by myself.... We're going to have to change the laws in Congress."[364] In El Paso, Texas, the President reminded the audience that "sometimes when I talk to immigration advocates, they wish I could just bypass Congress and change the law myself. But that's not how a democracy works."[365] To the National Council of La Raza, the President stated, "[B]elieve me, the idea of doing things on my own is very tempting.... But that's not how ... our system works.... That's not how our Constitution is written."[366]

Finally, Gabriel Lerner from AOL Latino asked the President about "granting administrative relief for Dreamers."[367] The President clearly and directly replied that he could not grant such relief unilaterally:

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361. President Barack Obama, Remarks at Univision Town Hall (Mar. 28, 2011), *available at* http://1.usa.gov/1yQ97YR [perma.cc/28QN-XKNK].

362. President Barack Obama, Remarks at a Cinco de Mayo Celebration (May 5, 2010), *available at* http://bit.ly/1OcCHOY [perma.cc/8GEV-34WQ].

363. Interview by Eddie "Piolin" Sotelo with President Barack Obama, in L.A., Cal. (Oct. 25, 2010), *available at* http://lat.ms/1DfgHZh [perma.cc/RE25-Y875].

364. President Barack Obama, Remarks at a Facebook Town Hall Meeting and a Question-and-Answer Session in Palo Alto, California (Apr. 20, 2011), *available at* http://bit.ly/1OcCL1j [perma.cc/QUR5-R734].

365. President Barack Obama, Remarks on Comprehensive Immigration Reform in El Paso, Texas (May 10, 2011), *available at* http://1.usa.gov/1HSvv5H [perma.cc/DCK4-U8BV].

366. President Barack Obama, Remarks to the National Council of La Raza (July 25, 2011), *available at* http://1.usa.gov/1FcCiGu [perma.cc/FY8F-SSM7].

367. President Barack Obama, Remarks in an "Open for Questions" Roundtable (Sept. 28, 2011), *available at* http://1.usa.gov/1Dfh06r [perma.cc/X5AL-DUWX].

> I just have to continue to say this notion that somehow I can just change the laws unilaterally is just not true. We are doing everything we can administratively. But the fact of the matter is there are laws on the books that I have to enforce. And I think there's been a great disservice done to the cause of getting the DREAM Act passed and getting comprehensive immigration passed by perpetrating the notion that somehow, by myself, I can go and do these things. It's just not true.[368]

But after the DREAM Act was defeated, his thinking about the scope of his executive powers evolved. He implemented the very relief that he previously said he lacked the power to effect: suspending the deportation of the Dreamers. The President's statements about his power before and after the legislative defeat are diametrically opposed.

In one sense, the President's loquaciousness and repeated statements against interest weaken his claim to good faith execution. This framework may create a perverse incentive for presidents to quietly disregard the law. But nonenforcement cannot have its intended effect unless people know about it. If the President never announced DAPA or DACA, then the aliens who are protected by it would continue to live in the shadows. This would make them ineligible for work authorization unless they came forward. If the President never announced his myriad delays of the Affordable Care Act's deadlines, those subject to the mandates would have continued to comply with them, and the goal of exempting people from the mandates would be unfulfilled. If the President never announced that he was declining to enforce controlled substance laws in states that legalized marijuana, then people would continue to abstain from the drug for fear of prosecution. These ploys would have been ineffective if the President said nothing.

The essence of nonenforcement is to remove the threat of prosecution, and thus assure people that they can break the law with impunity.[369] With respect to Obamacare, immigration, or marijuana, so long as the threat remains, people will continue to modify their behavior at the margins. And this is exactly what Congress intended, even if it knew a law could not be fully enforced. The threat of enforcement nudges people to behave in

368. *Id.*
369. Price, *supra* note 20, at 705.

accordance with the law.[370] This realization further explains why nonenforcement cannot be consistent with congressional policy.

2. The President Consistently Disclaimed Authority to Defer Deportations of Parents of U.S. Citizens

DAPA bears a similar pedigree to DACA. From 2012 through 2014, while Congress considered comprehensive immigration reform, the President consistently stated that he lacked the authority to defer deportations of more aliens. Further, he reasserted that he pushed the boundaries as far as he could with DACA. His comments ranged from broad statements about executive power to very specific fact scenarios. First, he explained that the Constitution imposes limits on what he can do as President. He said that as the "head of the [E]xecutive [B]ranch, there's a limit to what I can do. . . . [U]ntil we have a law in place that provides a pathway for legalization and/or citizenship for the folks in question, we're going to . . . continue to be bound by the law."[371]

Second, during a Presidential debate, he said he could not stretch his executive powers any further than DACA: "[W]e're also a nation of laws. So what I've said is, we need to fix a broken immigration system. *And I've done everything that I can on my own.*"[372] Third, the President directly refuted the notion that he could defer removals to protect families. During a Google+ Hangout on immigration reform, a question was asked about whether the President could halt deportations to prevent family break-ups.[373] The President replied:

> [T]his is something that I've struggled with throughout my presidency. The problem is that, you know, I'm the [P]resident of the United States. I'm not the emperor of the United States. My job is to execute laws that are passed, and Congress right now has not changed what I consider to be a broken immigration system.
>
> And what that means is that we have certain obligations to

370. *Id.* at 761.

371. President Barack Obama, Remarks at Univision Town Hall (Sept. 20, 2011), *available at* http://bit.ly/1GhsjkO [perma.cc/P63V-U7GF].

372. President Barack Obama, Presidential Debate in Hempstead, New York (Oct. 16, 2012) (emphasis added), *available at* http://bit.ly/1yNHZtp [perma.cc/9G5A-L5YF].

373. President Barack Obama, Remarks at Google Hangout (Feb. 14, 2013), *available at* http://bit.ly/1aQygXT [perma.cc/679W-ES4Q].

> enforce the laws that are in place . . . .[374]

Again, the President stressed that with DACA, "we've kind of stretched our administrative flexibility as much as we can."[375]

Fourth, the President was asked in an interview if he would "consider [unilaterally] freezing deportations for parents of deferred-action kids."[376] The President replied that the DREAM Act could not be expanded beyond "young people who have basically grown up here . . . . [I]f we start broadening that, then essentially I would be ignoring the law in a way that I think would be very difficult to defend legally. So that's not an option."[377] While the OLC would ultimately find that deferred action for the parents of Dreamers was unconstitutional, the President did "freeze deportation" for groups beyond the Dreamers.

Fifth, during a town hall meeting, the President was asked whether he could do for an "undocumented mother of three" what he "did for the [D]reamers."[378] The President replied that he could not extend the relief given to the Dreamers to these parents:

> I'm not a king. . . . [W]e can't simply ignore the law.
>
> When it comes to the Dreamers—we were able to identify that group [as] generally not a risk. . . .
>
> But to sort through all the possible cases—of everybody who might have a sympathetic story to tell is very difficult to do. This is why we need comprehensive immigration reform.
>
> . . . .
>
> [If] this was an issue that I could do unilaterally I would have done it a long time ago. . . . The way our system works is Congress has to pass legislation. I then get an opportunity to sign and implement it.[379]

But DAPA accomplished exactly what the individual asking the question wanted: it deferred deportations for parents whose children are citizens. More directly, the President was asked

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374. *Id.*

375. *Id.*

376. Steve Contorno, *Barack Obama: Position on Immigration Action Through Executive Orders 'Hasn't Changed,'* POLITIFACT, NOV. 20, 2014, http://bit.ly/1OEbmjE [perma.cc/KSN4-ZQUP] (quoting a September 2013 interview with Noticias Telemundo). Ultimately, the OLC opinion found the President could not do this. THOMPSON, *supra* note 5, at 33.

377. Contorno, *supra* note 376.

378. Interview by José Díaz-Balart with President Barack Obama, in Wash., D.C. (Jan. 30, 2013), *available at* http://on.nbclatino.co/1yQqtVw [perma.cc/L2NQ-QWX9].

379. *Id.*

whether he could halt deportations of non-criminals—another category of aliens protected by DAPA. He replied, "I'm not a king. I am the head of the executive branch of government. I'm required to follow the law."[380]

Sixth, during a speech on immigration reform in San Francisco, hecklers called out at least six times, "Stop deportations!"[381] The President replied:

> [I]f, in fact, I could solve all these problems without passing laws in Congress, then I would do so.
>
> But we're also a nation of laws. That's part of our tradition. And so the easy way out is to try to yell and pretend like I can do something by violating our laws. And what I'm proposing is the harder path, which is to use our democratic processes to achieve the same goal . . . .[382]

Seventh, the President's most pointed comments came on March 6, 2014, during an appearance on Univision.[383] The host asked him about "Guadalupe Stallone from California, [who] is undocumented. However, her sons are citizens."[384] She feared deportation, even though her children could remain in the country.[385] The President explained that he could not help Ms. Stallone: "[W]hat I've said in the past remains true, which is until Congress passes a new law, then I am constrained in terms of what I am able to do."[386] DACA, he admitted, "already stretched my administrative capacity very far."[387] The President could go no further because "at a certain point the reason that these deportations are taking place is, Congress said, you have to enforce these laws."[388] Citing congressional power to distribute funding, the President reiterated, "I cannot ignore those laws any[]more than I could ignore, you know, any of the other laws that are on the books."[389] Under DAPA, Ms. Stallone's deportation would be deferred because her children are

380. President Barack Obama, Interview with Univision (Jan. 31, 2013), *available at* http://wapo.st/1K3sFdm [perma.cc/JWR4-DDZA].

381. President Barack Obama, Remarks on Immigration Reform—San Francisco, CA (Nov. 25, 2013), *available at* http://1.usa.gov/1DAaNBa [perma.cc/R27T-BXFK].

382. *Id.*

383. President Barack Obama, Interview with Univision (Mar. 5, 2014), *available at* http://bit.ly/1HSJokm [perma.cc/6RT7-RF9Q] (the interview aired on Mar. 6, 2014).

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

citizens—even though, as the President explained, Congress imposed laws and funded the agencies and he was required to enforce the law.

Leading up to November 2014, however, the President's position evolved from "impossible" to "absolutely." During this process, the President announced that "[i]n the face of that kind of dysfunction, what I can do is *scour our authorities* to try to make progress."[390] What limits exist on how far he can scour? The President explained the "temptation to want to go ahead and get stuff done," when "there's a lot of gridlock":

> What I've tried to do is to make sure that the Office of Legal Counsel, which weighs in on what we can and cannot do, is fiercely independent. They make decisions. We work well within the lines of that.[391]

While claims of a supine OLC are nothing new—as the President has disregarded OLC's opinion regarding "hostilities" in Libya[392]—this statement is particularly implausible because the President personally pushed his legal team to go further and exert even broader assertions of executive power. The *New York Times* reported that the Administration urged the legal team to use its "legal authorities to the fullest extent."[393] When they presented the President with a preliminary policy, it was a disappointment because it "did not go far enough."[394] Scouring the bottom of the presidential barrel for more power, Obama urged them to try again.[395] And they did just that. Politico reported that over the course of eight months, the White House reviewed "more than [sixty] iterations" of the executive action.[396] The final policy, which received the President's blessing, pushes presidential power beyond its fullest extent and embodies

390. Caitlin MacNeal, *Obama: When Congress Fails, I'll 'Scour' Authorities To 'Make Progress,'* TPM LIVEWIRE, Aug. 6, 2014, http://bit.ly/1E9rS9Z [perma.cc/4M9J-Y6R9] (emphasis added).

391. Interview by Stephen Colbert with President Barack Obama, in Wash., D.C. (Dec. 8, 2014), *available at* http://1.usa.gov/1GhtJMj [perma.cc/2RSR-849Q].

392. Jack Goldsmith, *President Obama Rejected DOJ and DOD Advice, and Sided with Harold Koh, on War Powers Resolution*, LAWFARE (June 17, 2011, 11:38 PM), http://bit.ly/1J9aXYi [perma.cc/K2YU-HSJP].

393. Michael D. Shear & Julia Preston, *Obama Pushed 'Fullest Extent' of His Powers on Immigration Plan*, N.Y. TIMES, Nov. 28, 2014, http://bit.ly/1aQyVsc [perma.cc/Z46D-GSBW].

394. *Id.*

395. *Id.*

396. Carrie Budoff Brown, Seung Min Kim & Anna Palmer, *How Obama Got Here*, POLITICO, Nov. 20, 2014, http://politi.co/1DAaNRV [perma.cc/BU4H-HS55].

discretion in name only. Further, the policy is in tension with numerous statements the President personally made explaining why he could not act alone. Here, the President alleging that the OLC is independent and detached is implausible.

3. Changed Justification After Defeat Amounts to Pretext

While flip-flops are par for the course in politics and usually warrant no mention in constitutional discourse, they are salient to ascertain pretext. In the context of the Establishment Clause, the Court has often looked past the stated purposes of a law to divine whether contemporaneous statements render the law "non-secular." For example, in *Wallace v. Jaffree*, Justice Stevens, writing for the majority, found that the secular purpose of permitting prayer in school was "dispositive," as the "record not only provides [the Court] with an unambiguous affirmative answer, but it also reveals that the enactment of [the statute] was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose."[397] For example, one state senator said he believed the statute was an "effort to return voluntary prayer" to the public schools.[398] As noted by Chief Justice Burger's dissent, the majority opinion "ignore[d] the statement of purpose that accompanied the moment-of-silence bill throughout the legislative process: 'To permit a period of silence to be observed for the purpose of meditation or voluntary prayer at the commencement of the first class of each day in all public schools.'"[399] In other words, Justice Stevens discounted the stated purpose of the law as pretext, and ascertained the true—and unlawful—motivation of the statute through statements from the legislators. The Court has recognized in many other contexts that malefactors cannot hide behind pretextual statements to justify unlawful acts.[400]

For the Take Care Clause, when the President repeats over and over again that he lacks the power to stop deportations, he is openly acknowledging the limitations of the separation of powers—something the President rarely does.[401] This is true for

397. Wallace v. Jaffree, 472 U.S. 38, 40–41, 56 (1985).

398. *Id.* at 56–57 & n.43 (emphasis removed).

399. *Id.* at 86 n.1 (Burger, J., dissenting) (citations omitted).

400. *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 690–91 (1994) (Scalia, J., dissenting) (listing cases to show various areas in which the Court "considers 'pretext' analysis sufficient").

401. JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO

Presidents "learned and unlearned in the law."[402]

When the President disclaims inherent executive power, it sends a signal to Congress: when deliberating, they can rest assured that if they vote the law down, that policy will not be put into action unilaterally. But when the President suddenly "discovers" authority to take action after Congress rebuffs his efforts, both the usual framework for the democratic process and the rule of law are turned upside down.

With DACA and DAPA, there is a prima facie case that the change in constitutional analysis was not done in good faith, but as pretext. I do not mean "good faith" in the sense that the President is acting in good faith to make a certain policy work.[403] Rather, by good faith I suggest the President knowingly disengaged from his constitutional duties to achieve just those policy objectives Congress rejected. The revised rationales speak directly to the motives of the Executive, and whether he mistakenly failed to comply with his constitutional duty or deliberately bypassed disfavored legislation. All signs point toward the latter. These facts rebut the presumption that the Executive faithfully executes the law.[404]

As a possible defense of DAPA, perhaps the President was dealing with the cards he was dealt by an intransigent and uncooperative Congress. Providing a "sympathetic reading [of] President Obama's maneuvers," could reflect a "species of *constitutional self-help*—attempts to remedy another party's prior wrong [Congress's failure to pass legislation], rather than to ignore inconvenient legal barriers."[405] Relying on inherent

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OBAMACARE 135, 181 (2013).

402. *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring) (describing actions taken by Presidents "learned and unlearned in the law"). President Obama has opined that his experience as an attorney makes his statements on executive power more authoritative than those who are not "constitutional lawyers." Interview by Jackie Calmes & Michael D. Shear with President Barack Obama, in Galesburg, Ill. (July 24, 2013) (alleging that Congress frequently accuses him of usurping authority for anything, even "by having the gall to win the presidency. . . . *But ultimately, I'm not concerned about their opinions—very few of them, by the way, are lawyers, much less constitutional lawyers.*") (emphasis added), *available at* http://nyti.ms/1J9bae3 [perma.cc/U5WV-L5QQ].

403. *See* Price, *supra* note 20, at 749.

404. *Id.* at 704.

405. Pozen, *supra* note 55, at 7; *see also* Price, *supra* note 20, at 674 (arguing that increasing executive reliance on nonenforcement is a structural problem arising from congressional gridlock); Cox & Rodriguez, *supra* note 282, at 532 (noting that the Executive Branch can respond faster to "changing needs and public opinion," and "sometimes help overcome counterproductive legislative deadlock").

executive powers, there is always room for some self-help within the realm of quasi-constitutional norms. But a touchstone of this inquiry is that it requires the President to still comply with his constitutional duties, specifically to "execute" the law "faithfully." Self-help reflected in efforts to "ignore inconvenient legal barriers," could still potentially fall within the range of permissible discretion.[406] This is true only so long as the President acts within his sphere of constitutional duties, as demonstrated by both text and tradition, and reflected in what Congress has acquiesced to. Self-help (effectuated by power not delegated by either the Constitution or Congress) can never license efforts to "remedy another party's prior wrong."[407] Gridlock does not license the President to transcend his Article II powers and subjugate congressional authority,[408] particularly where the President's justification for ignoring inconvenient barriers is extremely weak.[409] As Justice Kennedy recently testified before Congress, "gridlock" should not affect the way the Supreme Court "interprets" the law.[410] The President's action still must be defensible as a good-faith effort to comply with the statutes, and not a deliberate effort to bypass Congress. Bypassing Congress may be convenient, but it conflicts with the "supreme Law of the Land."

As the Supreme Court recently explained in a unanimous decision against the President's similar actions around Article I, "political opposition" in Congress does not "qualify as an unusual circumstance" to justify the unlawful exercise of presidential power.[411] Further, Justice Scalia concurred in rejecting the Solicitor General's invitation to "view the recess-appointment power as a 'safety valve' against Senatorial 'intransigence.'"[412] The separation of powers remains just as strong whether the relationship between Congress and the President is symbiotic or antagonistic. Where the people cannot agree, gridlock is the constitutionally ideal form of government—it means the process is working. As Madison wisely

406. Pozen, *supra* note 55, at 7.

407. *Id.*

408. *See* Gridlock and Executive Power, *supra* note 21, at 17.

409. Price, *supra* note 20, at 674–75.

410. Josh Blackman, *Justice Kennedy Discusses Gridlock During Hill Testimony. Yes, there is a* King v. Burwell *Connection*, JOSH BLACKMAN'S BLOG, (Mar. 23, 2015) http://bit.ly/1bhuV4H [perma.cc/A5RJ-GDYQ].

411. NLRB v. Noel Canning, 134 S.Ct. 2550, 2567 (2014).

412. *Id.* at 2599 (Scalia, J., concurring).

observed: "Ambition must be made to counteract ambition."[413]

President Obama himself made this point eloquently. On April 29, 2011, the President responded to calls for executive action on immigration, saying, "I know some here wish that I could just bypass Congress and change the law myself. But that's not how democracy works. See, democracy is hard. But it's right. Changing our laws means doing the hard work of changing minds and changing votes, one by one."[414] DACA came up one vote short in the Senate. DAPA never even came up for a vote in the House. Despite all of the hard work to change minds, not enough votes were changed. It is up to Congress, and not the President, to decide whether the INA needs to be changed. No self-help can fix this.

C. Youngstown Redux

To assess the faithfulness of the President's execution, consider a *Youngstown* counterfactual that is fairly close to reality. In the actual case, five years before the steel seizure crisis arose, Congress had considered the issue of labor strikes and deliberately chose not to give the President the power to seize mills unilaterally. As Justice Frankfurter explained in his concurring opinion, "By the Labor Management Relations Act of 1947, Congress said to the President, 'You may not seize. Please report to us and ask for seizure power if you think it is needed in a specific situation.'"[415] In the wake of World War II, "Congress was very familiar with Government seizure as a protective measure. On a balance of considerations Congress chose not to lodge this power in the President. It chose not to make available in advance a remedy to which both industry and labor were fiercely hostile."[416] But relying on his inherent executive powers, President Truman did so anyway.[417]

After ordering Secretary of Commerce Charles Sawyer to take over the mills, the next morning the President addressed a message to Congress, notifying them about the seizure and indicating that Congress may "wish to pass legislation," or "deem

413. THE FEDERALIST NO. 51, *supra* note 64, at 356 (James Madison).

414. President Barack Obama, Remarks at Miami Dade College Commencement (Apr. 29, 2011), *available at* http://1.usa.gov/1bhuWp6 [perma.cc/FX2C-X3YK].

415. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 603 (1952) (Frankfurter, J., concurring).

416. *Id.* at 601.

417. *Id.* at 582 (majority opinion).

it [not] necessary to act at this time."[418] In either event, the President wrote, he would "continue to do all that is within [his] power to keep the steel industry operating and at the same time make every effort to bring about a settlement of the dispute."[419] On these facts, the Court found the President acted unconstitutionally.[420]

Let's change the facts. Suppose that leading up to the labor crisis, President Truman urges Congress to pass a statute giving him the sole authority to seize the steel mills in the event of a strike. As he lobbies for this legislation, Truman repeats over and over again that he does not have the authority to do so alone, and that Congress needs to fix the "broken" labor system. Congress refuses to pass this new bill, content to leave in place the 1947 Labor Management Relations Act—knowing that without further legislation, the President cannot act.[421] The President is furious at this defeat and announces, "I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing,"[422] as President Obama did.

When the labor crisis comes to a head, the President announces a newly discovered font of authority to control the mills. After seizing the mills, the President explains to Congress that in "the absence of any [labor] action from Congress to fix our broken" labor system, he will act alone.[423] In anticipation of Congress opposing his actions, the President explains that Congress cannot defund the seizure of his steel mills without shutting down the entire federal government during the ravages of the Korean War. The President urges Congress to "pass a bill" giving him the authority he seeks. Congress, however, has a different bill in mind. Both houses begin debate on the Steel Mill Restoration Act of 1952, which denies funding to any Executive Branch official who attempts to take control of a steel mill. The bill passes the House. Rather than treating that unicameral statement as an indication that he lacks the power to

418. *Id.* at 677 (Vinson, J., dissenting) (citation omitted).
419. *Id.*
420. *Id.* at 588–89 (majority opinion).
421. *Id.* at 588.
422. President Barack Obama, Remarks on Immigration (June 30, 2014), *available at* http://bit.ly/1bhv0oS [perma.cc/ZX5F-AB6M].
423. President Barack Obama, Remarks on Immigration (June 15, 2012), *available at* http://1.usa.gov/1aQmDAe [perma.cc/4TMY-KXCJ].

take the mills, President Truman threatens to veto the bill if it passes the Senate.[424] After the veto threat, the bill stalls in the Senate. With that altered background, the case is argued before the Supreme Court.

If Justice Jackson had any doubts about whether President Truman's actions fell within the second or third tier, two additional factors would render this case much, much easier. First, unlike the actual *Youngstown* case, Congress did not remain silent after the President seized the mills in our counterfactual. Rather, both houses debated how to halt the seizures, and one passed a bill to stop the President. Though short of bicameralism and presentment,[425] these actions express a congressional policy in opposition to the Executive's assertion of inherent power. Even more strikingly, the President threatened to veto the very bill that would have constrained his executive action. His brazen flouting of the separation of powers would make an easy case for unconstitutionality—despite the harm that such a decision could inflict on American war efforts. Second, the President's changed position on the scope of his executive powers after Congress rebuffed him further diminishes the usual presumption that the Executive executes the laws faithfully.

This counterfactual illustrates why DAPA cannot withstand *Youngstown* scrutiny. In both cases, Congress declined to create the Executive's desired policy. President Obama has called the INA "broken" and championed the DREAM Act in 2011 and comprehensive immigration reform in 2013–14. But for better or (mostly) worse, Congress left the immigration laws as they were. Despite the serious humanitarian concerns, the Dreamers and parents of U.S. citizens remain outside the category of favored aliens embodied in congressional policy. The President's concerns about the "broken immigration system" were well-founded, but, as he admitted, he lacked an executive remedy. His changed position, as convenient as it is, is not entitled to the normal presumption of good faith.

Second, unlike President Truman, who told Congress he would listen if they passed legislation, President Obama threatened to veto a bill that would defund his program.[426] His

424. Seung Min Kim, *White House Threatens to Veto House GOP's Immigration Gambit*, POLITICO, Jan. 12, 2015, http://politi.co/1JsfAJw [perma.cc/VE9M-ZCNW].

425. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983).

426. Lauren French, *Barack Obama Threatens to Veto Attacks on His Immigration Policy*,

oft-repeated imperative to "pass a bill"[427] uses the incorrect article. It should be "pass *my* bill." Anything short of that would be met with a veto. The veto remains the prerogative of the President, but it is unseemly for a President to wield it to stop Congress from checking his extraconstitutional assertions of power. Unlike the facts in *Youngstown*, Congress has not remained silent, but has opposed this action.

Third, and perhaps most importantly, the stakes of *Youngstown* were exponentially higher than those of DAPA.[428] If the steel seizure were halted, the American war effort could have been hampered, and the Commander in Chief would have been hamstrung. American soldiers could have died.[429] With DAPA, if Secretary Johnson's memo were enjoined, the *only* result would be to maintain the ex ante status quo. No one would be removed who would not have been removed under the law Congress passed. Justice Jackson would "indulge the widest latitude of interpretation to sustain [the Commander in Chief's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."[430] But when this power "is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. His command power . . . is subject to limitations consistent with a constitutional Republic whose law and policy-making br[a]nch is a representative Congress."[431] While halting DAPA would harm aliens, it is nowhere near the gravity of harm attending the facts of *Youngstown*.

Under any reading of *Youngstown*, DAPA flunks Justice Jackson's most charitable vision of executive power.[432] The President is not acting as a faithful agent of Congress and the sovereign people, but is implementing his own laws. As Justice Frankfurter recognized in *Youngstown*, "[a]bsence of authority in the President to deal with a crisis does not imply want of power in the Government. Conversely the fact that power exists in the

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POLITICO, Jan. 29, 2015, http://politi.co/1yNJfwo [perma.cc/DYN3-W958].

427. Justin Sink, *Obama to Congress: 'Pass a Bill,'* THE HILL, Nov. 20, 2014, http://bit.ly/1FcLsmn [perma.cc/5G94-XVYX].

428. *See* Delahunty & Yoo, *supra* note 20, at 829–30.

429. *See id.* at 827.

430. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 645 (1952) (Jackson, J., concurring).

431. *Id.* at 645–46.

432. *See id.*

Government does not vest it in the President."[433] These are matters for Congress to decide, not the President alone.

VIII. CONCLUSION

In its full scope, DAPA stems from the President's interest in enacting his agenda. That agenda may well be appropriate as a policy matter, but the Framer's pathway for implementing that policy agenda is clear: it goes through Congress. Unilateral exercises of power such as DAPA undermine that procedure, as well as the Constitution's scheme.

The test to determine whether the Take Care Clause has been violated imposes a high burden. First, it is not enough to assert that the President has not enforced the law to the standards set by his political opponents. A careful study of the underlying congressional policy and the scope of the President's discretion shows only the most egregious exertions of lawmaking power may be challenged. As President Obama explained many times *before* he acted, he lacked the power to defer deportations unilaterally. This view was correct, and reflected longstanding Executive-Branch policy about the scope of authority. Historically, this background served as an important check.[434]

Second, it is not enough to claim that the Executive is prioritizing some cases over others because of limited resources. Agencies retain broad discretion to allocate resources to achieve their priorities, but allocation decisions must be judged on whether they promote or ignore congressional policy. Through DAPA, the Administration limited officers by turning discretion into a rubber stamp. Further, the policy added millions of new individuals to the system, thus imposing additional costs. Here, the tail wags the dog.

Third, it is very hard to make it into Justice Jackson's lowest tier. In the six decades since *Youngstown*, the Supreme Court has not found a single executive action that violated his test. Even Justice Rehnquist, who clerked for Justice Jackson that term, found a way to save the settlement program at issue in *Dames & Moore v. Regan* by identifying some tacit congressional approval.

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433. *Id.* at 603–04 (Frankfurter, J., concurring).

434. As an aside, a renewed focus on the Take Care Clause would have the salutary effect of Congress placing *more* limitations on the President's discretion. *See* Josh Blackman, *Obama's Overreach? Look in the Mirror, Congress*, L.A. TIMES, Nov. 21, 2014, http://lat.ms/1E9sXP2 [perma.cc/9GD5-CM2W].

No such refuge can be found for DAPA, however, which ignores *past* and *present* congressional opposition.

In all but the most severe cases, these three hurdles will be insurmountable. Partisan politics may claim a violation of the Take Care Clause, but the facts will foreclose most challenges. If each of these factors points toward a President deliberately disregarding a law he disfavors, however, only the last resort of "good faith" can save the action.

With DACA and DAPA, the case for "bad faith" is palpable. The President instituted these policies after Congress voted down the legislation he wanted. Further, the President repeated over and over again that he could not act unilaterally. But this position changed almost overnight once he recognized that Congress would not give him what he wanted. His actions and statements create the prima facie case of bad faith, and point toward a violation of the Take Care Clause. The President has failed to take care that the laws are faithfully executed.

THE BP GULF OIL SPILL CLASS SETTLEMENT: REDISTRIBUTIVE "JUSTICE?"

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I. INTRODUCTION

On December 8, 2014, the Supreme Court denied a petition for certiorari filed by BP over the class settlement of many claims related to the 2010 Gulf Oil spill.[1] BP maintained that it was being required to pay for some claims that were fraudulent.[2] BP argued that the district court and the Fifth Circuit failed to give a proper interpretation to the class settlement agreement that the parties had signed.[3] That alone was not worthy of certiorari. The constitutional hook that BP argued was that the fraudulent claims meant that some of the parties in the class had no standing because of the absence of a proven injury and that, therefore, the class failed to meet the requisite case or controversy requirement of Article III.[4]

BP was attempting to avoid the drawn-out public-relations disaster that followed the Exxon Valdez spill in 1989. One of the plaintiffs' lead lawyers thought that "BP did something remarkable [by] voluntarily . . . set[ting] up an administrative program . . . that aimed to fully compensate all the victims of the spill. . . . [I]t backed up all of this by setting aside $20 billion in a trust fund, with an open-ended commitment should that amount prove insufficient."[5]

Although BP failed to have the Supreme Court review its

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1. BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc., 135 S. Ct. 754 (2014).

2. An op-ed in the *New York Times* was generally favorable to BP and portrayed the company as the victim of fraudulent claims paid out over its objections to the lower federal courts. BP claimed that it has been forced to pay "hundreds [of] bogus claims" for damages, like those to the "wireless phone retailer who was awarded more than $135,000, even though its building had burned down before the spill [and an] attorney who was awarded more than $172,000, even though his license had been revoked in 2009." Joe Nocera, Op-Ed., *Sympathy for the Devil: Those Bogus Claims Against BP*, N.Y. TIMES, Aug. 2, 2014, http://nyti.ms/1Ea1Vpo [perma.cc/D3UG-KU2P].

3. Petition for a Writ of Certiorari at 2–14, BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc., 135 S. Ct. 754 (2014) (No. 14–123).

4. *Id.* at 23–24. BP relied on the dissent of Fifth Circuit Judge Edith Clement, contending that the federal courts had become a "party to this fraud":

> [B]y (1) adopting an unreasonable interpretation of the Settlement Agreement to remove any requirement of causation, and (2) certifying a class by ignoring the fact that although causation and traceability were initially written into the Settlement Agreement, the Claim's Administrator's interpretation governing what would *actually happen* meant that Article III requirements would be ignored in the class settlement's execution.

In re Deepwater Horizon (*Deepwater Horizon IV*), 753 F.3d 516, 520 (5th Cir. 2014) (Clement, J., dissenting from denial of rehearing en banc).

5. Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 398 (2014) (footnotes omitted).

claims of fraud and still has a public-relations problem,[6] the company will certainly survive this defeat. As Steve Olenski observed, "it really doesn't matter" what the general public thinks about BP.[7] "As long as BP sells oil in colossal quantities, it will continue to attract investment."[8] BP "remains an economic behemoth and a major player in a commodity the world hopelessly depends on."[9] Accordingly, four years after the spill, the Environmental Protection Agency lifted its ban and allowed BP to bid for new leases in the Gulf of Mexico.[10]

So if BP neither needs nor receives much sympathy, how important is it that it is being defrauded of a few million dollars? A few million dollars seems like only a rounding error in terms of the many billions BP has already paid—and will continue to pay—before all the spill-related matters are resolved. Of course, the scenarios of fraud cannot be measured against the defendant's size, total net worth, or prospects for profitability. BP's experience, however, should serve as an important practical and constitutional lesson for those defending against multidistrict litigation (MDL).[11]

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6. *See* Steve Olenski, *Nearly Four Years After Deepwater Horizon, Has BP's Brand Image Recovered?*, FORBES, Jan. 24, 2014, http://onforb.es/1QxOGWf [http://perma.cc/U6SU-N5B8].

7. *Id.*

8. *Id.*

9. *Id.* But note that BP has been sued by investors in both American and British courts over the spill. *See* Alison Frankel, *Institutional Investors Step Off Sidelines to Sue BP for Fraud*, REUTERS, Apr. 21, 2014, http://reut.rs/1DOoMUc [perma.cc/KV42-C9HU]; Terry Macalister, *BP Faces Deepwater Horizon Lawsuit by Investors Including London Councils*, THE GUARDIAN, July 4, 2014, http://bit.ly/1EGZVIN [perma.cc/3C5B-CHSV].

10. Stanley Reed, *Ban Lifted, BP Bids $42 Million to Win Gulf Oil Leases in U.S. Auction*, N.Y. TIMES, Mar. 19, 2014, http://bit.ly/1EGZYnL [perma.cc/ZT23-8BUP].

11. The relevant statute concerning multidistrict litigation reads, in part:

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. . . .
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> . . . .
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> (c) Proceedings for the transfer of an action under this section may be initiated by—
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> i) the judicial panel on multidistrict litigation upon its own initiative, or
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> ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. . . .

28 U.S.C. § 1407 (2013).

II. BP: THE OCCASION FOR A CLOSER LOOK AT CLASS SETTLEMENTS

The strange developments in the BP class settlement offer an appropriate occasion to consider the fundamental constitutional question raised by the creation of class settlements as a distinct form of class action. Such settlements presume that neither the plaintiff attorneys nor the defense attorneys have any intention of litigating. Objectors may well appeal a settlement, but defendants normally do not. Having negotiated and agreed to the settlement, however, BP initiated a rare appeal.

As related below, BP based its appeal on class action Rule 23 and Article III standing grounds stemming from the fraud alleged in the administration of the settlement.[12] Notwithstanding any fraud, however, the constitutionality of the settlement class can be examined from a more generalized viewpoint by looking at Rule 23 and Article III. The fundamental Article III issue worthy of consideration is whether unconstitutionality is embedded in every settlement class action. Professor Martin Redish simply says "[t]he settlement class action, in short, is inherently unconstitutional."[13]

Redish's *Wholesale Justice* provides a thorough and discriminating treatment of the constitutional issues related to class actions.[14] He raises a number of constitutional issues regarding class actions, but he thinks most of them can be remedied.[15] It is the settlement class, however, that he contends is always necessarily unconstitutional. Why?

> Because by its nature it does not involve any live dispute between the parties that a federal court is being asked to resolve through litigation, and because from the outset of the

12. *See supra* notes 2–4 and accompanying text.

13. MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 178 (2009).

14. *See* Douglas G. Smith, *The Intersection of Constitutional Law and Civil Procedure: Review of* Wholesale Justice—Constitutional Democracy and the Problem of the Class Action Lawsuit, 104 NW. U. L. REV. COLLOQUY 319, 319 (2010) ("In *Wholesale Justice*, Professor Redish provides a thorough analysis of the constitutional implications of the class action mechanism. Unlike prior commentators and courts, which have focused mainly on limited constitutional issues arising in class action cases, Professor Redish's analysis sweeps more broadly. In the process, he brings to bear principles of constitutional law that have long lain dormant in the field of class action practice. His insights demonstrate that more than mere practical or policy concerns arise when class action procedures are used. Rather, they implicate—and often infringe—fundamental principles of constitutional law.").

15. REDISH, *supra* note 13, at 13–15.

> proceeding the parties are in full accord as to how the claims should be disposed of, there is missing the adverseness between the parties that is a central element of Article III's case-or-controversy requirement.[16]

BP argued that the claims administrator, by including within the class claimants who did not sustain injuries caused by the spill, violated Rule 23 and the standing requirements necessary to satisfy the case or controversy requirement of Article III.[17] But what about the claimants in the settlement class whose injuries *were* caused by the spill—can even they satisfy Article III? The parties to litigation cannot create or consent to federal court jurisdiction.[18] Let's look at what happened when the parties attempted to do so in this litigation.

III. A CLASS THAT SETTLED, THEN LITIGATED

The first of three Fifth Circuit opinions describes the BP oil spill litigation as "one of the largest and most novel class actions in American history."[19] While no doubt exists about the unprecedented size and novelty of the BP litigation, it is misleading to label it a "class action." Actually, hundreds of cases, involving thousands of individual claimants, were filed in various federal courts and later consolidated in the Eastern District of Louisiana by the Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407.[20]

During the centralized discovery phase of this MDL, the separate lawsuits continued. But along the way a court-appointed "Plaintiffs' Steering Committee" (PSC) was negotiating with BP.[21] When a basic agreement was reached, the plaintiffs' attorneys filed a class action.[22] After only two days, the parties completed,

16. *Id.* at 178.

17. Petition for a Writ of Certiorari, *supra* note 3, at 23–24.

18. Federal courts "have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. For that reason, every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' *even though the parties are prepared to concede it.*" Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986) (emphasis added) (citations omitted); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958) ("The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction.").

19. *In re* Deepwater Horizon (*Deepwater Horizon I*), 732 F.3d 326, 345 (5th Cir. 2013).

20. *In re* Oil Spill by the Oil Rig "Deepwater Horizon," 910 F. Supp. 2d 891, 900 (E.D. La. 2012).

21. *Id.* at 917.

22. *Id.* at 901–02.

signed, and filed in the court record the Settlement Agreement that had been reached prior to the filing.[23]

The settlement class action was designed to begin and end almost simultaneously. The new class action was filed on the assumption that it would involve no litigation. Inverting normal processes, however, litigation between the parties commenced only after the settlement.[24] The litigation was so convoluted that it is extremely difficult to summarize in an adequate, but brief, statement of the facts.[25]

The convoluted course of the appeals occurred because BP and objectors to the class settlement pursued different appeals. In panel decisions labeled *Deepwater Horizon I*[26] and *Deepwater Horizon III*,[27] BP twice appealed the interpretation of the settlement agreement, but not the agreement itself.[28] In *Deepwater Horizon II*, several objectors appealed certification of the settlement class itself.[29] BP petitioned the Supreme Court on

23. *Id.* at 902. The settlement agreement provided for numerous types of claims, one of which was a claim for economic loss. The class definition limited eligibility for business economic loss claims to those claimants who conducted commercial activities in the Gulf Coast region between April 20, 2010, and April 16, 2012. *Id.* at 903. Additionally, claimants must have experienced loss of income, earnings, or profits as a result of the spill. To demonstrate economic loss, claimants submitted documentation detailing the difference between their expected variable profit during a defined period of time prior to the spill and their actual variable profit during a defined period of time after the spill. If a claimant met all the other requirements of the class, he would be entitled to the difference between the variable profits in the two time periods. *Deepwater Horizon I*, 732 F.3d at 329–330, 330 n.1.

24. The litigation over the class settlement resulted from two policy announcements issued by the Claims Administrator that interpreted the settlement agreement and were adopted by the district court. The first of these policy announcements concerned whether the variable profit used to determine a claimant's economic loss would be calculated using the accrual or the cash accounting method. *In re* Deepwater Horizon—Appeals of the Economic and Property Damage Class Action Settlement (*Deepwater Horizon II*), 739 F.3d 790, 796–97 (5th Cir. 2014). The second policy announcement interpreted the settlement's "Causation Requirements for Businesses [*sic*] Economic Loss Claims" and declared that the Administrator would pay claims "without regard to whether such losses resulted or may have resulted from a cause other than the Deepwater Horizon oil spill," as long as the claimant met the requisite economic loss using the method provided in the settlement. *Id.* at 797 (alteration in original). While these issues were significantly intertwined, they were decided by two separate Fifth Circuit panels in three separate appeals.

25. BP's "Statement of the Case" in its petition for certiorari contained nearly thirteen pages devoted to the facts and procedural history of the three appeals, only two of which were the subject of the petition for certiorari. Petition for a Writ of Certiorari, *supra* note 3, at 2–14. Likewise, the Opposition to the Petition also contained a nearly thirteen-page "Statement of the Case." Brief in Opposition at 5–17, BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc., 135 S. Ct. 754 (2014) (No. 14-123).

26. 732 F.3d 326.

27. 744 F.3d 370 (5th Cir. 2014).

28. *Deepwater Horizon I*, 732 F.3d at 329; *Deepwater Horizon III*, 744 F.3d at 373.

29. 739 F.3d 790 at 795.

decisions in *Deepwater Horizon II* and *III*, even though it had not challenged the agreement that was upheld in *Deepwater Horizon II*.[30] After losing their appeal in the Fifth Circuit, the objectors apparently did not petition the Supreme Court on their case, *Deepwater Horizon II*. Instead, they filed as respondents to the BP petition, but nevertheless urged the Court to grant review without specifying whether they were referring only to the decision in *Deepwater Horizon II*.[31]

In order to provide a readable and relatively concise summary, the following statement includes lengthy quotes from a journalistic piece by self-described "class action geek," Alison Frankel, explaining much of the litigation.[32]

> Considering that BP's resolution of claims stemming from the Deepwater Horizon oil spill in 2010 is the biggest single-defendant private settlement in U.S. history, it's only fitting that the case has generated a spectacular[—]and procedurally peculiar[—]appellate record on the constitutionality of class actions. . . .
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> The abbreviated appellate backstory dates back to December 2012, when U.S. District Judge Carl Barbier of New Orleans granted final approval to a class action settlement between BP and a steering committee of plaintiffs lawyers, negotiated over the course of more than a year. The settlement, which replaced a claims facility BP established right after the spill [administered by Ken Feinberg], was designed to compensate several different sorts of victims, from the shellfishing and tourism industries directly impacted by the spill to businesses whose losses were indirect fallout. As the settlement defined it, the class included everyone whose losses resulted from the Deepwater Horizon disaster.
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> BP supported class certification and approval of the settlement. But the company developed qualms after Judge Barbier approved policy decisions by claims administrator Patrick Juneau that, in the company's view, enabled businesses unharmed by the oil spill to recover money from BP through creative accounting tactics. As business loss claims mushroomed, BP's lawyers from Kirkland & Ellis (which had negotiated the settlement) and Gibson, Dunn & Crutcher

30. Petition for a Writ of Certiorari, *supra* note 3, at 2–4.

31. Response for the Cobb Respondents at 3–7, BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc., 135 S. Ct. 754 (2014) (No. 14-123).

32. Alison Frankel, *With 5th Circuit Split on Class Constitutionality, What's Next for BP?*, REUTERS, Jan. 14, 2014, http://reut.rs/1KlCm79 [perma.cc/7NCH-X7E2]. Ms. Frankel granted written permission to quote her extensively throughout.

> (which came in for the company after the deal was approved) appealed Barbier's order to the 5th Circuit. That appeal led to Judge Clement's opinion last October. Despite arguments by class counsel, represented on appeal by New York University law professor Samuel Issacharoff, that BP agreed to settlement terms that were open to the interpretation Barbier approved, Judges Clement and Leslie Southwick instructed Judge Barbier to reconsider his interpretation of deal terms. On her own, Clement went quite a bit further. If the BP settlement permitted claims by class members who had suffered no losses attributable to the oil spill, she said, then it was illegal. Uninjured plaintiffs don't have standing under Article III of the Constitution, Clement wrote, and judges can't create a cause of action that doesn't otherwise exist[—]even if the defendant wants to buy global peace through a settlement.
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> Judge Southwick declined to join Clement's conclusions about constitutional standing, though he said it was logical, because he found it unnecessary. The third judge on the panel, Judge James Dennis, dissented vigorously, arguing that Clement's Article III analysis would erase the benefits of class action settlements by imposing expensive and unwieldy requirements at the class certification stage.
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> While BP's appeal of Barbier's order was under way, class members who objected to the approval of the deal proceeded with a separate appeal at the 5th Circuit. In September, BP filed an extraordinary brief in that case. Even though the company had backed approval of the settlement at the trial court and had pledged to defend the agreement against objections, BP said that it was prepared to argue alongside objectors for decertification of the class unless Barbier's interpretation of the settlement agreement was reversed.
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> BP maintained that position after the Clement panel's ruling in its appeal of Barbier's order. In fact, the company filed a supplemental brief citing Judge Clement's analysis to back its assertion that a class encompassing uninjured claimants does not pass constitutional muster.[33]

This second appeal came before a panel consisting of two different judges, Judges Davis and Garza, along with Judge Dennis, the dissenting judge on the first panel.[34] This decision, one of the two covered in the petition for certiorari, upheld the certification of the class action,[35] which had been criticized on

33. *Id.* (emphasis removed).
34. *Id.*
35. *Id.*

constitutional grounds in the earlier opinion by Judge Clement.[36] As Ms. Frankel wrote at the time,

> . . . [The] majority opinion writer Judge Davis was joined by Judge Dennis[—]yes, the same Judge Dennis who dissented from Clement's opinion in the other appeal[—]in upholding the settlement. Federal circuit courts, the majority wrote, have developed two different standards to guide trial judges in the evaluation of class action settlements that may sweep in uninjured claimants. The so-called Kohen test, followed by the 3rd, 7th[,] and 9th Circuits, holds that settlement approval hinges on the constitutional standing only of named plaintiffs; as long as they have a viable federal-court claim, courts need not consider the standing of absent class members. The 2nd and 8th Circuits follow the Denney test, which requires that classes be defined to include only claimants with constitutional standing but does not insist that every absent class member submit evidence of personal standing. (Interestingly, according to the 5th Circuit, the 7th and 9th Circuits have used both the Kohen and Denney tests in reviewing class certification decisions.)
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> According to the 5th Circuit majority, Judge Barbier's approval of the BP settlement was justified under either test. Even BP has not challenged the standing of named plaintiffs in the case, which would satisfy the Kohen test. And the settlement agreement defined the class as those whose injuries were the result of the oil spill, which satisfies Denney. Judge Davis's opinion conceded that in the previous appeal, Judge Clement said the BP settlement would fail the Denney test if it permitted claims by uninjured plaintiffs. "In Judge Clement's view, if absent class members include persons who 'concede' that they have no 'causally related injury,' then a district court lacks jurisdiction to certify the class," the opinion said. But Clement misread Denney, according to Davis's opinion. By the agreement's definition, the BP settlement class includes people injured by the spill, he said. "Accordingly, using Judge Clement's formulation of the standard, the class in this case does not include any members who 'concede' that they lack any 'causally related injury,'" the majority wrote. "This ends the Article III inquiry under the Denney test, which does 'not require that each member of a class submit evidence of personal standing' so long as every class member contemplated by the class definition 'can allege standing.'"
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> BP's arguments that Barbier's post-approval interpretation of

36. *Id.*

> the deal rendered class certification unconstitutional were beside the point, according to the majority. The 5th Circuit's review, the opinion said, was based on the evidence before Judge Barbier in December 2012. If BP had wanted a deeper review of individual claims, according to the opinion, then it should not have settled through a class action. The company might have obtained rulings on the evidentiary standards for economic loss claims through summary judgment or at trial, the 5th Circuit majority said, but it's simply not part of the class certification inquiry to consider individualized claims.
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> Indeed, the majority said, BP knew (or should have known) that it was asking for something impossible. "In particular, BP's arguments fail to explain how this court or the district court should identify or even discern the existence of 'claimants that have suffered no cognizable injury' for purposes of the standing inquiry during class certification and settlement approval," the opinion said. "It would make no practical sense for a court to require evidence of a party's claims when the parties themselves seek settlement . . . . Logically, requiring absent class members to prove their claims prior to settlement . . . . would eliminate class settlement because there would be no need to settle a claim that was already proven."[37]

In dissent, Judge Emilio Garza followed Judge Clement on the issues of Article III standing and class certification.[38] Meanwhile,

> . . . [A]fter Clement's panel ordered Judge Barbier to reconsider his interpretation of the settlement agreement, the trial judge basically stuck with his old holding on causation for business loss claimants (though he did modify his previous interpretation of accounting terms). BP raced back to Judge Clement's panel at the 5th Circuit to ask the appeals court to make permanent a temporary injunction against payments to uninjured claimants. The 5th Circuit ordered expedited briefing on BP's motion . . . .[39]

Ms. Frankel concluded, saying "this record is as interesting as it is weird."[40]

But matters got more "weird" after Ms. Frankel's report. Following the expedited appeal, the original panel, for which Judge Clement wrote the lead opinion, refused BP's requested injunction and upheld the district court's interpretation of the

37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*

settlement agreement.[41] This time, Judge Southwick wrote the lead opinion,[42] with Judge Dennis concurring in part and concurring in the judgment.[43] Judge Clement, of course, dissented.[44]

Judge Clement contended one panel would have better handled the issues presented to the two different panels.[45] Quite remarkably, the Fifth Circuit declined to sort out the three conflicting panel decisions.[46]

IV. ARTICLE III: A PROBLEM WITH INTERPRETING THE SETTLEMENT OR WITH THE SETTLEMENT ITSELF?

Given that BP agreed to the settlement class and that it relied on Judge Clement's opinions, it is understandable that BP did not attack the settlement itself. Nevertheless, the more fundamental issue is whether this and other settlement classes could ever satisfy Article III.

A. The Statements by the Parties as to the Question Presented

Tracking Judge Clement, BP presented the question to the Supreme Court in terms of a circuit split on class actions under Rule 23 and whether claimants who do not satisfy the causation requirement have Article III standing.[47] The respondent class, on the other hand, reframed the question as follows:

> May a party to a class action settlement who advocated settlement approval before the district court, filed no notice of appeal, and appeared as an appellee urging affirmance, now seek to switch sides in order to overturn that same settlement through a petition for certiorari?[48]

The lawyers for the class sought to make the issue one of simple contract, but they could not ignore the Rule 23 and Article III standing arguments. Of course, just as BP tracked

41. *Deepwater Horizon III*, 744 F.3d 370, 378 (5th Cir. 2014).
42. *Id.* at 373.
43. *Id.* at 380 (Dennis, J., concurring).
44. *Id.* at 381 (Clement, J., dissenting).
45. *See Deepwater Horizon IV*, 753 F.3d 516, 521 (5th Cir. 2014) (Clement, J., dissenting).
46. *Id.* at 518.
47. Petition for a Writ of Certiorari, *supra* note 3, at 12–13.
48. Brief in Opposition, *supra* note 25, at i.

Judge Clement and those who joined her,[49] the class tracked the position of the other judges and claimed there was no circuit conflict on Rule 23 and Article III standing.[50]

For the moment, however, let's ignore that the Article III "case or controversy" issue is necessarily present throughout all phases of the litigation,[51] and that courts have the duty to raise the subject–matter jurisdictional issues even if both sides fail to do so.[52]

The Plaintiff-Respondent's counsel argued (1) that Supreme Court review of the constitutional issues would have had to occur after the ruling on the first appeal in which Judge Clement initially raised the constitutional issues, (2) that those issues were not presented in either of the two cases in which BP sought review, and (3) that BP was judicially estopped from switching sides on the settlement.[53] Then, their argument would follow and reduce the dispute to one that was "fundamentally a matter of contract interpretation between parties to a complicated settlement . . . ."[54]

The big problem with the "this is just a contract dispute" argument is that no contract would have been signed but for the approval of the federal district court. One of the attorneys for the class, Professor Samuel Issacharoff, explains that the advantage of the BP and other settlement classes lies in the

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49. The denial for a rehearing en banc was rejected with five judges voting for a rehearing (Judges Jolly, Jones, Clement, Owen, and Elrod) and eight judges voting against a rehearing (Chief Judge Stewart and Judges Davis, Dennis, Prado, Southwick, Haynes, Graves, and Higginson). *Deepwater Horizon IV*, 753 F.3d at 518. While only Judges Jolly and Jones joined Judge Clement in dissenting from the denial, Judge Clement noted that Judge Garza would have also joined the dissent, had he been able to vote as an active member of the en banc panel. *Id.* at 518 & n.1.

50. Brief in Opposition, *supra* note 25, at 21–25.

51. Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013) ("Most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an 'actual controversy' persist throughout all stages of litigation.") (citation omitted); Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) ("Since [standing elements] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.").

52. United States v. Hays, 515 U.S. 737, 742 (1995) (noting that standing cannot be waived, because federal courts "are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'") (alteration in original) (citation omitted).

53. *See* Brief in Opposition, *supra* note 25, at 18–21.

54. *Id.* at 4.

district court's approval, administration, and enforcement.[55] He rightly says that "[o]nly a court's imprimatur—and a deal that comports with the formalities and safeguards of the class action system—can bind absentees without their affirmative consent."[56]

B. Rule 23 and Article III

Rule 23, derived from the Supreme Court's authority under the Rules Enabling Act,[57] is not supposed to alter substantive rights.[58] As Professor Redish observes, however:

> Under the guise of procedure, class actions often effect dramatic alterations in the DNA of the underlying substantive law. The result—whether intended or not—is a form of confusion or even deception of the electorate, which is likely unaware that the essence of the governing substantive law has been altered because the alteration has occurred under the guise of procedural modification. Substantive law is altered, not through resort to traditionally recognized democratic procedures but rather by what is effectively a procedural shell game.[59]

The different views on the Fifth Circuit regarding whether the BP case satisfied Rule 23 and whether a conflict existed with other circuits may well have been rooted in unarticulated views about the malleability of the class action and the importance of protecting the substantive rights at stake. It is certainly possible that some judges, regardless of the circuit, are more inclined to shape class actions for the convenience of the courts, even while convincing themselves that such flexibility serves justice. But as Redish writes, "The class action collectivizes adjudication of those substantive rights, often revoking—either legally or practically—the individual right holder's ability to control the protection or vindication of his rights through resort to the legal process."[60]

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55. *See* Issacharoff & Rave, *supra* note 5, at 403.

56. *Id.* at 426.

57. 28 U.S.C. § 2072(a) (2013) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.").

58. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 406–07 (2010) ("In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, but with the limitation that those rules 'shall not abridge, enlarge or modify any substantive right.'" (citations omitted).

59. REDISH, *supra* note 13, at 3.

60. *Id.*

Standing is one of the four components of Article III's "case or controversy" requirement.[61] The jurisprudence on the four components—standing, ripeness, mootness, and political question—enforce the adverseness between the parties required by Article III. The adverseness requirement can be met in a class action lawsuit, but in what is solely a class action settlement, adverseness is necessarily absent.

Professor Redish does not argue that actual class action *litigation* is necessarily unconstitutional. It is the settlement class, however, that he contends is always unconstitutional because it involves no litigation:

> A typical class action is legitimate because the interests of the plaintiffs and defendant are adverse. In that scenario, the monetary interests of class counsel, which are contingent on class recovery, are aligned with the absent class members' interest in maximum redress, incentivizing a presentation of the issues that benefits both equally. These incentives break down in the context of the non-adversarial settlement class. Because class counsel seeks the same outcome as the defendant, she has no reason to formulate her clients' arguments or destroy her opponent's case. Particularly, she lacks incentive to present to the court evidence that may shed unfavorable light upon the non-adversarial agreement, even though that evidence may reveal critical details about the effect of the settlement on absent class members.[62]

C. The Individuals: "Skunks at the Tea Party"

Several parties objected to the settlement and appealed to the Fifth Circuit, where they lost in *Deepwater Horizon II*.[63] Their simple, straightforward argument was that they were "inherently harmed by the inclusion of uninjured persons in the class" because the inclusion "diminishe[d] the relief for class members who were actually harmed."[64]

None of the major players in the litigation ever seemed to have questioned the constitutionality of a settlement class. Judge

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61. Flast v. Cohen, 392 U.S. 83, 95 (1968) ("[N]o justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action.") (footnotes omitted).

62. REDISH, *supra* note 13, at 211.

63. 739 F.3d 790, 821 (5th Cir. 2014).

64. Response for the Cobb Respondents, *supra* note 31, at 2 (emphasis removed).

Barbier wrote that settlement classes are "a typical feature of modern class litigation, and courts routinely certify them, under the guidance of *Amchem Prods., Inc. v. Windsor*, to facilitate the voluntary resolution of legal disputes."[65] The experts tendered by both parties apparently indicated nothing to the contrary.[66]

As Professor Redish recognizes, in *Amchem* "the Court implicitly approved the concept of the settlement class as an alternative form of dispute resolution."[67] So, therefore, on what basis would practicing lawyers attack the constitutionality of settlement classes? Although *Amchem* "implicitly" approves settlement classes, it did so in dictum and it did not consider the constitutional issues.[68] Rather, "the Court reserved for a later date the question of whether the settlement class presents a justiciable case or controversy."[69]

How is it then that so many very bright lawyers and judges have failed to question the constitutionality of the settlement class? One answer may be that the constitutional point is so very simple that many sophisticated minds cannot see it. As Professor Redish writes:

> On the most basic analytical level, the unconstitutionality of the settlement class action should be obvious, purely as a matter of textual construction. There is simply no rational means of defining the terms "case" or "controversy" to include a proceeding in which, from the outset, nothing is disputed and the parties are in complete agreement. Moreover, from both historical and doctrinal perspectives, Supreme Court decisions could not be more certain that Article III is satisfied only when the parties are truly "adverse" to one another, which, at the time the relevant proceeding is undertaken, they are not in the case of the settlement class action.[70]

Another answer may be that both plaintiffs and defendants like the settlement class. As explained both by Professor

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65. *In re* Oil Spill by the Oil Rig "Deepwater Horizon," 910 F. Supp. 2d 891, 913 (E.D. La. 2012) (citations omitted).

66. *See id.* at 914.

67. REDISH, *supra* note 13, at 185.

68. *Id.*; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612–13 (1997) ("We agree that '[t]he class certification issues are dispositive,' because their resolution here is logically antecedent to the existence of any Article III issues, it is appropriate to reach them first . . . . Rule 23's requirements must be interpreted in keeping with Article III constraints.") (alteration in original) (citations omitted).

69. REDISH, *supra* note 13, at 185.

70. *Id.* at 178 (footnotes omitted).

Issacharoff[71] and Professor Redish,[72] defense attorneys and corporations have many reasons to favor "aggregate settlements." Corporations may not be able to avoid defending a class action. But corporations are not legally required to enter into a separate settlement class. So when corporations and their attorneys enter such agreements, they believe on utilitarian grounds that that option, however expensive, is preferable to the alternatives. Precisely because the parties cannot always be relied upon to raise subject-matter jurisdiction, it is the duty of federal judges—no matter how much they prefer mass settlement solutions—to do so.

V. COLLECTIVE AND REDISTRIBUTIVE LITIGATION VERSUS LITIGATION BY AND FOR THE INDIVIDUAL

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'"[73] As Benjamin Cardozo pointed out, however, through common-law reasoning the exception often becomes the rule.[74] How might that occur?

> By collectivizing—often forcibly—the litigation process, the class action procedure threatens core notions of the process-based autonomy that is central to liberal democratic thought. The class action, then, gives rise to at least a prima facie tension between legally imposed collectivization and democratic meta[-]decision[-]making autonomy on the part of the individual.[75]

As evident from this quote, Professor Redish's consideration of class actions includes the perspective of political theory.[76] He has "described four normative models of political theory: liberalism, utilitarianism, democratic communitarianism, and civic republicanism."[77] He proposes that:

> (1) the various normative approaches to the class action that have been advocated by prominent legal scholars are best understood largely as manifestations of one or another of these

71. *See* Issacharoff & Rave, *supra* note 5, at 413–18.
72. REDISH, *supra* note 13, at 185–86.
73. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (quoting Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979)).
74. *See* BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 38–40 (1924).
75. REDISH, *supra* note 13, at 4.
76. *See id.* at 93–106.
77. *Id.* at 106.

> broader political theories, and (2) when viewed from this theoretical perspective, each should be found wanting because of its improper departure from the fundamental norms of liberal theory, which value the process-based autonomy of the individual."[78]

Professor Redish then "identif[ies] three class action models that illustrate the breadth and depth of legal scholarship on the normative rationale and proposed structure of the modern class action."[79] These models largely track the four earlier categories: "utilitarian justice," "communitarian process," and "public action."[80] Professor Issacharoff, Counsel of Record in the Supreme Court for the BP Settlement Class, is one of two prominent scholars who have developed the "communitarian process model."[81]

The communitarian process model "views a class as a stand-alone 'entity,' rather than an aggregation of separate individual claims."[82] Professor Redish finds that the "constitutional implications of the entity perspective are both striking and troubling. Likening class actions to private voluntary associations permits . . . circumvent[ing] the due process inquiry, because where class actions are legally similar to voluntary private organizations, it is not the individual plaintiffs but rather the collectivity which seeks redress for the violation of its substantive rights . . . ."[83] Using the settlement class is certainly an effective way of advancing the "entity theory" and the communitarian process model. Getting a settlement agreement with the defendant pretty well insulates such outcomes from appellate judicial scrutiny, unless some objector raises the Article III issues.

In a law review article about the BP case, Professor Issacharoff noted that "the Supreme Court has made it more difficult to use class action to resolve large-scale disputes arising out of mass injuries."[84] That has produced "pressure to find alternative means of effectively resolving mass disputes at a wholesale level outside of the courtroom."[85] Accordingly, mass torts "have

78. *Id.*
79. *Id.*
80. *Id.*
81. *See id.*
82. *Id.* at 115.
83. *Id.* at 150.
84. Issacharoff & Rave, *supra* note 5, at 428 (footnote omitted).
85. *Id.*

shifted into MDLs, where parties must rely on non-class aggregate settlements in their quest for global resolution."[86] This has meant that "lawyers constructing these deals must use innovative and controversial contractual strategies to try to achieve full participation by claimants . . . ."[87]

The limits imposed on class actions by the Supreme Court are largely designed to ensure that Rule 23 does not contravene the Rules Enabling Act or Article III.[88] Accordingly, the creative use of MDL to reach class settlements as advocated by Professor Issacharoff should be viewed as an unconstitutional "end-run" around Article III. Unless standing and the larger "case or controversy requirements" of Article III can be avoided, the settlement class will not be available. It will not be able to produce the kind of redistributive "justice" sought by plaintiffs' lawyers in mass tort litigation and consented to by corporations and defense attorneys on utilitarian grounds.

VI. CONCLUSION

Prominent constitutional scholars who also litigate look for opportunities to bring the jurisprudence in line with what they think the law is or should be. Often, however, constitutional scholars are brought into a case only at the appellate level, which can limit their ability to shape the theory of the case. The BP case demonstrates the wisdom of the plaintiffs' lawyers representing the class who early on brought Professor Issacharoff into the litigation.[89] Professor Issacharoff was able to shape the strategy and the settlement as he has described in his law review article. He did not need to lay out his entity theory in any of the appellate briefs.[90]

While defense attorneys might consider the importance of political and constitutional theory in any matter that may raise

86. *Id.* at 428–29.

87. *Id.* at 429.

88. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 406–08 (2010).

89. *In re* Oil Spill by the Oil Rig "Deepwater Horizon," 910 F. Supp. 2d 891 *passim* (E.D. La. 2012) (citing Issacharoff's declaration).

90. The three appellate cases shared five overlapping appellate dockets [Nos. 13-30095; 13-30329; 13-30315; 13-31220; 13-31316] and one district court docket [2:10-md-02179-CJB-SS]. Of the more than 30 briefs, motions, and responses filed by Professor Issacharoff that I was able to locate on the five separate appellate dockets, only one filing, the Plaintiffs-Appellees' Brief on the Merits, contained a citation to himself. Plaintiffs-Appellees' Brief on the Merits at 35 n.60, *Deepwater Horizon II*, 739 F.3d 790 (2013) (No. 13-30095), 2013 WL 8902142, at *35 n.60.

Article III issues, very few litigators have time to read and reflect on the constitutional and political-theory foundations of what they do in practice. Moreover, class actions are so complicated that, despite the countless articles on the subject, not many academics have broadly considered the constitutional foundations.[91] For these reasons, the vice president and chief counsel for AON, a leading insurance and reinsurance broker, has urged defense attorneys and in-house counsel to read and draw arguments from *Wholesale Justice*.[92]

The Supreme Court avoided an opportunity during the 2013 term to address issues raised in mass tort litigation.[93] Obviously, the plaintiffs' and BP's attorneys had opposing views on the importance of the Court reviewing their litigation. The constitutional problem posed by class settlements, however, transcends the narrow interests of both plaintiff and defense attorneys in the BP case. Although the Court declined to hear the BP case, in near future, it needs to reconsider the justifications offered for class settlements. Specifically, the Court must examine class settlements in terms of separation of powers, because maintaining the limits of Article III's case or controversy requirement is fundamental for protecting the individual liberties of all.[94] As Redish writes:

> [B]y authorizing a federal court to redistribute resources as a means of enforcing legislative directives absent an adversary adjudication, the settlement class action effectively transforms the court into an administrative body, which is more appropriately located in the executive branch. . . . [It] improperly transfers powers reserved to the executive branch to the federal judiciary, in clear contravention of separation-of-powers dictates.[95]

91. *See* Smith, *supra* note 14, at 319; *see also* REDISH, *supra* note 13, at 20 ("I undertake an examination of the modern class action from an intellectual perspective that no scholar has, to date, attempted.").

92. Mark Herrmann, *Inside Straight: Torpedoing Class Actions*, ABOVE THE LAW (Jan. 12, 2012, 10:12 AM), http://bit.ly/1JISb6T [perma.cc/R76N-37G6].

93. Heather A. Pigman & John M. Kalas, *High Court's* Cert *Denial Foments Greater Confusion Over Removal of Mass Actions Under Federal Law*, LEGAL BACKGROUNDER, Oct. 2014, at 1, *available at* http://bit.ly/1HLpB7J [perma.cc/EK5X-JE86].

94. *See generally* THE FEDERALIST NOS. 47, 48 (James Madison).

95. REDISH, *supra* note 13, at 182 (footnote omitted).

PEEKING INTO THE ABYSS: WHAT PAKISTAN AND THE A.Q. KHAN NETWORK TELL US ABOUT THE FUTURE OF NUCLEAR NONPROLIFERATION

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I. INTRODUCTION

In a young country only half a century removed from its colonial yoke, A.Q. Khan held the position of a national hero as the man who gave Pakistan its nuclear arsenal. Known as the "Father of the Bomb," he could even cheer on a cricket team named after him: the Dr. Abdul Qadeer Khan Eleven.[1] Not satisfied with the honors he received and the memorials to his work, he even wanted a city renamed Qadeerabad.[2] To the west, however, Khan is a reckless proliferator who put the entire world at risk solely to satisfy his own vanity and greed.[3] Mohammed El-Baradei, former Director General of the International Atomic Energy Agency (IAEA), described Khan's global network as a "Wal-Mart of private-sector proliferation."[4] One former CIA director even considered Khan "at least as dangerous as Osama bin Laden."[5] Khan has rejected that view, arguing: "I am not a madman or a nut.... They dislike me and accuse me of all kinds of unsubstantiated and fabricated lies because I disturbed all their strategic plans, the balance of power and blackmailing potential in this part of the world."[6] Yet one cannot grasp the current state of nuclear nonproliferation without first understanding Khan and his network. As one of Khan's biographers, Gordon Corera, explains: "Two related phenomena call for pessimism about the future of proliferation—one is the growing supply of nuclear technology, in which Khan's legacy is vital. The other is the growing demand, which Khan has also fuelled."[7]

II. BACKGROUND OF A.Q. KHAN

A. Khan's Early Life

Abdul Qadeer Khan was born in 1936 in Bhopal, British

1. GORDON CORERA, SHOPPING FOR BOMBS: NUCLEAR PROLIFERATION, GLOBAL INSECURITY, AND THE RISE AND FALL OF THE A.Q. KHAN NETWORK 125 (2006).

2. *Id.*

3. *See* Editorial, *A.Q. Khan Job*, WALL ST. J., Feb. 9, 2009, http://bit.ly/1Gt8qXd [perma.cc/HQ99-6NSJ] ("If a nuclear weapon ever does incinerate a U.S. city, Mr. Khan will be as responsible as anyone.").

4. CORERA, *supra* note 1, at xiv.

5. *See* Douglas Jehl, *C.I.A. Says Pakistanis Gave Iran Nuclear Aid*, N.Y. TIMES, Nov. 24, 2004, http://nyti.ms/1JEmRIM [perma.cc/2SHL-F4Q2] (quoting Director George J. Tenet); *see also* CORERA, *supra* note 1, at xiii.

6. CORERA, *supra* note 1, at 123.

7. *Id.* at 241.

India.[8] As a boy, he witnessed firsthand the violent dissolution of British India into Muslim-controlled Pakistan and Hindu-controlled India in 1947.[9] Though a Muslim, Khan stayed in Hindu India until 1952, when he left to live with his brothers in Pakistan.[10] His departure by train, punctuated by thievery and abuse from Indian soldiers, scarred him for life, and a "fiery picture of the last train out of India still hangs in Khan's study in his home in Islamabad."[11]

Once in Pakistan, Khan attended school in Karachi before leaving to study metallurgy in Europe in his mid-twenties, intending to return to Pakistan as a university professor.[12] He attended several schools throughout Western Europe before finally obtaining a Ph.D. in metallurgy in Belgium.[13] According to Corera, "[t]hose who knew Khan in this period remember an affable young man who had an uncanny knack of easily getting to know people from all over the world,"[14] which would be key to his later career as a nuclear proliferator.

Though he did not come to Europe as a spy, it was at this point that Khan began to build his network of academics, businessmen, and engineers that would later serve him so well. When he completed his Ph.D. in 1971, one of his professors recommended him for a position at Physical Dynamics Research Laboratory (FDO) in the Netherlands.[15] At the time, FDO was a subcontractor of the Dutch wing of URENCO—a consortium of companies from the United Kingdom, West Germany, and the Netherlands that pioneered nuclear innovation and exposed Khan to advanced centrifuge technology.[16] Khan, who was fluent in English, Dutch, and German, worked as "part translator–part scientist" in helping URENCO shift to a new German-designed centrifuge.[17] From this position, "he learned not only how the new technology functioned, but also the identities of the

8. *Id.* at 4.
9. *Id.*
10. *Id.*
11. *Id.* ("[S]till I can remember trains coming into the stations full of dead Muslims.").
12. *Id.* at 5.
13. PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY 107 (Anchor Books 2009) (2008).
14. CORERA, *supra* note 1, at 5.
15. *Id.* ("Without this job offer, Khan would most likely have ended up an unknown academic or engineer.").
16. *Id.* at 6.
17. *Id.* at 6–7.

suppliers who provided the parts that were assembled to make the new centrifuges."[18]

But most importantly, the year that Khan accepted the position coincided with one of the greatest disasters in Pakistan's short history. After the division of British India, the state of Pakistan originally consisted of two large landmasses separated by more than 1,000 miles of India: West Pakistan and East Pakistan.[19] But when East Pakistan rebelled against the unequal rule of the West, India invaded the region to support its bid for freedom.[20] After only thirteen days of fighting, the Pakistani army in East Pakistan surrendered on December 16, 1971, and the new state of Bangladesh was born.[21] It was a humiliating defeat for Pakistan, whose army "stood accused of mass murder, torture and rape," and footage of the surrender was televised only once in Pakistan.[22] Khan, then in Belgium, fell into a deep depression on hearing the news and was unable to work for days.[23] But once he recovered, Khan resolved never to allow such a catastrophe to befall his homeland again.[24] And his position at FDO provided the perfect opportunity to ensure that.

Due to the sensitivity of FDO's technology, Khan first had to obtain a security clearance from Dutch Security Service.[25] But the "process was sloppy: no one saw any great danger from a young scientist from a poor, undeveloped country like Pakistan who had been settled in Europe for more than a decade."[26] Once cleared, the security only slackened, and Khan was able to operate in what one Dutch government report would later describe—with obvious understatement—as an "open atmosphere."[27] He often worked on sensitive documents at home, accessed classified material beyond his clearance, took notes in his native Urdu, and wandered unescorted through

18. BOBBITT, *supra* note 13, at 107.

19. BUREAU OF INTELLIGENCE & RESEARCH, U.S. DEP'T OF STATE, REVISED BACKGROUND NOTE ON BANGLADESH (2005), *available at* 2005 WLNR 9523302.

20. *Id.*

21. *Id.*; CORERA, *supra* note 1, at 3.

22. Shahzeb Jillani, *Scars of Bangladesh Independence War 40 Years On*, BBC NEWS, Dec. 13, 2011, http://bbc.in/1ej74Ds [perma.cc/CQ66-SCF2]; *see also* CORERA, *supra* note 1, at 3.

23. CORERA, *supra* note 1, at 4.

24. *Id.*

25. *Id.* at 7.

26. *Id.*

27. *Id.*

restricted areas of the plant.[28] As Corera explains: "Even though his specialty was in the field of metallurgy, his gaze merrily wandered across a much broader variety of information. Crucially, he was not just learning how the centrifuge worked but how it was put together and who supplied the parts that made the whole."[29]

On September 17, 1974, Khan contacted Zulfikar Ali Bhutto, then Prime Minister of Pakistan, and offered to supply classified nuclear information to his homeland.[30] Khan does not appear to have been recruited by Pakistan, and his "motivation appears primarily patriotic—a chance to put his contacts and access at his country's service."[31] And by this point, Pakistan's regional-security position had only worsened. Not only had India taken part in the dismemberment of East Pakistan, it had now even successfully tested a nuclear weapon, or what it referred to as a "peaceful nuclear experiment."[32] For Bhutto, who in 1965 pledged that "[i]f India builds the bomb, we will eat grass or leaves, even go hungry, but we will get one of our own," there was only one response.[33]

Although now in direct contact with Pakistani officials, Khan made even less of an effort to hide his activities. Cars with Pakistani diplomatic plates could be seen parked by his house "until the early hours of the morning," and he even accessed URENCO's latest G-2 centrifuge designs.[34] In fact, URENCO officials admit that Khan "stole the designs for almost every centrifuge on the drawing board."[35] One of Khan's associates, Frits Veerman, found centrifuge designs at Khan's home and overheard him speaking to Pakistani officials about centrifuge technology.[36] But when Veerman repeatedly warned FDO officials, their only "reaction was to deny it was possible and to

28. *Id.*
29. *Id.*
30. *Id.* at 8; BOBBITT, *supra* note 13, at 108 ("He suggested that Pakistan should develop its own nuclear weapons; he proposed this be done by uranium enrichment; and he offered his services in accomplishing this.").
31. CORERA, *supra* note 1, at 8.
32. BOBBITT, *supra* note 13, at 108. India even dubbed the explosion "Smiling Buddha." Peter Edidin, *Pakistan's Hero; Dr. Khan Got What He Wanted, and He Explains How*, N.Y. TIMES, Feb. 15, 2004, http://bit.ly/1LhlUo3 [perma.cc/KGN9-VQ67].
33. CORERA, *supra* note 1, at 9.
34. CORERA, *supra* note 1, at 14.
35. *Id.*
36. *Id.* at 15.

do nothing."[37] FDO even allowed Khan to invite Pakistani officials to its facility and to send old centrifuge parts to Pakistan.[38]

It was only in late 1975, as the Pakistani embassy in Belgium began asking about restricted URENCO technology, that FDO and Dutch officials became suspicious.[39] Although Khan was placed under "official scrutiny," it is unclear how closely he was monitored.[40] Dutch security did not arrest or even question Khan, possibly because they "thought it would be more valuable to watch Khan and try and work out what he was up to."[41] Dutch officials claim that decision was taken at the behest of the CIA, but U.S. officials deny this.[42] When FDO transferred him away from its centrifuge technology, Khan realized his exposure. Having already obtained enough information for his purposes, he traveled to Pakistan in December 1975 for what he claimed would be a brief holiday. He would never return to Europe.[43]

B. Building the Bomb

Once back in Pakistan, Khan joined its fledgling enrichment program. Because he was the only person in the entire program "who had ever actually seen a working centrifuge," he convinced Prime Minister Bhutto to provide him with his own organization: Engineering Research Laboratories, based in Kahuta.[44] Khan faced a daunting task, as he later conceded: "A country which could not make sewing needles, good and durable bicycles or even ordinary durable metal rods was embarking on one of the latest and most difficult technologies."[45] To establish a Pakistani enrichment capacity, Khan eschewed conspicuous orders for finished products and instead sought parts directly from the European suppliers and middlemen he knew from his days at FDO, which would be much harder for western intelligence agencies to track.[46] He could then use the stolen URENCO designs to piece together a working centrifuge.

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37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 16.
42. *Id.* at 15–16.
43. BOBBITT, *supra* note 13, at 109.
44. CORERA, *supra* note 1, at 17–18.
45. CORERA, *supra* note 1, at 22.
46. *Id.*

To accomplish this, Khan often played on the greed of western businessmen.[47] Pakistani buyers would pay extra for enrichment components to ensure that suppliers would remain silent and continue dealing with Khan.[48] As Corera explains: "In some cases, suppliers must have known what the purpose was, in other cases they may have been deceived, or the lure of large amounts of cash may have persuaded them to deceive themselves."[49] Yet reminiscent of Khan's earlier security clearance from the Dutch Security Service, sometimes sales were made simply because westerners underestimated Pakistan's capabilities.

For example, officials at Britain's Emerson Electric sold Khan high-frequency inverters—vital to powering fast-spinning centrifuges—fully understanding their intended purpose, because they believed the Pakistanis would be at a loss as to how to use them.[50] According to one scientist, there was even a company joke that they would "rust away in cases."[51] The company was shocked when a few weeks later it received an order for more inverters "with a list of sophisticated modifications that showed the recipients knew exactly what they were doing."[52] When Britain then added the inverters to their export control list, Khan's associates simply moved further up the supply chain to purchase the inverter components.[53]

But private companies were not the only ones to blame. When Vakkuum Apparate Technik—a company that produced vacuum tubing and valves used for enrichment—asked the Swiss government whether it could sell its equipment to Khan's agents, the government simply responded that only complete centrifuges violated Swiss export controls, and the sale went through, "even though the final purpose was obvious."[54]

By 1979, when CIA officials began to realize what Khan and Pakistan were up to, most of the damage was done and Khan had

47. *See* BOBBITT, *supra* note 13, at 109 ("I took full advantage of the willingness of western companies to do business and decided to make purchases from the open market."); *see also* Edidin, *supra* note 32 ("While a lot of biased and unfounded propaganda is directed against us, the Western world never talked about their own hectic and persistent efforts to sell everything to us.").

48. CORERA, *supra* note 1, at 22–23.

49. *Id.* at 23.

50. *Id.* at 25.

51. *Id.*

52. *Id.*

53. *Id.* at 26.

54. *Id.* at 23.

almost everything he needed to build his own centrifuge plant.[55] Yet even then some officials showed little interest in what Pakistan was doing.[56] As late as 1986, one West German Economic Ministry official stated in an internal memo that U.S. warnings regarding nuclear sales to South Asia "usually land in my wastepaper basket."[57]

As Khan's enrichment and weapons program developed, his power and influence grew. Engineering Research Laboratories was renamed Khan Research Laboratories (KRL) and became "a state within a state with Khan its undisputed leader."[58] As Corera explains: "Running a clandestine nuclear procurement, enrichment, and weapons program inevitably creates a hidden world within a state, a place that prying eyes are not allowed to peer into."[59] That was only exacerbated by KRL's rivalry with Pakistan's other nuclear developer: Pakistan Atomic Energy Commission.[60]

Even worse, a triumvirate of Pakistan's three centers of power—the prime minister, the president, and the head of the military—came to govern the country's nuclear program, leading to complicated oversight responsibilities for important institutions like KRL.[61] That not only gave Khan the room to operate as he wished, but it also meant that "[o]ne section of Pakistan's leadership could promise other countries, such as the United States, one thing whilst another section like the military took a different, even contradictory path."[62] Even worse, Pakistan's civilian leaders ignored the advice of the head of Inter-Services Intelligence (ISI) at their own peril.[63] Indeed,

55. *Id.* at 27.

56. *Id.* at 35–36.

57. *Id.* at 36 (internal quotation marks omitted).

58. *Id.* at 41–42 ("The importance of the pursuit of nuclear weapons meant success was prioritized above worrying over corruption or effective oversight, allowing Khan to run rampant.").

59. *Id.* at 43.

60. *Id.* ("Each wanted to be the lead organization when it came to building the bomb and claim the glory.").

61. *Id.* at 50.

62. *Id.* Indeed, the influence and power of the Pakistani military cannot be understated, as some quip, "all countries have armies, but in Pakistan the army has a country." AHMED RASHID, DESCENT INTO CHAOS: THE U.S. AND THE DISASTER IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA 38 (rev. ed. 2009).

63. *See, e.g.*, CORERA, *supra* note 1, at 53 ("There had been a vicious battle with the ISI, and especially its chief Hamid Gul, who did everything to stop [Benazir Bhutto] from coming to power and then to drive her out, even after he had been removed from post.").

Benazir Bhutto—daughter of Zulfikar Ali Bhutto—would largely be left in the dark regarding the nuclear program during her first tenure as prime minister, and her best briefing on it would come from CIA officials during a state visit to Washington.[64]

C. Selling the Bomb

Khan claims that in 1982 he successfully enriched uranium and performed a cold test—triggering a nuclear device without the fissile material—two years later.[65] U.S. intelligence officials soon discovered the origin of the weapons technology that Khan used when they covertly searched his luggage during one of his trips abroad and found Chinese bomb designs.[66] That assistance cannot be understated because it "short cut a huge amount of difficult work in developing a weapon and even more importantly working out how to reduce its size so that it could be carried on a missile."[67] It also relieved Khan of having to test the device, which would have drawn unwanted international attention.[68] Indeed, Pakistan would not announce itself to the world as a nuclear power until May 28, 1998, when it exploded a nuclear device in the Chagai Hills in direct response to India's similar test less than three weeks earlier.[69] And Khan used the intervening uncertainty to upgrade his network from one looking to purchase nuclear technology for internal development to one looking to sell it abroad.

In 1987, Khan sold nuclear designs and parts to Iran, allowing it to "short cut large parts of the process of research and development for centrifuges that would otherwise have taken years, perhaps decades."[70] He also sold the Iranians a "shopping list" that explained what enrichment technology was needed and where it could be purchased, which the Iranians hoped would enable them to become self-sufficient.[71] By 1994, Khan began

64. *Id.* at 51.
65. *Id.* at 44.
66. *Id.* at 44–45 (speculating that Khan bartered for the Chinese technology by offering his stolen URENCO centrifuge designs).
67. *Id.* at 46.
68. *Id.*
69. *Id.* at 82–85; *see also* Edidin, *supra* note 32 ("As the world watched the hill changing color due to the immense heat generated by the nuclear explosions taking place beneath it, we all felt vindicated in our pledge to make this country's defense impregnable.") (quoting Khan).
70. CORERA *supra* note 1, at 67.
71. *Id.*

selling Iran more advanced designs and components for URENCO's P-1 and P-2 centrifuges.[72] Given the heightened secrecy of these later meetings, some even fear that Iran obtained a nuclear weapons design from Khan at this time.[73]

Furthermore, in December 1993, Pakistan began developing ties with North Korea, largely based on the exchange of nuclear technology. Benazir Bhutto visited the country that year and returned home with either a dismantled Nodong missile or the blueprint for it.[74] Though Bhutto is publicly credited with the acquisition, and even dubbed herself the "mother of the missile program,"[75] Corera explains that "it was Khan who paved the way for Bhutto's visit and Khan who would be at the center of Pakistan's relationship with Pyongyang on the nuclear front."[76] Benazir Bhutto always claimed that the deal was a cash transaction, but many believe that it developed into a barter, swapping Pakistani enrichment technology for North Korean missile technology, with Khan as the go-between.[77] At this time, Pakistan had little available cash to pay the estimated $3 billion cost of the Nodong missiles.[78] Instead, barter was more likely because "each had technology the other desperately wanted and neither had the cash to pay for it."[79]

But Khan's most expansive nuclear deal involved Libya, which has been described as a "quantum leap forward in his operations."[80] Muammar Gadaffi, Libya's former leader, had developed ties with Pakistan's nuclear program as early as 1973, when he funded the nascent program with oil revenues, hoping to share in its spoils.[81] But in contrast to Iran and North Korea, both of which already possessed some degree of nuclear expertise, Libya "wanted the works—an entire nuclear weapons capability from start to finish."[82] Furthermore, Corera sees this deal as much more of a "money-making enterprise" for Khan, as opposed to his earlier "strategic" deals, demonstrating a further

72. *Id.* at 69.
73. *Id.* at 70; *see also* BOBBITT, *supra* note 13, at 110.
74. CORERA, *supra* note 1, at 87.
75. *Id.* at 89 (echoing her father's claim to be the "father" of Pakistan's nuclear program).
76. *Id.* at 87.
77. *See, e.g., id.* at 89–90; *see also* BOBBITT, *supra* note 13, at 112.
78. CORERA, *supra* note 1, at 90.
79. *Id.* at 92.
80. BOBBITT, *supra* note 13, at 113.
81. CORERA, *supra* note 1, at 12.
82. *Id.* at 109.

development of the network.[83] But it would be this deal that ultimately caused Khan's downfall, as in the wake of the 2003 invasion of Iraq and the interception of one of Khan's nuclear shipments to Libya on the *BBC China*, Gadaffi sought rapprochement with the West and divulged his dealings with Khan.[84]

III. U.S. AID RESTRICTIONS AND THE FAILURE TO PRIORITIZE NONPROLIFERATION

Since its independence, Pakistan's relationship with the United States has never been truly stable. Nevertheless, surrounded by several international hotspots—India, Iran, Afghanistan, China, and the former Soviet Union—Pakistan has long been an important variable in U.S. geopolitical calculus.[85] Pakistan, often aided by conflicted U.S. officials, used that importance to undermine several key U.S. laws meant to obstruct its nuclear development.

While Khan was building Pakistan's nuclear program, Congress passed several amendments that conditioned continued military and economic aid on Pakistan maintaining its nonnuclear status. The first of such amendments, the 1976 Symington Amendment and the 1977 Glenn Amendment, applied this condition generally to all nonnuclear states, not just Pakistan.[86] The Symington Amendment prohibited nonnuclear countries that imported or exported enrichment equipment, material, or technology outside of the safeguards established by the International Atomic Energy Agency (IAEA) from receiving U.S. aid under the Foreign Assistance Act or Arms Export Control Act.[87] The Glenn Amendment extended that prohibition to reprocessing equipment, materials, and technology, and lacked the IAEA safe harbor.[88]

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83. *Id.* at 120.

84. *See* Paul Reynolds, *On the Trail of the Black Market Bombs*, BBC NEWS, Feb. 12, 2004, http://bbc.in/1AnIpqZ [perma.cc/5XAN-4ZYZ] [hereinafter "Black Market Bombs"]; *see also* CORERA, *supra* note 1, at 176–94.

85. *See* RASHID, *supra* note 62, at 36–37 ("Pakistan became a frontline bastion for the United States in the cold war, joining several U.S.-led regional pacts, allowing a large CIA office to be established in Karachi, and letting American high-altitude U2 spy planes fly over the Soviet Union from an air base near Peshawar.").

86. Leonard Weiss, *Turning a Blind Eye Again? The Khan Network's History and Lessons for U.S. Policy*, ARMS CONTROL TODAY, Mar. 1, 2005, http://bit.ly/1HkXd6V [perma.cc/GDB4-RNFN].

87. *Id.*

88. *Id.*

But once Pakistan developed into a staging area for U.S. aid to the Afghan mujahideen after the 1979 Soviet invasion of Afghanistan, the United States sought to avoid any action that could destabilize or alienate its partner.[89] Instead, as National Security Advisor Zbigniew Brzezinski advised President Carter: "This will require a review of our policy toward Pakistan, more guarantees to it, more arms aid, and, alas, a decision that our security policy toward Pakistan cannot be dictated by our nonproliferation policy."[90] Following that advice, President Carter lifted the Symington Amendment and restored economic and military aid to Pakistan.[91] When President Reagan assumed office, he expanded on Carter's indulgence of Pakistan's nuclear ambitions, and his Secretary of State Alexander Haig even informed Pakistan's foreign minister that the United States "will not make your nuclear program the centrepiece of our relations."[92]

Then, in 1985—soon after the United States caught Pakistani dealers attempting to export fifty kryton triggering switches from Houston—Congress passed the Pressler and Solarz Amendments.[93] The Pressler Amendment conditioned any U.S. "assistance" or "military equipment or technology" to Pakistan on the president first certifying in writing "that Pakistan does not possess a nuclear explosive device and that the proposed United States assistance program will reduce significantly the risk that Pakistan will possess a nuclear explosive device."[94] Similarly, the Solarz Amendment prohibited aid to any nonnuclear country that:

> exports illegally (or attempts to export illegally) from the United States any material, equipment, or technology which would contribute significantly to the ability of such country to manufacture a nuclear explosive device, if the President determines that the material, equipment, or technology was to be used by such country in the manufacture of a nuclear explosive

89. CORERA, *supra* note 1, at 30–31.

90. STEVE COLL, GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001, at 51 (2004).

91. CORERA, *supra* note 1, at 31.

92. *Id.* (internal quotation marks omitted).

93. *Id.* at 37, 48.

94. International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 902, 99 Stat. 190, 268 (1985) (amending Section 620E of the Foreign Assistance Act of 1961).

device.[95]

But the Solarz Amendment allowed the president to continue aid despite such a determination if he concluded that "the termination of such assistance would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security."[96]

That waiver provision saved Khan's program. Indeed, only a month after a Pakistani official was convicted of trying to purchase a special type of steel for Khan's Kahuta plant in December 1987, President Reagan invoked the Solarz Amendment and then promptly issued a waiver.[97] Richard Barlow, a CIA official in charge of monitoring Khan, vented his frustrations over his superiors' decision to prioritize cooperation with Pakistan over nonproliferation:

> You could have done both. . . . It was basically a question of more effectively using our leverage of economic and military aid. We drew lines in the nuclear sand and when [President] Zia crossed them, we just drew another line. The 'powers that be' felt that if we pushed it and cut off aid or even part of it, that Zia wouldn't help us and wouldn't funnel aid to the Afghans. I didn't agree with that. The Pakistanis didn't want the Russians on their border any more than we did. They weren't doing it for us. They had their own reasons. People were not willing to call his bluff. He had us wrapped around his finger and Zia played us brilliantly.[98]

Barlow would later quit the CIA when he was reassigned for informing Congressman Solarz of his contrarian views regarding Khan and Pakistan.[99]

Yet when the Soviet Union began its withdrawal from Afghanistan in 1988, U.S. reliance on Pakistan appeared to wane.[100] But then in August, President Zia died in a plane crash

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95. Memorandum from Abraham Sofaer, Legal Advisor to the Dep't of State, to Michael Armacost, Under Sec'y of State for Political Affairs, on the Applicability of the Solarz Amendment to the Current Pakistan Cases 2 (July 20, 1987), *available at* http://bit.ly/1F0p6jj [perma.cc/Z9UE-PU25].

96. *Id.*

97. CORERA, *supra* note 1, at 36–39.

98. *Id.* at 38.

99. *Id.* at 39–40 ("High-level people were not happy. His briefing had deeply upset a number of colleagues at the CIA Directorate of Operations and the State Department because it made clear that those who had been briefing Congress before had not been providing a full picture.").

100. *Id.* at 49.

and Benazir Bhutto was elected prime minister.[101] Female, Western-educated, and democratically elected, Bhutto was well-regarded by the West and seen as a moderating force in Pakistan; many U.S. officials wanted to avoid anything that might undermine her position.[102] That caused a new predicament for the United States[103]

When Bhutto travelled to Washington in 1989, President Bush told her that although Pakistan would be certified as a nonnuclear state that year, it could not be the following year unless she promised that Pakistan would not assemble a weapon or enrich above five percent.[104] But after Bhutto declared before Congress Pakistan's policy not to possess or make a nuclear device, Bush sold Pakistan $1.6 billion worth of F-16 fighter jets.[105] As Corera explains: "On the surface, it all looked like a success. No one mentioned to Congress or the American public that the CIA actually believed that the prime minister's confident statement was irrelevant and that Pakistan already had the bomb."[106] Barely a year later, when Pakistan went to the brink of nuclear war with India over the disputed province of Kashmir and Bhutto was toppled in what she later referred to as a "nuclear coup," Bush invoked the Pressler Amendment and finally cut off all U.S. aid to Pakistan.[107]

Because a string of administrations—from Jimmy Carter's to George H.W. Bush's—prioritized the United States' relationship with Pakistan over nonproliferation, an important obstacle to Khan's nuclear ambitions was undercut. Even worse, every presidential waiver and obfuscation regarding Pakistan's nuclear status made the United States complicit in the program, almost tacitly approving it. Going forward, it will be incumbent on U.S.

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101. *Id.*

102. *Id.*; *see also* Mohtarma Benazir Bhutto, Prime Minister of the Islamic Republic of Pakistan, Address before the U.S. House of Representatives (June 7, 1989), *available at* http://bit.ly/1BeQYzv [perma.cc/MW5P-NMWS] ("We gather together to celebrate freedom, to celebrate democracy, to celebrate the three most beautiful words in the English language: 'We the People.'").

103. CORERA, *supra* note 1, at 49 ("With the Afghan campaign winding down, there was no doubt that it was going [to] be harder for the United States to certify Pakistan did not have the bomb, but that problem had to be balanced against supporting Benazir Bhutto.").

104. *Id.* at 51.

105. Bhutto, *supra* note 102 ("Speaking for Pakistan, I can declare that we do not possess nor do we intend to make a nuclear device. That is our policy."); *see also* CORERA, *supra* note 1, at 51–52.

106. CORERA, *supra* note 1, at 52.

107. *Id.* at 53–55.

presidents in particular to sufficiently prioritize nonproliferation, or at least to find a way to properly integrate it into the United States' wider global strategy. One 12.5 kiloton nuclear device alone could engulf 7.8 square kilometers and kill up to 80,000 people and "[o]nce the world bears witness to a nuclear explosion directed purposefully at civilians and outside the context of conventional war, nothing in political life will ever be the same again."[108]

But many concede that a focus on nonproliferation will create tension with other major foreign-policy goals. Professor Philip Bobbitt, for example, has constructed a "triage of terror," consisting of three competing interests: (1) "global, networked terrorism," (2) "WMD proliferation," and (3) "human catastrophe."[109] According to him:

> If . . . we give security guarantees and share technology as the surest way to prevent proliferation, we take on board partners whose commitment to human rights may be highly questionable (Russia, for example, or China) and whose campaign against terror is largely confined to the national liberation groups that bedevil them, leading in the end to new alliances for our terrorist adversaries.[110]

But even under that framework, Professor Bobbitt still views nonproliferation as the priority—"if only temporarily so"—because of the threat of nuclear terrorism.[111] And that threat is particularly worrisome given the precarious nature of Pakistani politics and Khan's alleged links with Al Qaeda.[112]

When dealing with provisions like the Pressler Amendment and its forebears, which could be effective if properly enforced, that shift will have to come from the Oval Office itself. Indeed, a statute similar to the Pressler Amendment—that embargoed arms sales to Bolivia and Paraguay during the Chaco War after a presidential determination that it may "contribute to the

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108. BOBBITT, *supra* note 13, at 99–100.
109. *Id.* at 511.
110. *Id.* at 511–12.
111. *Id.* at 514.
112. *See* Robert D. Kaplan, *What's Wrong with Pakistan? Why Geography—Unfortunately—Is Destiny for South Asia's Troubled Heartland*, FOREIGN POL'Y, June 18, 2012, http://atfp.co/1F4rvum [perma.cc/35Q3-26BU] (noting Pakistan's high rank on the Failed States Index); *see also* CORERA, *supra* note 1, at 161 ("What really set off alarm bells was that the documents found in Kabul made clear that Pakistani nuclear scientists had actually met with the Taliban and Al Qaeda to discuss the development of nuclear devices.").

reestablishment of peace"—spawned the often expansively interpreted doctrine of the president as the "sole organ" of the United States in foreign relations.[113] Also, the unconstitutionality of the legislative veto after *INS v. Chadha* limits the degree to which Congress can ensure enforcement of such laws.[114] The Solarz Amendment included a provision that allowed Congress to disapprove a presidential waiver by concurrent resolution—a resolution passed by both Houses but not presented to the president and therefore lacking the force of law post-*Chadha*.[115] Therefore, the burden must fall to presidents not to repeat the mistakes of their predecessors, who saw nonproliferation not only as an issue distinct and severable from our relationship with Pakistan, but also as one that could be subordinated to it.

IV. THE SHORTCOMINGS OF THE NONPROLIFERATION TREATY

But U.S. aid restrictions were not the only failure. Entering into effect in 1970 and extended indefinitely in 1995, the Non-Proliferation Treaty (NPT) boasts 190 countries as parties—the most of any arms-control treaty.[116] The treaty and the international framework implemented in its wake have enjoyed many successes. The most prominent are the continued statuses of Japan and Germany as nonnuclear states and the decisions of several former Soviet republics to relinquish the nuclear weapons left behind after the disintegration of the Soviet Union.[117] Indeed, some regard the NPT as the "most important step thus far taken against proliferation."[118] In the lifetime of the NPT, however, the international community has witnessed four

113. U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 311–12, 319 (1936) (quoting then-Representative and soon-to-be Chief Justice John Marshall).

114. INS v. Chadha, 462 U.S. 919, 958 (1983) ("To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President.").

115. *See* Sofaer, *supra* note 95, at 2.

116. *Treaty on the Non-Proliferation of Nuclear Weapons (NPT)*, UN OFF. FOR DISARMAMENT AFF., http://bit.ly/1K6yCpE [perma.cc/66RF-NMNR] (last visited May 20, 2015).

117. *See* BOBBITT, *supra* note 13, at 515; *see also* Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty is Losing Its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT'L L. 337, 339 (2007) (noting President Kennedy's prediction in 1963 that "as many as 'fifteen or twenty' states could possess nuclear weapons by 1975").

118. *See, e.g.*, BOBBITT, *supra* note 13, at 515.

states—India, Pakistan, Israel,[119] and North Korea—obtain a nuclear capacity.[120] It is time for the international community to recognize and address the NPT's limitations to ensure that there will not be a fifth, or more. Indeed, shortly after the *BBC China*'s interception exposed the extent of Khan's network in 2004, the UN Secretary-General's High-level Panel on Threats, Challenges and Change stressed "the erosion and possible collapse of the whole [NPT] regime" and declared that the world is "approaching a point at which the erosion of the non-proliferation regime could become irreversible and result in a cascade of proliferation."[121]

A. The NPT's Two-Tier Hierarchy

The NPT's framework establishes a clear divide between a few recognized nuclear states and all others. Article III only recognizes the United States, United Kingdom, France, Russia, and China as "nuclear-weapon States."[122] Under Article I, these five states agree both:

- "not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly;"
- "and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices."[123]

Similarly, all other states—the "non-nuclear-weapons States"—undertake under Article II:

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119. Israel refuses to publicly admit its nuclear weapons program, "retaining a level of diplomatic ambiguity." CORERA, *supra* note 1, at 72. *See also* LAWRENCE WRIGHT, THIRTEEN DAYS IN SEPTEMBER: CARTER, BEGIN, AND SADAT AT CAMP DAVID 218 (2014) (describing the "Samson Option": Israel's strategy to use nuclear weapons to counter an overwhelming Arab military attack).

120. *See* Louis Charbonneau, *U.S. Wants Israel, India in Anti-Nuclear Arms Treaty*, REUTERS, May 5, 2009, http://reut.rs/1F4rxlK [perma.cc/4D8S-TAQW].

121. Kittrie, *supra* note 117, at 341 (citing U.N. Secretary-General, *Rep. of the Secretary-General's High-level Panel on Threats, Challenges and Change*, ¶¶ 109, 111, U.N. Doc. A/59/565 (Dec. 2, 2004)).

122. Treaty on the Non-Proliferation of Nuclear Weapons, art. IX, para. 3, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT] ("For the purposes of this Treaty, a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967.").

123. *Id.* at art. I (bullets added).

- "not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly;"
- "not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices;"
- "and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices."[124]

After India's 1974 nuclear test, that framework was bolstered by the efforts of the London Club, a collection of fifteen countries supplying nuclear technology that sought "to restrict the export of nuclear technologies using a 'trigger list' of banned exports, and conditioned imports on various undertakings and inspections by importing states."[125]

Despite its influence, the NPT's two-tier hierarchy has generated much criticism within important states it deems "nonnuclear," which is often directed almost exclusively at the West. Khan himself criticized this double standard when he wrote a letter to *Der Spiegel*:

> I want to question the bloody holier-than-thou attitudes of the Americans and the British. These bastards are God-appointed guardians of the world to stockpile hundreds of thousands of nuclear warheads and have the God-given authority of carrying out explosions every month. But if we start a modest program, we are the Satans, the devils.[126]

Even Khan's rivals in India shared this view. Indeed, after India's 1998 nuclear test, one of its ranking officials referred to the West's position as "nuclear apartheid" and declared that his "country's national security in a world of nuclear proliferation lies either in global disarmament or in exercise of the principle of equal and legitimate security for all."[127] Thus, Pakistan and India—two states integral to the success of nuclear nonproliferation—have never signed the NPT and have

124. *Id.* at art. II (bullets added).
125. BOBBITT, *supra* note 13, at 108–09.
126. CORERA, *supra* note 1, at 122.
127. Jaswant Singh, *Against Nuclear Apartheid*, FOREIGN AFF., Sept.–Oct. 1998, *available at* http://fam.ag/1KyPvN0 [perma.cc/5TZX-6APW] (last visited May 20, 2015).

generally shunned its provisions.[128] Israel is also not a signatory to the NPT, and North Korea has withdrawn from it.[129] Thus the most worrisome, if not downright troublesome countries for the international nonproliferation movement exist outside its most important treaty regime. That is particularly troubling given what Professor Bobbitt identifies as one of the two major defects of the NPT: "Because strategy is shaped by law, those states that refuse to participate in the legal regime have become prime candidates for marketing their weapons development programs."[130]

That underscores one of the most intractable obstacles to nonproliferation: too many states view nuclear weapons, and the "lateral" deterrence they provide, as key to their regional security.[131] Indeed, just considering the Indian subcontinent, it is easy to see how nuclear proliferation can become self-generating. The Chinese bomb begat the Indian bomb, which in turn begat the Pakistani bomb.[132] And for Pakistan, a nuclear arsenal can deter the threat of what would inevitably be an overwhelming conventional armed attack from India, as Pakistan has a population of just less than 200 million people, compared to India's well over 1.2 billion.[133]

B. Supposedly "Peaceful Purposes"

Despite that two-tier hierarchy, NPT Article IV explicitly recognizes "the inalienable right" to develop nuclear technology for "peaceful purposes."[134] In fact, the treaty even calls on all parties to "facilitate" such development as part of the tradeoff between nuclear and nonnuclear states at the heart of the treaty.[135] Though this development must be done "in conformity with Articles I and II," many fear that it could be used to mask

128. *Disarmament Treaties Database: Treaty on the Non-Proliferation of Nuclear Weapons (NPT)*, UN OFF. FOR DISARMAMENT AFF., http://bit.ly/1LhmEcM [perma.cc/QA4Y-88FY] (last visited May 20, 2015).

129. *Id.*

130. BOBBITT, *supra* note 13, at 475.

131. *Id.* at 10.

132. JOSEPH CIRINCIONE, BOMB SCARE: THE HISTORY AND FUTURE OF NUCLEAR WEAPONS 51–52 (rev. ed. 2008).

133. *The World Factbook: Pakistan: People and Society*, CENT. INTELLIGENCE AGENCY, http://1.usa.gov/1LhmHp3 [perma.cc/YZ7H-PBRX] (last visited May 20, 2015); *The World Factbook: India: People and Society*, CENT. INTELLIGENCE AGENCY, http://1.usa.gov/1Gt8RRk [perma.cc/6T2L-A5WF] (last visited May 20, 2015).

134. NPT, supra note 122, at art. IV, para. 1.

135. *Id.* at art. IV, para. 2.

an illegal program.[136] Indeed, Benazir Bhutto exploited this tension during her fruitful 1993 trip to North Korea, asserting: "Pakistan firmly holds the view . . . that nuclear non-proliferation should not be made a pretext for preventing states from exercising fully their right to acquire and develop nuclear technology for *peaceful purposes*."[137] Likewise, during a speech on February 11, 2006, President Mahmoud Ahmadinejad of Iran led his audience in a chorus of: "Nuclear *power* is our absolute right."[138]

But because nuclear technology is often "dual use"—capable of being used for both peaceful and illicit purposes—this exception is very difficult to police. And Khan did not operate in the black market, but in a gray market.[139] His skills were in "working through the holes in the existing export control regime and using a variety of techniques to disguise the use or final destination of dual-use items."[140] One executive from CORA Engineering—a company that produces equipment to convert solid uranium into a gas for centrifuges—defended his dealings with Khan by arguing: "What can lead to a nuclear weapon that is the question of course . . . . Nuts and bolts can lead to a nuclear weapon. Where do you draw the line?"[141]

Khan, along with his partners in Iran, also created an international network of front companies to purchase dual-use nuclear technology and equipment for illicit purposes in the guise of a proper buyer, like a university.[142] International efforts to alert suppliers often went unheeded and "[d]iplomatic demarches and warnings were only serving to alert procurers that they were being watched and had to shift their approach."[143] And when caught, Iran has defended those actions—along with its development of nuclear technology and a homegrown nuclear fuel cycle, purportedly for nuclear energy only—by citing NPT Article IV.[144]

136. *Id.* at art. IV, para. 1.
137. CORERA, *supra* note 1, at 86 (emphasis added) (internal quotation marks omitted).
138. *Iran and the West: Nuclear Confrontation* (BBC television broadcast Feb. 21, 2009), YouTube (Mar. 25, 2014), http://bit.ly/1HxD2s7 (playing at 46:00) (emphasis added).
139. CORERA, *supra* note 1, at 118.
140. *Id.*
141. *Id.* at 23.
142. *Id.* at 67.
143. *Id.* at 42.
144. *Id.* at 72.

C. Treaty Withdrawal

Furthermore, NPT Article X allows for a party to withdraw "if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country."[145] The withdrawing party need only provide three months' notice and "a statement of the extraordinary events it regards as having jeopardized its supreme interests."[146] Though the plain language of Article X seemingly restricts withdrawal to limited circumstances—requiring *extraordinary* events and *supreme* interests instead of merely *an* event or *an* interest—the provision can easily be abused by bad actors because those key phrases have been left undefined in the treaty.[147]

Even more, Article X explicitly refers to the withdrawing party's "national sovereignty," a phrase rarely included in treaties.[148] That language is the product of a long debate between the United States and the Soviet Union during the treaty's drafting in 1965—indeed, it had been one of the major sticking points.[149] The original U.S. draft of Article X lacked the "national sovereignty" language, but the Soviet Union demanded its inclusion.[150] The Soviet Union even sought unsuccessfully to exclude the "statement of extraordinary events" requirement for withdrawal.[151] Because the Vienna Convention on the Law of Treaties recognizes "preparatory work" on a treaty as a "supplementary means of interpretation,"[152] the drafting history of the rarely used "national sovereignty" language lessens the bite of the seemingly more demanding "extraordinary events" and "supreme interests" language.

Indeed, when North Korea announced its decision to withdraw from the NPT on March 12, 1993—a mere nine months before Benazir Bhutto's visit and Khan's suspected

145. NPT, supra note 122, at art. X, para. 1.

146. *Id.*

147. *See generally id.* at art. I–XI.

148. Susan Carmody, *Balancing Collective Security and National Sovereignty: Does the United Nations Have the Right to Inspect North Korea's Nuclear Facilities?*, 18 FORDHAM INT'L L.J. 229, 265 (1994).

149. *Id.* at 241–42, 245–46.

150. *Id.* at 241 n.80.

151. *Id.*

152. Vienna Convention on the Law of Treaties, art. 32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

technology swap[153]—it invoked Article X's "national sovereignty" language in the opening line of its required statement.[154] North Korea specifically cited the IAEA's demand to inspect its military sites,[155] and it in effect argued that the IAEA's inspection regime itself violated North Korea's "national sovereignty" and "supreme interests" under Article X:

> If we submissively accept an unjust inspection by the IAEA, it would legitimize the espionage acts by the United States, a belligerent party vis-à-vis the DPRK, and set the beginning of the full exposure of all our military installations. Under our specific conditions in which the country still remains divided and exposed to the constant nuclear threats from the United States, it will be totally inconceivable to lay our military sites open to the enemies.[156]

According to North Korea, the United States manipulated the IAEA to interfere in North Korea's "internal affairs" and "stifle" its socialism.[157] Though the United States convinced North Korea to temporarily suspend "effectuation" of its decision, North Korea formally withdrew from the NPT a year later on June 13, 1994, just six months after Benazir Bhutto's visit.[158]

Article X is even more worrisome when read in conjunction with Article IV's allowance for nuclear development for "peaceful purposes," as explained above.[159] Indeed, many believe that Iran—and any other country following its lead—could use these two provisions to develop a weapons-grade enrichment capacity in the guise of a "peaceful" one before pulling out of the NPT.[160] It could then rearrange the centrifuge cascades of the "peaceful" enrichment facility to provide a "breakout capacity" that could reduce the time required to

153. *See supra* Part II.C.

154. IAEA Director General, *The Non-Compliance of the Democratic People's Republic of Korea with the Agreement Between the IAEA and the Democratic People's Republic of Korea for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons (INFCIRC/403) and on the Agency's Inability to Verify the Non-Diversion of Material Required to be Safeguarded*, annex 7, at 1, IAEA Doc. INFCIRC/419 (Apr. 8, 1993) *available at* http://bit.ly/1F0pBdj [perma.cc/H3NS-26QR].

155. *Id.* (citing also "Team Spirit," a joint United States–South Korean military exercise, which it referred to as a "nuclear war rehearsal").

156. *Id.* at 2.

157. *See id.* at 1.

158. *See* Int'l Atomic Energy Agency [IAEA], *Fact Sheet on DPRK Nuclear Safeguards*, http://bit.ly/1Gt8WnZ [perma.cc/N3FN-8EJ8] (last visited May 27, 2015) [hereinafter *Fact Sheet*].

159. *See supra* Part IV.B.

160. *See* CORERA, *supra* note 1, at 72.

enrich weapons-grade material by a factor of five and preempt any international reaction.[161] As Corera explains: "This may well be the most attractive option for Tehran since it is technically legal and provides more diplomatic room for maneuvering than rushing headlong towards a bomb with all the consequences that this would entail."[162] Similarly, a country could obtain a "breakout capacity" by establishing a legitimate peaceful program that would cover research and purchases for a secret and illegal parallel program to develop weapons-grade enrichment.[163] This illustrates what Professor Bobbitt identifies as the other NPT defect: "Because law is shaped by strategy, signatory states have found ways to comply with the letter of the treaty while evading its intent."[164]

D. IAEA Oversight

Furthermore, nonnuclear states accept safeguards and a verification regime under the auspices of the IAEA to ensure compliance with the NPT.[165] According to its governing statute, the objective of the IAEA is to "accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world" and "ensure, so far as it is able," that nuclear assistance is not used to "further any military purpose."[166] The IAEA is the central agency of the nonproliferation regime and it was even awarded the Nobel Peace Prize in 2005 for its "efforts to prevent nuclear energy from being used for military purposes and to ensure that nuclear energy for peaceful purposes is used in the safest possible way."[167]

Nevertheless, the IAEA has often been too slow to react, and its efforts have been feeble once it does. Experts have noted both the IAEA's lack of a forceful verification authority and its

161. *Id.*; *see also* Black Market Bombs, *supra* note 84 ("But enriching uranium beyond power station grade to weapons grade is no great technological feat and as long as you keep your activities a secret, you can get away with it.").

162. CORERA, *supra* note 1, at 72.

163. *Id.* at 72–73.

164. BOBBITT, *supra* note 13, at 475.

165. NPT, *supra* note 122, at art. III, para. 1.

166. Statute of the International Atomic Energy Agency, art. II, *ratified* July 29, 1957, 8 U.S.T. 1093, 1095–96, 276 U.N.T.S. 3, 6 (amended Oct. 4, 1961, 14 U.S.T. 135, 471 U.N.T.S. 333) [hereinafter IAEA Statute].

167. *The Nobel Peace Prize 2005*, NOBELPRIZE.ORG, http://bit.ly/1FFBn36 [perma.cc/8N2H-7P3T] (last visited May 20, 2015).

inability to penalize suspected proliferators for lying.[168] For example, when the true extent of the Khan network was revealed—at least in part—in the wake of the collapse of the Libyan deal, the IAEA mounted an investigation of Khan's dealings with Iran.[169] When an Iranian opposition group revealed the location of a secret centrifuge site in Tehran, Iranian officials delayed access to the site, claiming it was a "private clock factory."[170] During the delay, satellites captured trucks removing material from the site, and by the time the IAEA was allowed in, the site had been sanitized to prevent inspectors from collecting environmental samples to test for uranium.[171] According to one inspector: "It was even smelling of paint."[172] Nevertheless, by testing areas the Iranian officials overlooked—like doorframes and rubber toilet seals—IAEA inspectors still found weapons-grade samples enriched to over thirty percent.[173] Iran learned from its mistake, and when the IAEA requested access to another site, it was razed with all the buildings and soil removed.[174]

E. Reliance on the UN Security Council

Even more, because the NPT never defined what actions legally qualify as "proliferation," the IAEA relies heavily on the Security Council and its "prevention and enforcement powers . . . rooted in the broader political context of maintaining peace and security."[175] Indeed, when North Korea withdrew from the NPT, the IAEA quickly referred the matter to the Security Council, expressing "deep concern" and calling on North Korea to "remedy urgently" the situation.[176] But under Article 2 of the UN Charter, states must refrain "from the threat or use of force against the territorial integrity or political independence of any state."[177] Besides the implied exception of consent, there are only two explicit exceptions to Article 2. First,

168. *See, e.g.*, Kittrie, *supra* note 117, at 352.
169. CORERA, *supra* note 1, at 228.
170. *Id.* at 229.
171. *Id.*
172. *Id.*
173. *Id.* at 229–30.
174. *Id.* at 230–31.
175. *See* Cristian DeFrancia, *Enforcing the Nuclear Proliferation Regime: The Legality of Preventive Measures*, 45 VAND. J. TRANSNAT'L L. 705, 714 (2012).
176. Fact Sheet, *supra* note 158.
177. U.N. Charter art. 2, para. 4.

the Security Council can authorize action. Once it has "determine[d] the existence of any threat to the peace" under Article 39,[178] the Security Council may:

- under Article 40, "call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable";
- under Article 41, employ "measures not involving the use of armed force"; or
- under Article 42, "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[179]

Second, states retain "the inherent right of individual or collective self-defence" under Article 51.[180] But states can only invoke Article 51 during an "armed attack," and only "until the Security Council has taken measures necessary to maintain international peace and security."[181] Furthermore, Article 51 explicitly states that the right of self-defense "shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."[182]

Although the UN Charter seems to envision a large role for the Security Council regarding nuclear proliferation—a clear threat to the "maintenance of international peace and security"[183]—the Council suffers from one glaring structural defect: the permanent-five veto. The United States, the United Kingdom, France, Russia, and China all enjoy veto power over Security Council decisions as permanent members.[184] That has stymied proactive measures on a host of important international issues, including nuclear proliferation. It has also hampered quick and effective responses to proliferation issues as they have arisen. Indeed, Professor Bobbitt has described China as an advocate of "opaque sovereignty," which deems "events within a state's borders . . . entirely internal matters, beyond the

178. *Id.* at art. 39.
179. *Id.* at art. 40–42 (bullets added).
180. *Id.* at art. 51.
181. *Id.*
182. *Id.*
183. *Id.* at art. 24, para. 1.
184. *See id.* at art 23, para 1; art. 27, para. 3.

judgment of other states."[185] That view has obstructed any forceful Security Council resolution addressing nonproliferation and differs with the United States' "transparent sovereignty," which instead "holds that because a regime's sovereignty arises from its compact with its people as well as with the society of states, sovereignty can be penetrated when a state . . . acquires weapons of mass destruction in violation of its international agreements."[186]

Yet on April 28, 2004, the UN Security Council unanimously passed Resolution 1540, which addressed WMD proliferation and decided that "all States shall take and enforce effective measures . . . to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery."[187] To accomplish that, Resolution 1540 called on states to implement "effective national control lists," to "work with and inform" industry and public officials, and to "take cooperative action" with other states.[188] Given the Security Council's strong language, which uses phrases like "decides" at key points rather than the more hortatory "calls upon,"[189] Resolution 1540 has been regarded as "one of the most sweeping resolutions in its history."[190]

Nevertheless, it still falls short of an authorization for use of force. Indeed, the United Kingdom even issued a statement when the resolution was passed, stating: "What this resolution does not do is authorise enforcement action against states or against non-state actors in the territory of another country. The resolution makes clear that it will be the Council that monitors its implementation. Any enforcement action would require a new Council decision."[191] That conclusion, undercutting any forceful and proactive interpretation of the resolution, is bolstered by the ending paragraph of Resolution 1540, in which the Security Council—and therefore also Russia and

185. BOBBITT, *supra* note 13, at 469–70.

186. *Id.* at 470.

187. S.C. Res. 1540, para. 3, U.N. Doc. S/RES/1540 (Apr. 28, 2004) [hereinafter UNSCR 1540].

188. *Id.* at para. 6–10.

189. *Compare id.* at para. 1–5, *with* para. 8–9 (primarily using "decides," and reserving "calls upon" for wishes that "all States" would promote the ideas and dialogue needed to stop proliferation).

190. Mark R. Shulman, *The Proliferation Security Initiative and the Evolution of the Law on the Use of Force*, 28 HOUS. J. INT'L L. 771, 818 (2006).

191. *Id.* at 820.

China—"[d]ecides to remain seized of the matter."[192]

The United States also had to forgo a provision authorizing WMD interdiction at sea to obtain China's consent in the Security Council, further demonstrating the power of the permanent-five veto.[193] The United States also agreed to add language disclaiming coverage of pre-existing violations, drastically limiting Resolution 1540's scope.[194] Even worse, though just a few short years removed from Khan's arrest, Pakistan was "the most vocal critic" of the resolution, fearing that it would "force it to take legal action against A.Q. Khan," and only dropped its opposition when "the United States had assured it that the resolution would not increase international scrutiny of its own nuclear weapons program."[195] Indeed, Pakistan's UN Ambassador declared: "Pakistan will not accept any demand for access, much less inspections, of our nuclear and strategic assets, materials and facilities."[196] All that drafting history prevents Resolution 1540 from signaling a new possible exception to Article 2's sovereignty protections as a matter of customary international law, along the lines of the controversial "responsibility to protect" doctrine.[197]

F. Going Forward

Much needs to change in order to properly address nuclear proliferation, which requires examination of both those who

192. *See* UNSCR 1540, *supra* note 187, at para. 12.

193. *See* Shulman, *supra* note 190, at 820–21 (citations omitted). This is ironic given that the *BBC China*'s interception at sea was the ultimate cause of Khan's downfall. *See* CORERA, *supra* note 1, at 186–87.

194. Colum Lynch, *Weapon Transfers Targeted; U.N. Security Council Resolution Seeks Criminalization*, WASH. POST, Apr. 29, 2004, at A21.

195. *Id.*

196. *Id.*

197. Professor Bobbitt describes this doctrine as "a far-reaching principle that holds that states have a responsibility to protect the lives, liberty, and basic human rights of their citizens and that if they fail or are unable to carry this out, the international community has a responsibility to step in." BOBBITT, *supra* note 13, at 471. Its most notable application justified NATO's 1999 campaign in Kosovo as "illegal, yet legitimate." *See* THE INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 186 (2000); *see also* Kittrie, *supra* note 117, at 349–50 (noting the International Court of Justice's 1996 holding that "[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such" to argue that if "customary international law did not in 1996 prohibit in all circumstances the threat or use of nuclear weapons, it surely did not prohibit their possession, and if nuclear nonproliferation was not customary international law in 1996, it is hard to imagine that it is customary international law today.") (alteration in original).

proliferate and those seeking to end proliferation.[198] But effective reforms need not be as drastic as the abolition of the permanent-five veto or of nuclear weapons generally, both of which some have advocated.[199] Indeed, if the UN General Assembly truly cared about nonproliferation, it could invoke Resolution 377, otherwise known as the "Uniting for Peace" Resolution.[200] Under that resolution, the General Assembly can respond to a "threat to the peace" when the Security Council fails to act due to a "lack of unanimity of the permanent members." The General Assembly itself can make "appropriate recommendations" that include "the use of armed force when necessary, to maintain or restore international peace and security."[201] That route may be complicated for the United States, however, as it lost interest in the Uniting for Peace Resolution in 1964 when it no longer enjoyed "an automatic majority in the General Assembly."[202] It would also force the United States to confront proliferation in an arena—the General Assembly—where the likes of Pakistan, North Korea, and Iran enjoy equal voting power and the United States lacks a veto power.

But laudable reforms need not be even that complex. For example, had FDO simply exercised better oversight during Khan's early years, many of his actions could have been prevented in the first place. Also, Resolution 1540 seems to indicate at least a recognition that industry officials should not have been so willing to do business with Khan and must be more discerning in the future. And although amending the NPT

198. *See* Kittrie, *supra*, note 117, at 345 ("Nuclear nonproliferation scholarship has thus far focused largely on the choices made by proliferators and somewhat on the content of nuclear nonproliferation norms, but it has largely ignored the choices made by those states in a position to enforce the norms and otherwise prevent proliferation. It is as if domestic criminal law scholarship were to focus mostly on decisionmaking by criminals, somewhat on the behavior criminal law prohibits, and little or not at all on the investigative authority, charging discretion, and sentencing decisions of police, prosecutors, and judges.").

199. *See, e.g.*, Editorial, *Scrapping UN Veto Would Help U.S. Take on Russia, China*, BLOOMBERG VIEW, Apr. 16, 2012, http://bv.ms/1HxDarn [perma.cc/B5WT-E6H7]; George P. Shultz, William J. Perry, Henry A. Kissinger & Sam Nunn, *A World Free of Nuclear Weapons*, WALL ST. J., Jan. 4 2007, http://on.wsj.com/1FAV9Le [perma.cc/BV9Y-3BYT]; *Obama's Lonely Quest: The President Wants to Scrap Nuclear Weapons. Other Powers Do Not*, ECONOMIST, June 22, 2013, http://econ.st/1BeRkpP [perma.cc/27AN-RPXK?type=pdf].

200. *See* G.A. Res. 377 (V), U.N. Doc. A/RES/377 (Nov. 3, 1950).

201. *Id.* at para. 1.

202. Charlotte Ku, In Memoriam, *When Can Nations Go to War? Politics and Change in the UN Security System*, 24 MICH. J. INT'L L. 1077, 1081 (2003).

would undoubtedly require exhaustive negotiations,[203] simply removing the phrase "national sovereignty" from NPT Article X would help to limit the withdrawal provision and bring it more in line with its "extraordinary events" and "supreme interests" language.[204] Though "constructive ambiguity" can sometimes help facilitate diplomatic negotiations—for example, in the case of the Shanghai Communique's "one China" language[205]—amending Article X to include a strict definition of "extraordinary events" and "supreme interests" would forestall expansive interpretations of those phrases from countries seeking to shirk their obligations under the treaty. The IAEA already seems to interpret Article X in that more limited way—at least more so than North Korea—because it continues to view its Safeguards Agreement with North Korea as "binding and in force," despite the country's withdrawal in 2003.[206]

But for the nonproliferation movement to be truly effective, the United States must lead the international effort. The United States' experience with the Pressler and Solarz Amendments and its failed diplomatic demarches demonstrate that unilateral action alone does not work. Professor Bobbitt believes that such an international effort should seek a "market state replacement for extended deterrence" that would include "defensive systems, security guarantees, redundant infrastructure, shared intelligence and warning."[207] That tradeoff between the United States and its partners would hopefully compensate for the understandable reluctance many states feel towards projections of United States influence into the domestic affairs of other states. It would also help to offset the need for the "lateral" deterrence that so motivated Pakistan's pursuit of nuclear weapons in the first place.[208] Professor Bobbitt has also argued for a compulsory NPT regime that includes "international consortia that locate, identify, monitor, regulate, and protect

203. *See* Kittrie, *supra* note 117, at 419 ("Unfortunately, the NPT is nearly impossible to amend formally. With the exception of its 1995 extension, the treaty has not been formally amended since its entry into force. Of the seven NPT Review Conferences since the treaty's entry into force, three—those in 1980, 1990, and 2005—were so contentious they ended without even an agreed concluding statement.").

204. *See* NPT, *supra* note 122, at art. X, para. 1.

205. *See* WRIGHT, *supra* note 119, at 101–02 (noting also UN Resolution 242's "territories occupied during the hostilities of June 1967" language).

206. IAEA, *Application of Safeguards in the Democratic People's Republic of Korea*, at 5, IAEA Doc. GOV/2011/53-GC(55)/24 (Sept. 2, 2011).

207. BOBBITT, *supra* note 13, at 515.

208. *See id.* at 10.

WMD facilities (including tagging all fissile material) everywhere in the world."[209] But perhaps the most important conclusion that world leaders must draw from Khan and his network is that the world has entered an era in which nuclear weaponry has become "commodified," and that no one law, treaty, or institution will end proliferation forever.[210] Instead, we must continually monitor developments in the global market of nuclear arms, just as governments monitor any other market, and react accordingly.

V. CONCLUSION

Khan's damage to the international nonproliferation regime cannot be understated. The United States, and the world, must learn from its botched approach to Khan's network and actively prioritize, monitor, and confront nuclear proliferation. And it must do so in a way that can be incorporated into its larger, post-Cold War geopolitical strategy. If not, the world is doomed to witness the emergence of new nuclear powers with alarming frequency.[211]

209. *Id.* at 394–95.

210. *See id.* at 59.

211. CORERA, *supra* note 1, at 122 ("[T]he more countries that had the bomb, the more the despised non-proliferation system would creak under the weight and the less pressure there would be on Pakistan over its ownership of the weapon. In this way, it could be argued that proliferating helped secure Pakistan's grip on its own bomb by distributing the strain of the international non-proliferation system more broadly whilst at the same time undermining it.").

NUDGE, DON'T THRUST: THE APPLICATION OF BEHAVIORAL LAW AND ECONOMICS TO AMERICA'S PORN ADDICTION

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I. INTRODUCTION

In 2013, British Prime Minister David Cameron sent shockwaves through the blogosphere when he announced his plan to change the default settings on Internet Service Providers (ISPs) from automatically allowing pornography to automatically blocking it.[1] His goal was to prevent children from accidentally accessing pornography. The full plan contained other child-sensitive measures, including stricter bans on child pornography.[2] The blogosphere met the measures with derision, incredulity, and disbelief that spouses would have to do the unthinkable—reveal their porn proclivity to their significant other in order to "opt in" to porn access.[3]

Although Cameron's proposal may be technologically difficult to achieve, it is relatively modest in terms of libertarian paternalism. The proposal merely changes a default from one in which consumers must opt *out* of a service to one in which they must opt *in*. Libertarian paternalism, a phrase coined by Cass Sunstein and Richard Thaler, refers to a central component of behavioral law and economics (BLE)—the idea that good government should make it easier to make good decisions.[4] Rather than overriding free will, choice architecture and public policy should "nudge" individuals toward decisions they *would like* to make but are unlikely to choose because they act like fallible humans instead of rational "Econs."[5] A nudge is "any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly

1. *See, e.g.*, Adam Taylor, *If You Live in the UK, You'll Have to Tell Your Spouse that You Watch Porn*, BUS. INSIDER, July 23, 2013, http://read.bi/1dnxNyD [perma.cc/8LAH-MVN6]; Brendan O'Neill, *Britain's Idiotic "Opt-In" Porn Ban*, DAILY BEAST, Nov. 23, 2013, http://thebea.st/1LqsU2B [perma.cc/6RS8-PVEC].

2. Adam Taylor, *UK Announces Radical, Nuclear-Option Plan To Prevent Users From Seeing Online Porn*, BUS. INSIDER, July 22, 2013, http://read.bi/1JEnP7U [perma.cc/A4FM-GGNW].

3. Taylor, *supra* note 1; O'Neill, *supra* note 1. These articles, however, seemed unaware of their own logical inconsistencies about whether pornography was a significant and shameful personal activity. These hypothetical spousal conversations were described as having the potential to be highly embarrassing, suggesting a shameful act. Simultaneously, however, the authors assumed that no one could see viewing pornography as problematic.

4. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 5–6 (Penguin Books 2009) (2008).

5. *Id.* at 5–7. According to Sunstein and Thaler, "Econs" are the humans in economics textbooks who always act rationally to maximize their self-interest. *Id.* at 6–7. Humans, however, often act irrationally because of other factors explainable by BLE concepts. *Id.* at 7–8.

changing their economic incentives."[6] Common examples include placing desserts and other fattening foods near the end of a cafeteria line or changing default settings to automatically enroll individuals in employee savings plans.[7] Without nudges, an individual may be overcome by his impulsive "hot self"—leading the dieter to indulge in cheesecake now and regret it later, or the busy employee to neglect reading the IRA information packet until years of valuable matched contributions have been lost. Contrast this with the Econ-like "cold self," which acts rationally in pursuit of long-term interests, and nudges make sense.[8] It is not that individuals *choose* to gain weight or fail to save; instead, many are victims of their own irrational selves, and tend to make poor decisions without ambient prompts or extra measures of willpower.

Many on both the political Right and Left have accepted these principles for a number of policy initiatives.[9] But mention pornography and suddenly everyone is a rational actor consciously engaged in deep philosophical inquiries about the intersection of the First Amendment, freedom from government intrusion, the privacy of one's own home, and benign sexual curiosity.[10] This paper offers a few modest (pun intended) arguments about the harms of pornography use, the lack of rational or volitional control at work, and the BLE implications

6. *Id.* at 6. Alternatively, a nudge is "any factor that significantly alters the behavior of Humans, even though it would be ignored by Econs." *Id.* at 8.

7. *Id.* at 1–2, 132.

8. *See infra* Part V for a full discussion of the hot and cold selves.

9. Although most people outside of the more ardent libertarian and progressive circles generally accept the goal of helping people make good choices without being heavy-handed, Sunstein himself may be better at the theory than the practice. His stint as Obama's regulatory czar at the helm of the Office of Information and Regulatory Affairs within the Office of Management and Budget was short-lived and expensive. Henry I. Miller, *Good Riddance to Obama's Regulatory Czar*, FORBES, Aug. 8, 2012, http://onforb.es/1Hx4ByF [perma.cc/VE8X-F7AE] (noting that under Sunstein, "government regulation has been one of the nation's few growth industries"). Sunstein also recommended various reforms for government surveillance, including more "oversight," while serving on the President's Review Group on Communication and Intelligence Technologies. *See* Jeffrey Rosen, *Metadata Material Shouldn't be Held by the Government: Interview: A Key NSA Reform Panelist Explains Their Recommendations*, NEW REPUBLIC, Dec. 22, 2013, http://bit.ly/1Sk3pVv [perma.cc/MA9S-B8W6] (advocating a new oversight body, similar to the Privacy and Civil Liberties Oversight Board that would "oversee not just terrorism related judgments but . . . review and assess the protection of privacy and civil liberties throughout the government).

10. *See, e.g.*, Ken Paulson, *Beware Revenge Porn Laws*, USA TODAY, Oct. 29, 2014, http://usat.ly/1Gt9qKY [perma.cc/CD33-2S57]; Gail Sullivan, *Renaissance Art Book Runs Afoul of Prison Pornography Ban*, WASH. POST, Oct. 21, 2014, http://wapo.st/1Gc1Rd1 [perma.cc/ZU2V-5HRN].

of helping those who wish to "see no evil."

Americans ought to embrace BLE insights to reduce pornography consumption in the United States because such methods meet the required burden of "asymmetric paternalism."[11] Asymmetrically paternalistic regulations "create[] large benefits for those who make errors, while imposing little or no harm on those who are fully rational."[12] In other words, a policy should meet the burden of Pareto optimality to be effective: the benefits to error-prone individuals must outweigh any small inconvenience to the rational members of society and ideally should not affect them at all.[13] This balances the extremes between libertarianism (uninhibited license at the expense of error-prone individuals) and paternalism (overbearing intrusion that impedes rational selection and liberty).[14] A full cost-benefit analysis would determine overall utility by combining these broad factors with implementation costs and lost revenue from companies who exploit their customers' mental weakness, but the asymmetric paternalism model focuses on the policy implications.[15]

Further, these concepts apply in both the private and public spheres, allowing considerably more leeway than other approaches to the regulation of speech or expression.[16] The BLE approaches described below should not run afoul of constitutional protections.[17] "Sin" behaviors such as gambling,

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11. Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211, 1211–14 (2003) (noting asymmetric paternalism balances concerns from both those who oppose paternalism and those who embrace paternalism too quickly).

12. *Id.* at 1212.

13. *Id.*

14. *See id.* at 1212–13.

15. *Id.* at 1219–20. Asymmetric paternalism is a useful metric, albeit somewhat utilitarian. *See id.* at 1216–17 & n.20. In contrast, some have called on individuals to self-regulate by not making pornography available, even when it is legal and profitable to do so. *See* Robert P. George, *Pornography, Respect, and Responsibility: A Letter to the Hotel Industry*, WITHERSPOON INST., July 9, 2012, http://bit.ly/1AibRz7 [perma.cc/L8XN-J4VX].

16. The largest drawback to enacting measures like Cameron's ISP default switch in the United States is the likely free-speech litigation. For example, the ACLU has filed and resumed suit against Arizona's recent ban on "revenge porn," alleging it is overbroad because it criminalizes sharing *any* nude photo without consent of the subject. Michael Muskal, *Coalition Files Lawsuit Challenging Arizona's 'Nude Photo Law,'* L.A. TIMES, Sept. 23, 2014, http://lat.ms/1Qi9VrW [perma.cc/3SE8-7YTM]; *see also* Howard Fischer, *Failure to Update Revenge-Porn Law Revives Lawsuit*, TUSCON.COM, Apr. 8, 2015, http://bit.ly/1FgYLh3 [perma.cc/9HM3-5NEK]. Not every BLE approach requires constitutional analysis, however, because many are enacted by non-government entities.

17. *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health and Mental Hygiene, 970 N.Y.S.2d 200, 204 (App. Div. 2013) (holding that the

smoking, drinking, overeating, and pornography carry both a moral question and the danger of addiction. BLE principles are frequently used to help individuals break these habits.[18] Recently, the fight against obesity has incorporated many BLE concepts,[19] and various parallels between food and sex addictions should legitimize the new application of BLE principles to the realm of pornography.

The argument has six parts. First, the insights BLE offers can and should be applied to pornography consumption. BLE concepts have been well received in efforts to reduce obesity, and there are important similarities between overeating and viewing pornography.[20] Second, pornography is a real harm worth addressing. Pornography harms five distinct groups of people: viewers, their partners, "stars," children, and society as a whole.[21] Thus, helping people who wish to avoid pornography do so results in net gains for the populace.[22] Third, specific BLE concepts such as overoptimism, self-serving biases, and pluralistic ignorance explain the difficulty of helping individuals exit pornography addiction on their own; they define the degree of both intrusion and benefit within the asymmetric paternalism test.[23] Fourth, the Constitution protects free speech, creating a threshold limit on government interference. Further, the constitutional law on pornography itself reflects the importance

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New York Board of Health exceeded its power in passing New York City's "Sugary Drinks Portion Cap"). When "nudging" individuals away from dangerous behavior, the amount and origin of regulation is key. Regulation may be valid from one state actor but not another, even before reaching First Amendment questions. Thus, a governing body may exceed its power both by issuing a regulation that violates an individual's constitutional rights and by exceeding its own authority.

18. *See* Richard A. Posner, *Behavioral Law and Economics: A Critique*, ECON. EDUC. BULL., Aug. 2002, at 21, *available at* http://bit.ly/1K6zYR2 [perma.cc/9TM9-LQ8K] (explaining the economic and behavioral aspects of habit breaking).

19. *See, e.g.*, Shin-Yi Chou, et al., *An Economic Analysis of Adult Obesity: Results from the Behavioral Risk Factor Surveillance System*, J. HEALTH ECON., May 2004, *available at* http://bit.ly/1cQJ8Gz [perma.cc/4C52-TYEM] (describing the rise in obesity not as a conscious desire to eat more, but as a result of women spending less time at home, individuals smoking less, and the availability and affordability of fast food); Michael M. Grynbaum, *New York's Ban on Big Sodas Is Rejected by Final Court*, N.Y. TIMES, June 26, 2014, http://nyti.ms/1FqTOW7 [perma.cc/SP3K-Y3RN] (describing efforts to reduce obesity by banning trans fats in restaurants and failed efforts to ban sale of some large sodas); Verena Dobnik, *Michelle Obama Announces Funding to Fight Childhood Obesity*, YAHOO! NEWS, Feb. 5, 2015, http://yhoo.it/1dny9VP [perma.cc/VL6U-D9JC] (describing the latest developments in Michelle Obama's "Let's Move" initiative to reduce childhood obesity).

20. *See infra* Part II.

21. *See infra* Part III.

22. *See infra* Part VII.

23. *See infra* Part IV.

of BLE concepts. The Supreme Court's misunderstanding of the significance of default-setting may have misdirected key Supreme Court precedent.[24] Fifth, BLE concepts in the private sector have helped create actions and opportunities that are asymmetrically paternalistic. Examples of measures already helping pornography users break their addictions include the Reddit NoFap forum, YourBrainOnPorn.com, Google's anti-porn decisions, and the United Kingdom's ISP default switch.[25] Finally, additional policy proposals within the asymmetric paternalism framework are suggested for later research or consideration.[26] There are no attempts to define or ban pornography, erotica, or other obscenity. Instead, the Supreme Court's, "I know it when I see it"[27] approach is assumed and the protection the Supreme Court's First Amendment case law grants to much filth is accepted for better or worse. Although both men and women view pornography, the paper follows the current research and focuses primarily on male viewers.[28]

II. APPLYING BLE TO FOOD AND SEX

The question of pornography has many similarities to a popular area for BLE application: food and dietary choices. Language reflects this commonality. The term "food porn" describes the elaborate photos of extravagant dishes posted online, often after extensive staging and lighting has created an enticing picture that has little to do with reality.[29] What started as a term for the idealization of unhealthy, high-calorie foods has expanded to include the oversaturation of glamorized food photography in daily life.[30] Like the rise of "sexting,"[31] the incessant stream of bathroom selfies in various states of

24. *See infra* Part V.
25. *See infra* Part VI.
26. *See infra* Part VII.
27. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
28. *But see What It's Like to Be a Girl Addicted to Porn*, FIGHT THE NEW DRUG (Oct. 24, 2014), http://bit.ly/1AEqsos [perma.cc/V5UX-ZQ5V].
29. *See What is Food Porn?*, SKINNY GOURMET (Feb. 18, 2008), http://bit.ly/1Emkrra [perma.cc/QAN5-ZT88].
30. *See, e.g.*, PORNBURGER, http://bit.ly/1Hx4Rhn [perma.cc/JPL7-RVWP] (last visited May 31, 2015) (featuring high-resolution images of unusual burger combinations and sultry descriptions).
31. *See* Jeff R. Temple et al., *Teen Sexting and Its Association with Sexual Behaviors*, 166 JAMA PEDIATRICS 828, 832–33 (2012) (noting that over a quarter of the teens sampled had sent a nude photo of themselves to another teen and over half had been asked to do so).

undress,[32] and even Paris Hilton's posturing for Carl's Jr.,[33] what was once hidden is now on full display.

On a more fundamental level, the survival of the species requires that individuals desire both food and sex. The possibility of sumptuous pleasures means that both have been religiously regulated.[34] Mosaic law, for example, forbade Israelites from eating unclean animals and from performing various unclean sexual practices (among other laws and ordinances).[35] Both obesity from overeating and pornography could be considered modern excesses of classic vices that move beyond the traditional conceptions of gluttony and lust.[36] Professor Kent Dunnington notes that food, alcohol, and sex are all natural desires requiring temperance or self-control to avoid the vices of excess: gluttony, drunkenness, and lust.[37] He distinguishes between intemperance and addiction, noting that intemperance is an "inordinate love of certain objects because of the sensory pleasures they provide," but addiction is the same inordinate love "for reasons other than sensory pleasure."[38] He acknowledges that individuals may be addicted even without such pleasure or with a sensory aversion to the object.[39] Once a sign of wealth, obesity now often results from the widespread availability of cheap and calorically dense fast food. Likewise, hardcore pornography is now available for free to anyone with an Internet connection.[40] Both obesity and pornography are

32. *See, e.g.*, Rachel Maresca, *Kim Kardashian to Release 352-Page Book of Selfies Titled 'Selfish,'* DAILY NEWS, Aug. 9, 2014, http://nydn.us/1Sk48WL [perma.cc/U3HZ-LLEF].

33. Paul Farhi, *Mama Warned Us About Fast Food and Fast Women*, WASH. POST, May 29, 2005, http://wapo.st/1F4scnw [perma.cc/377X-LBRV] (calling, with tongue only half in cheek, Hilton's first Carl's Jr. ad "a shoddy, shameless, plainly outrageous publicity stunt that all decent, right-thinking people will condemn"); *see also* Mariah Haas, *Paris Hilton Returns in a New Carl's Jr. Commercial*, PEOPLE, July 24, 2014, http://bit.ly/1HxDM0a [perma.cc/T2ML-WUBA] (noting blandly that Carl's Jr. has re-cast Hilton and has used Kate Upton, Kim Kardashian, Nina Agdal, and Padma Lakshmi in ads since the original).

34. See generally FREDERICK KAUFMAN, A SHORT HISTORY OF THE AMERICAN STOMACH (2008) (outlining the American obsession with regulating food).

35. *See, e.g.*, *Leviticus* 11 (unclean foods and unclean animals); *Leviticus* 17 (slaughtering animals, dietary restrictions against food with lifeblood); *Leviticus* 18 (unlawful sexual relations); *see also* DAVID L. TUBBS, FREEDOM'S ORPHANS: CONTEMPORARY LIBERALISM AND THE FATE OF AMERICAN CHILDREN 31 (2007) (quoting HAROLD S. KUSHNER, TO LIFE: A CELEBRATION OF JEWISH THINKING AND BEING 51–52 (1993)).

36. *See* KENT DUNNINGTON, ADDICTION AND VIRTUE: BEYOND THE MODELS OF DISEASE AND CHOICE 89–90 (2011).

37. *Id.* at 90.

38. *Id.* at 91.

39. *Id.*

40. *See* Adi Jaffe, *Internet Porn Addiction—Why is Free Porn So Irresistible*, PSYCHOL. TODAY, Nov. 11, 2011, http://bit.ly/1cQJnBc [perma.cc/NEA7-JKHV].

perversions stemming from good human desires: the desire for food and the drive to reproduce.

A. BLE and Obesity

BLE principles are frequently invoked in efforts to reduce obesity and should also be applied to reduce pornography use. Despite intentions to eat better and exercise more, office birthday parties and Netflix interfere, and our indulgent "hot" selves override the rationality of our earlier "cool" selves.[41] BLE does more than help people stick to their diets, however. It drove mandatory displays of calorie content on menus[42] and has led to small improvements like trayless cafeterias, smaller plate sizes, and putting dessert at the end of the cafeteria line.[43] Many people genuinely want to eat less sugar or more vegetables, but find themselves unable to do so when eating out with friends.[44]

Pornography is the trans fat of human sexuality. Few would argue that it contains nutritional *benefit*—it is thought of more as a dirty indulgence. Gender studies scholar Ran Gavrieli notes that "we should be very careful, I think, with not only what we put into our bodies in terms of food and nutrition, [but also the] nutrition of our minds."[45] Pornography is harmful—regardless of whether free will or addiction motivated the viewer.[46]

B. Pornography and Addiction

Internet pornography addiction contains elements of both sexual addiction and Internet addiction, making it potentially more toxic than other addictions.[47] The American Bar

41. The cool self rationally plans ahead, while the hot self gives into temptation in the moment. *See infra* Part IV.C for a full discussion.

42. *See* Stephanie Rosenbloom, *Calorie Data to Be Posted at Most Chains*, N.Y. TIMES, Mar. 23, 2010, http://nyti.ms/1Gta3E7 [perma.cc/XSF6-4MPW].

43. THALER & SUNSTEIN, *supra* note 4, at 1–3, 44, 263.

44. *Id.* at 64.

45. Ran Gavrieli, *Why I Stopped Watching Porn*, YOUTUBE 6:03–6:12 (Oct. 26, 2013), http://bit.ly/1INSd0D [perma.cc/2KNS-RC69]. Comedian Russell Brand recently released a video discussing the mental harms of pornography, saying, "If you're constantly bombarded with great waves of filth, it's really difficult to remain connected to truth." Fight the New Drug, *Russell Brand Talks Sex, Softcore & Hardcore Porn*, YOUTUBE 5:40–5:47 (Feb. 23, 2015), http://bit.ly/1HkYcUK [perma.cc/6YK5-QE9Y].

46. *See generally A Review of the Research: Hearing on Pornography's Impact on Marriage & the Family Before the Subcomm. on the Constitution, Civil Rights & Prop. Rights of the S. Comm. on the Judiciary*, 109th Cong. (2005) (written testimony of Jill C. Manning, Social Science Fellow, Heritage Foundation).

47. *See* Hilarie Cash et al., *Internet Addiction: A Brief Summary of Research and Practice*, 8 CURRENT PSYCHIATRY REVIEWS 292, 293 (2012) (describing the "multiple layers of reward"

Association (ABA) defines sexual addiction as a "compulsive dependence on any sexual behavior that preoccupies the addict, who continues to act compulsively as the consequences mount and who experiences the compulsion as beyond his or her ability to resist, control, or stop it."[48] The ABA notes that while "the addiction develops, the addict needs to engage in more frequent or riskier behaviors to produce the same biochemical rush," and "the preoccupation, persistence, and compulsive need to continue," rather than specific acts, mark the addiction.[49] Similarly, those with Internet Addiction Disorder (IAD) displayed at least five signs of addictive behavior, such as feelings of depression or sensitivity when trying to cut back, negative ramifications with family or work, lying, and going online as a means of escape.[50] Those with IAD were found to have less white matter and brain volume in certain areas, mirroring the brains of heroin addicts.[51] This correlation seems to be a common thread in addictive behaviors overall.[52] "Food addiction" may sound like a natural human condition, but a recent study has shown that individuals with "addictive-like eating behavior" have similar neural activity to those with drug addictions.[53] For food addicts and drug addicts, the reward center in the brain activates more in response to the anticipation of food or drugs than to the actual consumption of them.[54]

Internet pornography addiction presents two problems: the compulsive behavior associated with addiction and the physiochemical changes that occur in the brain.[55] Internet pornography addicts are those who have lost control over the behavior.[56] Further, unlike print pornography or other addictive

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that occur in pornography and other internet addictions, as well as the tolerance and increasing need for stimulation after dopamine release).

48. Lynn Phillips, *Sexual Addiction*, GPSOLO MAG., Oct.–Nov. 2004, *available at* http://bit.ly/1Aich8w [perma.cc/5RGM-BZ42].

49. *Id.*

50. Alice G. Walton, *Internet Addiction Shows Up in the Brain*, FORBES, Jan. 17, 2012, http://bit.ly/1R7X4uW [perma.cc/8G64-YRU7].

51. *Id.*

52. Thomas E. Schlaepfer et al., *Decreased Frontal White-Matter Volume in Chronic Substance Abuse*, 9 INT'L J. OF NEUROPSYCHOPHARMACOLOGY 147, 149–50 (2006).

53. Ashley N. Gearhardt et al., *Neural Correlates of Food Addiction*, 68 ARCHIVE GEN. PSYCHIATRY 808, 808, 813–14 (2011).

54. *Id.* at 812.

55. *Id.* at 813–14; *see generally Articles on Porn Addiction & Sexuality*, YOUR BRAIN ON PORN (Nov. 28, 2010, 9:32 AM), http://bit.ly/1R7X5yM [perma.cc/45AT-R53C] (listing studies).

56. *See generally Am I Addicted to Porn?*, Recovery Ranch, http://bit.ly/1KnkDPx [perma.cc/L3FX-NKGX] (last visited May 31, 2015). Symptoms of addiction include

substances, online pornography is free, legal, widely accessible, and nearly limitless in its variety.[57] These elements, combined with the novelty-seeking component of male sexuality known as the "Coolidge Effect," mean that Internet pornography is ideally situated to facilitate an addiction.[58] As viewers continually search out new material to maintain or restart their stimulation, the Internet continues to provide both new material and a maddening search—the hope of a better high or a more perfect image keeps viewers clicking. In other words, an alcoholic reaches the end of the bottle, but Internet pornography is a bottomless bottle in a bar that never closes. There, the options keep increasing and escalating until what started as a wine cooler ends up as a toxic mix of absinthe and Everclear.

Recognizing these toxic effects, many pornography users find themselves wishing they could cut back and regain control of their sexuality. One in five male college students feels "controlled" by his own sexual desires, and twelve percent watch five or more hours of Internet pornography each week.[59] Psychiatrist Norman Doidge writes that "[p]ornographers promise healthy pleasure and relief from sexual tension, but what they often deliver is an addiction, tolerance, and an eventual decrease in pleasure. Paradoxically, the male patients I worked with often craved pornography but didn't like it."[60] In those cases, pornography is both inconvenient and undesired. Thus, helping those who wish to cut back to do so would be a net gain and would *restore* individual liberty rather than limit it. Consider Alexander Walters, who destroyed his marriage and his career because of compulsive Internet pornography viewing—he watched up to eight hours a day, jeopardized business meetings, and stayed in seedy hotels to indulge the voyeurism he developed.[61] If Internet pornography can create addiction in the same way that alcohol or gambling can, then some users may be

viewing pornography more than eleven to twelve hours per week, disruption to everyday life, unhappiness about the pornography use, and a compulsive need to view pornography. *Id.*

57. *The NoFap Experiment: A Voyage Through Porn Addiction, Support, and Recovery*, PROJECTKNOW, http://bit.ly/1KnkXh3 [perma.cc/6C43-CTHH] (last visited May 31, 2015) [hereinafter *NoFap Experiment*].

58. *Id.*

59. *Id.*

60. NORMAN DOIDGE, THE BRAIN THAT CHANGES ITSELF 107 (2007).

61. Alexander Walters, *Internet Porn Ruined My Life*, VICE, Jan. 4, 2013, http://bit.ly/1LhoF8X [perma.cc/ZD6X-ZHB7].

addicted but are unable or unwilling to admit their dependence upon the stimulus.

Unsurprisingly, a recent study by Cambridge neuropsychiatrist Valerie Voon found that compulsive pornography users react to pornography cues "in the same way drug addicts react to drug cues."[62] Researchers at the Max Planck Institute also found a correlation between increased pornography viewing and smaller striatum (the portion of the forebrain that processes rewards and motivating behavior).[63] The study suggests that heavy pornography use "dulls the reward system," increases the required strength of sexual stimuli to hit the same reward level, and affects overall motivation.[64] If the reward center in a pornography addict's brain responds the same way as the reward center in a food or drug addict's brain, then an addict will respond more to the *anticipation* of watching pornography than to actually watching. This would explain why pornography addicts typically have *less* drive for sex (rather than masturbation to pornography) than non-addicts.[65] Not only were individuals desensitized, receiving less reward activation from sexual images, they were also less likely to be able to control their impulses.[66]

In other words, pornography acts like a drug that both dulls the ability to feel a reward and changes the brain's thought process between action and reward—a change that begins taking place even before an individual is addicted.[67] To return to earlier terminology, suppose an individual acts like a rational Econ and decides that pornography is worth the risk of permanent changes in brain chemistry. The more pornography

62. *Cambridge Study: Internet Porn Addiction Mirrors Drug Addiction (2014)*, YOUR BRAIN ON PORN (July 10, 2014, 4:09 PM), http://bit.ly/1cQJz3v [perma.cc/JYG8-TZKT] (citing Valerie Voon et al., *Neural Correlates of Sexual Cue Reactivity in Individuals With and Without Compulsive Sexual Behaviours*, July 2014, 9 PLOS ONE e102419). The fine lines between addiction, compulsion, and heavy use are complex and beyond the scope of this paper—as are distinctions between Internet addiction involving pornography and Internet pornography addiction.

63. *Viewers of Pornography Have a Smaller Reward System*, MAX PLANCK INST. FOR HUM. DEV., (Feb. 6, 2014), http://bit.ly/1INSjoW [perma.cc/JQ6T-FL4Q] [hereinafter "Max Planck Study"].

64. *Id.*; *see also* Simone Kühn & Jürgen Gallinat, *Brain Structure and Functional Connectivity Associated with Pornography Consumption: The Brain on Porn*, 71 JAMA Psychiatry 827 (2014); *Brain Structure and Functional Connectivity Associated with Pornography Consumption: The Brain on Porn (2014)*, YOUR BRAIN ON PORN (Aug. 16, 2014, 8:29 PM), http://bit.ly/1c834E4 [perma.cc/5YTD-QFM2] [hereinafter "Brain Structure"].

65. *See* Brain Structure, *supra* note 64; Davy Rothbart, *He's Just Not That Into Anyone*, N.Y. MAG., Jan. 30, 2011, http://nym.ag/1Lqu91Z [perma.cc/A4KT-LHWQ].

66. Brain Structure, *supra* note 64.

67. *See* Max Planck Study, *supra* note 63.

he views, the less pleasure he experiences—so he will need to turn to more extreme forms of pornography to chase the same high.[68] The more pornography he views, the less gray matter in his brain on average, which means fewer nerve connections, slower reward activity, and desensitization.[69] Not only does this mean that pornography destroys rationality and turns it into compulsion, but it means that over time, pornography can never be a rational choice. Even by hedonistic and utilitarian standards, in the aggregate, increased pornography viewing leads to *less* pleasure, making it an irrational choice for humans and Econs alike.

III. Is Pornography Really a Problem?

Before applying BLE insights and policies, maintaining the delicate balance of individual autonomy and effective nudging requires a harm sufficiently irrational and frequent to be worth addressing, actions that are minimally intrusive for rational actors, and small, non-mandatory nudges for those prone to mistake.[70] This framework first requires that there be a harm to address, lest policy become needless meddling.[71] The adjectives used to describe Cameron's measures in the UK suggest that pornography is a much-beloved vice, so the harm must be clearly and completely established.[72] Pornography addiction harms addicts, but the harms occur throughout society and are not limited to pornography use that rises to the level of addiction.[73] This paper explores the additional harms to five key groups of people: viewers, their mates, "stars," children, and society as a

68. *See* Brain Structure, *supra* note 64.

69. *Id.*

70. *See* Camerer, *supra* note 11, at 1218; *see also* THALER & SUNSTEIN, *supra* note 4, at 13–14. Camerer offers a more complete explanation of the concepts—the "harm" Sunstein and Thaler require may be somewhat less rigorous than a follower of J.S. Mill's "harm principle" would require. *See* JOHN STUART MILL, ON LIBERTY 21–22 (John W. Parker & Son, W. Strand 1859) *available at* http://bit.ly/1d8gQrd [perma.cc/9UD3-RZTQ]. In other words, there may be disagreements about whether an individual's temporary choices rise to the level of "harm" such that a nudge is warranted. These considerations typically fall along philosophical and political lines. Rather than delve into the denotative nuance of harm, this paper simply presents evidence that pornography is harmful.

71. *See* THALER & SUNSTEIN, *supra* note 4, at 14 ("So, to be clear: *we are not for bigger government, just for better governance.*").

72. *See supra* notes 1–3 and accompanying text.

73. *See generally* MARY EBERSTADT & MARY ANNE LAYDEN, THE SOCIAL COSTS OF PORNOGRAPHY: A STATEMENT OF FINDINGS AND RECOMMENDATIONS (2010), *available at* http://bit.ly/1Knl6Rz [perma.cc/R6X9-LCKX].

whole.[74] The harms to any one of these groups justify an asymmetrically paternalistic nudge. The harms in the aggregate suggest that many possible courses of action could help people without significantly limiting the freedom of those unaffected—thus satisfying the test of asymmetric paternalism.[75] Indeed, neuroscientists Ogi Ogas and Sai Gaddam, in their book *A Billion Wicked Thoughts*, estimate that in 2010, about four percent (42,337) of the top one million websites in the world were sex-related.[76]

A. Viewers and Their Partners

Porn viewers subject themselves to the possibilities of addiction[77] and overall physical, mental, and relational harm. Regular pornography viewers face physical, mental, and relational risks because pornography rewires the brain and affects both the emotions and the physical responses associated with sex.[78] Those who regularly masturbate to pornography experience a range of physical problems, including reduced desire for sex,[79] erectile dysfunction,[80] and reduced life satisfaction.[81] Although both sexes view pornography, men of all ages are far more likely to view pornography—and to have recently viewed it—than women.[82]

Pornography affects the way people of all ages interact romantically. Gender studies scholar Ran Gavrieli explains that most of the time, pornography does not show "how we authentically desire."[83] Instead, it shows "sex with no hands involved," because "porn cameras have no interest in capturing any normal sensual activities, such as petting, caressing . . . hugging, [or] kissing. . . . What porn cameras [show] is the

74. For additional research on the harms to each of these groups, see *id.*

75. Camerer, *supra* note 11, at 1212.

76. Julie Ruvolo, *How Much of the Internet is Actually for Porn*, FORBES, Sep. 7, 2011, http://onforb.es/1AnKpzs [perma.cc/TNW9-KVSC].

77. *See supra* Part II.B.

78. *See* Nisha Lilia Diu, *How Porn is Rewiring Our Brains*, TELEGRAPH, Nov. 15, 2013, http://bit.ly/1Sk58u0 [perma.cc/4L9D-PBZ4].

79. *Id.*

80. *Is My Erectile Dysfunction (ED) Related to My Porn Use?*, YOUR BRAIN ON PORN (July 6, 2011, 1:04 PM), http://bit.ly/1eKP2tS [perma.cc/C5N6-HACB].

81. *What Predicts Masturbation Practices?*, AUSTIN INST. FOR STUDY FAM. & CULTURE, http://bit.ly/1EmkW4N [perma.cc/M6TL-2D6A] (last visited May 31, 2015).

82. *How Much Pornography are Americans Consuming?*, AUSTIN INST. FOR STUDY FAM. & CULTURE, http://bit.ly/1PZFsic [perma.cc/5FLC-CPDN] (last visited May 31, 2015) [hereinafter *How Much Pornography?*].

83. Gavrieli, *supra* note 45, at 2:53–2:56.

penetration."[84] He points out that no one *wants* that kind of impersonal "sex with no hands."[85] Gavrieli recalls that before pornography he imagined a romantic narrative of "sensuality and mutuality" with his lover alone, but after porn he "lost [his] ability to imagine."[86] He quit watching pornography for three reasons: first, it "brought so much anger and violence into [his] private fantasies;" second, he was "creating a demand for filmed prostitution;" and third, it changed the way his mind worked.[87] Many men who watch pornography have trouble achieving an erection or orgasm while having sex with a woman unless they play pornography scenes in their heads simultaneously.[88] Behavioral therapist Andrea Kuszewski explains that an orgasm releases a combination of dopamine and oxytocin, which bonds the partners during sex.[89] Masturbating to pornography, however, leaves only pornography to bond with. Increasingly high-definition pornography can make the sex acts seem real.[90] Media outlets ranging from *GQ*[91] to *Marie Claire*[92] to *VICE*[93] to *Thought Catalog*[94] have begun detailing the harms that can come from watching online pornography, including difficulties with physical intimacy and forming relationships with women.

As men find their appetites changing thanks to the endless kinks online, women are trying—often uncomfortably—to keep up. The line between exploitation and "empowerment" grows dangerously thin for women in this world. Actress Jennifer Lawrence recently had nude photos she had sent to her boyfriend stolen and leaked online. When interviewed later, she said she originally sent them because the relationship "was long

84. *Id.* at 2:48–3:20.

85. *Id.* at 4:13–4:40.

86. *Id.* at 4:43–5:33.

87. *Id.* at 0:17–0:57; *see also* Aaron Kheriaty, *Hooked Up and Tied Down: The Neurological Consequences of Sadomasochism*, PUB. DISCOURSE, Feb. 17, 2015, http://bit.ly/1ej9dPt [perma.cc/QPS2-67MU] (discussing the specific harms of BDSM kinks rewiring the brain to associate sexual arousal with violence, fear, and aggression).

88. Rothbart, *supra* note 65 (describing men faking orgasms, having trouble becoming aroused by their partners, needing constant turnover in sexual imagery, and coming home early to spend specific evenings with videos of specific porn stars).

89. *Id.*

90. *Id.*

91. Scott Christian, *10 Reasons Why You Should Quit Watching Porn*, GQ, Nov. 20, 2013, http://gqm.ag/1Sk5lxp [perma.cc/6T24-7ETE].

92. Rich Santos, *4 Ways Porn Is Ruining My Love Life*, MARIE CLAIRE, Mar. 2, 2011, http://bit.ly/1JEoSVp [perma.cc/K4RR-KCPQ].

93. Walters, *supra* note 61.

94. Mark Manson, *Pornography Can Ruin Your Sex Life*, THOUGHT CATALOG, June 19, 2013, http://tcat.tc/1HxEdHX [perma.cc/2NYM-JJNT].

distance, and either your boyfriend is going to look at porn or he's going to look at you."[95] Average women find that men are less inclined to make love and more inclined to reenact porn, and women often comply.[96] Even middle-aged British women—hardly anyone's idea of a kinky demographic—are now told that to enter the dating market after a divorce, they should get "a Brazilian wax and be prepared for anal sex."[97] Though it is certainly possible that women are voluntarily expressing their own interests, the tone is one of matter-of-fact acceptance, not empowered pleasure-seeking.[98] If someone like Jennifer Lawrence has to compete with online pornography, middle-aged divorcees may have an uphill battle.

B. "Stars"

For all the talk of sexual liberation and women's equality, making pornography frequently involves sex trafficking, prostitution, abuse, and coercion—particularly of vulnerable and minority women. And even the glamorous side of the industry is dangerously dark. Duke freshman Miriam Weeks found mainstream fame after paying her tuition by appearing in adult films and stripping under the name Belle Knox. Weeks advocates de-stigmatization and acceptance of the sex industry.[99]

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95. *Cover Exclusive: Jennifer Lawrence Calls Photo Hacking a "Sex Crime,"* VANITY FAIR, Nov. 2014, http://vnty.fr/1AicSah [perma.cc/75E6-PBWW] (quoting Jennifer Lawrence).

96. Rothbart, *supra* note 65; *see also* Diu, *supra* note 78.

97. Cosmo Landesman, *Porn-Agains: Meet the Middle-Aged Men—and Women—Warped by Internet Porn*, SPECTATOR, Aug. 2, 2014, http://bit.ly/1AicSHm [perma.cc/562Z-CJZA]. Landesman notes that the trend toward waxing or shaving pubic hair leaves genitalia looking prepubescent—a trend that may be the cause or effect of child pornography. *Id.* Child pornography is illegal and viewed as morally reprehensible, but the expectations it sets for human sexuality are widespread and mainstream.

98. *Id.* Although some may argue that the popularity of erotic novel *Fifty Shades of Grey* indicates that women both want and enjoy pornography, the messages sent by the narrative of domination are hardly empowering. *See 5 Things 'Fifty Shades of Grey' Teaches About Sex*, FIGHT THE NEW DRUG (Feb. 4, 2015), http://bit.ly/1F0rQ01 [perma.cc/6VXP-8D9T]. Further, the lines between reenacting the book or movie and sexual assault or abuse are dangerously blurred. Nineteen-year-old University of Illinois at Chicago student Mohammad Hossain was accused of sexual assault, but the case was dismissed after a preliminary hearing. Steve Schmadeke, *Judge Throws Out Case Against UIC Student Charged With '50 Shades of Grey' Assault*, CHI. TRIB., Mar. 20, 2015, http://trib.in/1LhppLb [perma.cc/8XGX-TYTP]. According to some accounts, although the girl had watched the film, the boy was the one who wanted to 'reenact' it, saying he wanted to "see how much [she could] take," and "see [her] cry." *Id.* Eventually he pinned her arms to her back and sexually assaulted her. *Id.* Regardless of whether the reenactment was consensual, Judge Peggy Chiampas believed that it was. She dismissed the case for lack of probable cause of sexual assault. *Id.*

99. *See, e.g.*, Alex Morris, *The Blue Devil in Miss Belle Knox: Meet Duke Porn Star Miriam*

Although Weeks insisted that she "love[s] being in porn," her interview with *Rolling Stone* suggests that despite her public-relations prowess, she remains an eighteen-year-old girl caught in typical insecurities about body image and boys.[100] At her very first porn shoot, the filmmakers slapped her, even after she asked them to stop, and repeatedly abused her.[101] She recounts being told that she was "fat," "a terrible feminist," "stupid, dumb, [and] a slut."[102] Still, advocacy and a middle-finger-to-the-world approach seemed the best way to handle the media firestorm, and Weeks began to advocate for both her freedom to film porn and for the rights of porn stars.[103] Hers is the "happy" ending. Despite being raped at a high school party and told not to report it, she insists that the emotional detachment and split personalities she endures to go through filming and to maintain a public persona as Knox are "consensual" and very different from the rape.[104] She now spends her time shopping for panties to hawk at sex trade conventions, being alienated from her family, leaving parties where she is recognized, texting guys and wondering if they care about her dreams of being a mother and a lawyer, and winning the "New Girl on the Block" award at a porn convention.[105] Most women in pornography are not as fortunate.

One woman, forced into pornography from the ages of four to sixteen by her father, his friends, her uncles, and her grandfather, writes:

> Snuff movies (where women actually are murdered) are real. I have seen them. I have seen them being made. I have seen women murdered and dismembered. I have seen men spit on their bodies, ejaculate on their faces. I have seen men orgasm as the women were murdered, so that death and orgasm become fused. I have seen men rape a woman's skull after filming her death. I have heard the women's screams. I have seen the agony. I have lived it.
>
> . . . .
>
> [They treated me like I was] [n]ext to nothing. Nothing at

Weeks, ROLLING STONE, Apr. 23, 2014, http://rol.st/1FAXmq4 [perma.cc/7DAB-ZRTB].

100. *See id.*

101. *Id.*

102. *Id.*

103. *Id.*; *Working Woman*, DAILY BEAST, May 6, 2014, http://bit.ly/1ej9wcY [perma.cc/Q6WJ-8A7A].

104. Morris, *supra* note 99.

105. *Id.*

> all when they set a dog on me and filmed it penetrating me. Nothing at all when they put a collar around my throat and tethered me to the bedpost. Literally. Really. Nothing at all. The bright lights and the pictures for sale of my pain . . . [s]old, laughed at, ejaculated on, fantasized over . . . .
>
> . . . .
>
> Then after the set was finished, the men picked us up and threw us out of the way in preparation for the next shoot, the next woman, the next child, the next rape. And when the defenders of pornography see us in the picture and we are smiling (forced), or pleading for more (forced), then they think power, they think self-determination. Just another career choice.[106]

This unconscionable abuse was and is illegal under U.S. law.[107] But the addictive dynamics of pornography mean users demand more extreme pornography, even pornography they find morally reprehensible.[108] This creates demand in the industry for the sort of violent pornography described above, in addition to the filmed threesomes and kinky schoolgirl outfits that Mr. and Mrs. Weeks's daughter uses to pay for tuition.[109] Reducing that demand is an appropriate use of BLE insights.

In recent years, the global problem of sex trafficking has entered the mainstream consciousness.[110] As growing numbers of advocacy groups fight the international sex trade,[111] pornography quietly drives demand—both for prostitution and for more pornography.[112] But limiting supply often only increases the price without necessarily reducing the quantity demanded—so reducing the demand is more effective than

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106. *My Life Will Not Be Negated! A Pornography Survivor Speaks*, 24 OFF OUR BACKS, Apr. 1994, at 8, 20. Although this is one of the more extreme accounts, this woman's experience is by no means isolated. *See, e. g.*, *Porn's Dirty Little Secret*, FIGHT THE NEW DRUG (Aug. 4, 2014), http://bit.ly/1dnz7Bu [perma.cc/XX5R-A9XY] (describing abuse of women in pornography).

107. *See, e.g.*, 18 U.S.C. §§ 1591, 2241–48, 2251, 2252 (2013).

108. *NoFap Experiment*, *supra* note 57; Rachel N. Busick, Comment, *Blurred Lines or Bright Line? Addressing the Demand for Sex Trafficking Under California Law*, 42 PEPP. L REV. 333, 351 (2015).

109. Morris, *supra* note 99; *My Life Will Not Be Negated!*, *supra* note 106.

110. *E.g.*, Sutapa Basu et al., *Selling People*, CONTEXTS, Winter 2014, http://bit.ly/1HxEyKD [perma.cc/ZZM8-Y8ZA].

111. *E.g.*, Peter Holley & Brian Goldman, *Sex Traffickers, Meet Your Worst Nightmare*, HOUSTONIA, Feb. 2, 2015, http://bit.ly/1c83Ocm [perma.cc/VY9A-WHG2].

112. *See generally* ROBERT PETERS, SEX TRAFFICKING & PORNOGRAPHY: THE LINKS BETWEEN THE TWO (2011), *available at* http://bit.ly/1ITZpIA [perma.cc/RP7P-CXAC]; Catherine A. MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INT'L L. 993, 999 (2005); Busick, *supra* note 108, at 341–43.

simply making something more expensive.[113] Indeed, reduced supply often increases demand by making the item rarer.[114] Recall that Gavrieli quit watching pornography because he realized that watching pornography creates a demand that leads to exploitation of women in any desired demographic.[115] The current legal system is primarily concerned with reducing the supply of child pornography,[116] which is certainly a worthy endeavor. But the Internet allows pornography to spread faster and more creatively than legislation or enforcement can keep up with. Because pornography is its own gateway drug, reducing demand for all pornography is the best way to reduce demand for extreme genres like child pornography, rape pornography, bestiality, and snuff.[117]

The women lured into the sex industry tend to be victims of abuse, economically disadvantaged, or ethnic minorities.[118] These vulnerable members of society deserve help, not a blind eye to their plight. Unfortunately, the cycle is self-perpetuating, as wealthy white Western men search for pornography featuring "blacks," "Asians," and "Latinos."[119] Well-known adult website Pornhub reflects this, featuring three categories of "specific[ally] ethnic porn: Asian, Ebony, and Latina."[120] In 2011, the "most popular adult site in the world [was] LiveJasmin.com," where thirty-two million monthly visitors instructed Eastern European and Southeast Asian girls to strip for them on a webcam.[121] In many ways, the Internet functions as a pornographic "menu."[122]

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113. Reem Heakal, *Economics Basics: Supply and Demand*, INVESTOPEDIA, http://bit.ly/1HDWJhO [perma.cc/MG59-KRMY] (last visited May 31, 2015).

114. *Id.*

115. Gavrieli, *supra* note 45, at 13:33–14:03.

116. *See Citizen's Guide to U.S. Federal Law on Child Pornography*, U.S. DEP'T. JUST., http://bit.ly/1BkLCCX [perma.cc/R5VU-VXMG] (last visited May 31, 2015).

117. *See* John-Henry Westen, *Want to Stop Sex Trafficking? Look to America's Porn Addiction*, HUFFINGTON POST, Jan. 28, 2015, http://huff.to/1FOjNKm [perma.cc/FW9H-SKEZ].

118. *See* Mary Rose Somarriba, *Sex, Money, and Slavery*, VERILY, http://bit.ly/1IYihVh [perma.cc/6YYX-8Q35] (last visited May 1, 2015); Ruvolo, *supra* note 76.

119. Ruvolo, *supra* note 76.

120. *Id.*

121. *Id.*

122. *This Year's Most Popular Genre of Porn is Pretty Messed Up*, FIGHT THE NEW DRUG (Jan. 27, 2015), http://bit.ly/1SyaAcG [perma.cc/YHM6-VFM8]. According to pornographic website PornHub, 2014's most-searched pornography type was "teen," which invokes concerns about child pornography. *Id.* Although poor women are often exploited for a sense of the exotic, "amateur pornography" feeds into the voyeur-style "girl next door" fetish and lures young girls into the industry. *See* Sandy Cohen, *Sundance Doc 'Hot Girls Wanted' Explores Amateur Porn*, CNSNEWS.COM, Jan. 25, 2015, http://bit.ly/1HF6ppo [perma.cc/9WXB-Y5G9] (discussing the documentary that

Children especially face exploitation in poor nations around the world.[123] When Eileen Ontong began running a cyber-brothel out of her home, her neighbors in the Philippines quickly followed suit.[124] Dubbed "the Queen of Cyberporn," Ontong abused children as young as five per requests from foreign men online.[125] She made an estimated $200,000 by selling photos of naked children for $50, webcam child nudity for $100, and up to $500 for live sex shows among children.[126] Her victims included extended family members and neighborhood children, who earned $10–$18 per show.[127] Although Internet providers were required to install pornography-detecting software, it was too expensive and few did.[128] The appetite for Ontong's child porn was pervasive—not only was it enough to fuel the cyberporn businesses of Ontong's neighbors, but she collected huge sums from single individuals—over $40,000 from one American Marine.[129] Her success drove her neighbors into the business, increasing both the number of children abused and the number of times children were expected to "perform."[130] Psychologist Guusje Havenaar works with abused children and explains that they start seeing "their bodies as a tool; they become separated from themselves."[131] The demand for ruining the lives of children was enough to put Ontong's daughter through private school and send the family on day-trips to beach resorts.[132]

To return to the food analogy, concerns about food

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actress Rashida Jones produced about the dangers of the pornography industry for American women).

123. *See Module 4: Child Labour and Child Abuse in Developing Countries*, UNITE FOR SIGHT, http://bit.ly/1FJXTGt [perma.cc/BR2Q-LEM6] (last visited May 31, 2015).

124. Kristen Schweizer & Clarissa Batino, *The 'Queen of Cyberporn' and Her Town's Industry of Abuse*, BLOOMBERG BUS., Dec. 22, 2014, http://bloom.bg/1cdxuEY [perma.cc/XH5G-U3KZ].

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* Although much child pornography comes from outside the U.S., some suspect that most of it is produced domestically. Tammie Fields, *Judd: Babies, Toddlers in Chains in Child Porn*, 10NEWS, Feb. 27, 2015, http://on.wtsp.com/1Fyd0kO [perma.cc/65DM-S3JX]. A recent bust in Florida revealed that men with diaper fetishes and bondage kinks had pornographic images of babies as young as six months, images of toddlers in chains, and images of one- and two-year-olds being sexually assaulted. *Id.* Authorities were able to identify some of the children. *Id.*

production techniques have escalated in recent years.[133] Documentary exposés have provoked outcries against everything from overcrowded chicken farms with birds full of hormones to corporate coffee production via exploited laborers in substandard economic conditions.[134] But if chickens deserve a basic standard of treatment, women certainly do—paying lip service to "lifestyle choices" does not justify their slavery or exploitation. It is inconsistent to promote fair-trade coffee and to condemn exploitative coffee production while driving demand for exploitative sex trafficking through pornography.[135] The FDA verifies claims made about how food is grown, and coffee labels speak about the fair trade partnership behind the grounds.[136] But even when pornographic material comes with a disclaimer that this adult content was *actually* made with an eighteen-year-old,[137] that does not guarantee that star consented to being slapped and penetrated on camera after years of abuse and a hollow recitation of "consent." Reducing demand for such content is essential to improve the lives and honor the dignity of women and children around the world.

C. Children

Pornography harms children outside of those forced into the industry like the children in Eileen Ontong's village. Some students are directly recruited for prostitution or pornography, frequently with the promise of modeling or acting jobs.[138] Beyond the children exploited to produce it, pornography also harms children and adolescents exposed to the finished product.[139] Research shows that Internet pornography is

133. *See e.g.*, FOOD, INC. (Magnolia Pictures 2008).

134. *See, e.g.*, 45 DAYS: THE LIFE AND DEATH OF A BROILER CHICKEN (Compassion Over Killing 2003), *available at* http://bit.ly/1GxLZ2Y [perma.cc/UUK4-QJLF]; BLACK GOLD (Speakit Films 2006).

135. *See* Colleen Haight, *The Problem With Fair Trade Coffee*, STAN. SOC. INNOVATION REV., Summer 2011, http://bit.ly/1AomxvX [perma.cc/6GGW-EEEY] (describing free trade coffee movement and its shortcomings in producing actual economic benefits). The proper scope of moral limitations on economic markets is outside of this paper; the main point is simply that low wages or cramped chicken coops cannot outweigh the abuse in the pornography as public policy initiatives.

136. *Id.*

137. *See* Julie Bindel, *The Truth About the Porn Industry*, GUARDIAN, July 2, 2010, http://bit.ly/1FydbN6 [perma.cc/9DB4-T9US].

138. Somarriba, *supra* note 118.

139. *See* Michael Flood, *The Harms of Pornography Exposure Among Children and Young People*, 18 CHILD ABUSE REV. 384 (2009); Christopher Carmouche, Exec. Dir. of GrasstopsUSA, Remarks to the World Congress of Families Regional Congress at the

fundamentally changing the brains of all users, especially adolescents.[140] The teenage brain, because it is still developing, is uniquely susceptible to addiction.[141] With still-developing brains, teenagers are especially prone both to addiction and to long-lasting "rewiring" effects of pornography.[142] Considering that teenagers are good with computers, full of hormones, and may be having their first sexual encounters, this should be especially troubling. Pornography shapes those encounters. Indeed, Martin Daubney—a former "lads' mag" editor—found that middle-class British children knew more explicit terminology than he or a professional sex educator; all of the children knew about anal sex.[143] Children accessed pornography through the "likes" feed from friends and in ads on the sidebars of Facebook.[144] None of the children had filters on their home computers because "their parents trusted them."[145] The girls especially seemed disturbed by the pornography, but recognized with childlike clarity and adult jade that "[b]oys expect porn sex in real life."[146] The problem is pervasive—the average boy first sees pornography at age eleven, one third of thirteen-year-old boys admitted they had viewed pornography, and one third of British children aged fourteen to sixteen had seen Internet pornographic images by

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Family Values Conference (June 2–3, 2010), *available at* http://worldcongress.org/wcfreg.spkrs/wcf.reg.uk.carmouche.htm [perma.cc/8BJD-HBWQ].

140. Diu, *supra* note 78.

141. *E.g.*, Eric W. Owens et al., *The Impact of Internet Pornography on Adolescents: A Review of the Research*, 19 SEXUAL ADDICTION & COMPULSIVITY: J. TREATMENT & PREVENTION 99, 114 (2012) (noting the teenage brain is especially prone to prioritizing emotions over delayed gratification and highlighting that teens exposed to sexually explicit content have a higher risk of problematic pornography use); Allison Baxter, *How Pornography Harms Children: The Advocate's Role*, 33 CHILD L. PRAC. 113, 117 (2014) (describing research on "mirror neurons" and the importance of imitation in the learning process for children, making early exposure to pornography potentially instructive).

142. Martin Daubney, *Experiment that Convinced Me Online Porn is the Most Pernicious Threat Facing Children Today: By Ex-Lads' Mag Editor Martin Daubney*, DAILYMAIL.COM, Sep. 30, 2013, http://dailym.ai/1cVnQrg [perma.cc/8S6S-822T] (citing sex addiction therapist Dr. Paula Hall and Professor Matt Field).

143. Daubney, *supra* note 142. "Lads' mags" are the British versions of magazines like *Hustler* and *Playboy* in the US.

144. *Id.* Although children access pornography and erotica from a variety of sources, they may also receive it from adults in a position of trust. *See* Vince Lattanzio, *Teacher Buys Student "Fifty Shades of Grey" for Reading Class*, NBC 10 PHILA., May 3, 2013, http://bit.ly/1PGqIdp [perma.cc/B7L3-M7B8] (describing a teacher purchasing an erotic novel for a fourteen-year-old high school freshman).

145. Daubney, *supra* note 142.

146. *Id.*; *see also* Diu, *supra* note 78.

the time they were ten.[147] Over eighty percent viewed pornography at home, and over sixty percent could easily do so from a cell phone.[148]

Gavrieli explains that because pornography is everywhere, "girls get this notion that if you want to be worthy of love, first and foremost you have to be worthy of sexual desire. And now, the definition of sexual desire almost equals be[ing] like a porn star."[149] While speaking to middle schools and high schools, Gavrieli consistently encountered girls who agreed to be documented in compromising situations in order "to please some guy that they had feelings for."[150] The guy then sells or distributes it, and "nobody even addresses him in terms of morals."[151] Instead the girls are haunted by this betrayal and face isolation, depression, eating disorders, and suicidal ideation.[152] This occurs both in and out of relationships, with "revenge porn" as a powerful new tool to hurt an ex after a relationship ends.[153] Similarly, pornography harms young boys and men by teaching that "you are solely valued in sex by having a large penis and an eternal erection."[154] It has nothing to do with character traits or caring behavior. Rather, it projects an ideal that men cannot live up to, and so instead they imitate the ideal and become aggressors.[155]

Today's Internet pornography is categorically distinct from the discovery of a dirty magazine at a friend's house: it provides instant access to inexhaustible quantities of mind-bending smut.

D. Social Loss

Pornography negatively affects culture, relationships, and women's security. Further, the amount of pornography sought and viewed is staggering, so the negative effects are prolific both as to type and as to degree.[156] Recall the journalists who were

147. Bindel, *supra* note 137 (citing studies).
148. *Id.*
149. Gavrieli, *supra* note 45, at 10:20–10:31.
150. *Id.* at 10:32–10:48.
151. *Id.* at 10:49–11:00.
152. *Id.* at 11:01–11:34.
153. Aubrey Burris, Note, *Hell Hath No Fury Like a Woman Porned: Revenge Porn and the Need for a Federal Nonconsensual Pornography Statute*, 66 FLA. L. REV. 2325, 2326–38 (2014) (discussing the definition and harms of revenge porn).
154. Gavrieli, *supra* note 45, at 9:00–9:09.
155. *Id.* at 9:10–9:35.
156. *Internet Porn Statistics*, TOPTENREVIEWS, http://bit.ly/1FOkSSr [perma.cc/M4UG-25MT] (last visited May 31, 2015) (citing pornography statistics in real

appalled at the thought of having to bring up the question of Internet filters with their significant others.[157] If this is *not* a comfortable situation to have with one's spouse, perhaps it is not a healthy part of marriage and sexuality, despite loud cries to the contrary. Viewing pornography may harm viewers' significant others, and compulsive viewing can negatively affect work, school, and outside relationships as well.[158] Pornography presents a warped view of sex and the human person, such that the "passion depicted and solicited is a thoroughly *depersonalized* sexuality, a desire for possession of bodies without regard for the personalities inhabiting them. Human beings, women especially, are vividly portrayed as objects to be used."[159] Professor Gail Dines explains that pornography changes the way men think about sex and the way women "think about their bodies, their sexuality and their relationships."[160] Dines explains that women who are opposed to pornography are not opposed to sex, but instead want a sexual experience that treats them like people, rather than just a package of stimuli.[161]

Although contested, many suggest that violence depicted in many pornographic films leads to an increase in violence, particularly sex crimes.[162] Some feminists point out that pornography harms and degrades all women, not just the ones exploited on camera, by reinforcing the idea that women are merely sexual objects and dehumanizing them is normal and acceptable.[163] Beyond desensitizing viewers to sexual violence, pornography can influence actual violence as well.[164] Convicted rapists typically view women's fear the same way pornography depicts it—as a stage of overall sexual arousal and physical gratification.[165]

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time); *see also Oh, the Irony. The Most Used Word in Porn Site Comments Is. . .*, FIGHT THE NEW DRUG (Jan. 21, 2015), http://bit.ly/1FydPdw [perma.cc/LAN2-R78B].

157. *See supra* notes 1–3 and accompanying text.

158. *See* Rothbart, *supra* note 65; Walters, *supra* note 61; Santos, *supra* note 92.

159. TUBBS, *supra* note 35, at 147 (citing political theorist Harry M. Clor, *The Death of Public Morality?*, 45 AM. J. JURIS. 33, 36 (2000)); *see also* Bindel, *supra* note 137.

160. Bindel, *supra* note 137.

161. *Id.*

162. *See id.* (discussing the rise of anal rape on college campuses, admissions that eighty percent of men interviewed would most like to ejaculate on a woman's face, and connections between viewing child pornography and raping a child within six months).

163. Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 802 (1991).

164. Robert Jensen & Debbie Okrina, *Pornography and Sexual Violence*, VAWNET.ORG, July 2004, http://bit.ly/1IYiXd5 [perma.cc/CW6D-Z9TG].

165. Michelle Chernikoff Anderson, *Speaking Freely About Reducing Violence Against*

In one study, experimenters provoked some men with name-calling and then showed both groups one of four videos: one depicted the "rape myth" of victim enjoyment, one depicted rape without victim enjoyment, one depicted consensual sex, and one neutral video.[166] The men were then asked to administer electric shocks to confederates, and they were told the study would focus on varying the intensity to test learning behaviors.[167] The provoked men were more aggressive in administering shocks to female confederates after seeing *either* of the rape videos, while unprovoked men were only more aggressive toward women after seeing the rape myth video.[168] Men did not show this aggression toward women after seeing the consensual video or the neutral video.[169] A separate study of non-experimental data suggests that violent pornography has a much stronger correlation to attitudes supporting violence against women than nonviolent pornography.[170] This hardly vindicates pornography. A 2010 study found that of fifty popular pornographic films, only about ten percent of the scenes "did not contain an aggressive act."[171]

Child pornography encompasses the worst of the above harms. Child pornography is always filmed sexual abuse.[172] Victims may carry various negative consequences with them, including future substance abuse, suicidal thoughts, health problems, an increased likelihood of becoming abusers, and difficulty developing romantic relationships.[173] Further, these images may be lurking on any hard drive, disc, or the Internet—the pornography is a "permanent record" of the abuse, which

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Women: A Harm Reduction Strategy from the Law and Social Science of Pornography, 10 U. FLA. J.L. & PUB. POL'Y 173, 184–85 (1998) (citations omitted).

166. *Id.* at 186.

167. *Id.*

168. *Id.*

169. *Id.* at 187. Although other studies have indicated that sexually violent—but not sexually explicit—media may have the same effect on male aggression, this study indicates that the likelihood of aggression increases the more women are portrayed as enjoying the sexual experience.

170. *Id.* at 189; Baxter, *supra* note 141, at 118 (citing Gert Martin Hald et al., *Pornography and Attitudes Supporting Violence Against Women: Revisiting the Relationship in Nonexperimental Studies*, 36 AGGRESSIVE BEHAV. 14, 14–20 (2010)).

171. Baxter, *supra* note 141, at 118 (citing Ana J. Bridges et al., *Aggression and Sexual Behavior in Best-Selling Pornography Videos: A Content Analysis Update*, 16 VIOLENCE AGAINST WOMEN 1065, 1079 (2010)).

172. AM. PROF'L SOC'Y ON THE ABUSE OF CHILDREN, APSAC STATEMENT ON THE HARM TO CHILD PORNOGRAPHY VICTIMS (2013), http://bit.ly/1KtC2WI [perma.cc/3MAM-YJJU] (citing New York v. Ferber, 458 U.S. 747, 759 (1982)).

173. *Id.*

makes recovery a lifelong battle.[174] Those who view such material have something so vile that the Supreme Court did not subject it to the *Miller* test for obscenity—the harms are so great that the *Miller* test is never reached.[175]

With those harms in mind, the argument now focuses on the harms of pornography for adults who use it themselves. BLE concepts help users quit viewing pornography, especially when it is irrational or compulsory. Though some BLE concepts may be helpful for porn stars, children, or society at large, the best immediate application of BLE concepts is to pornography's target demographic: postpubescent males.[176]

IV. APPLYING BLE TO PORNOGRAPHY

Pornography's vast harms justify action within the asymmetric paternalism framework. But that action must be tailored to the problem at hand, and ideally will affect only those who view pornography and wish they did not. The most asymmetrically paternalistic policy would leave both non-viewers and willing viewers unchanged. BLE concepts help explain why it is so difficult for reluctant pornography viewers to quit even if they want to. Understanding the BLE concepts at work allows policymakers, businesses, and individuals to implement the best and least intrusive policies to help individuals quit viewing pornography.

A. Overoptimism, Flawed Self-Assessments, and Pluralistic Ignorance

To "know thyself" is harder than it may seem, especially in the realm of risks and behaviors. Overoptimism is a broad term that refers to several mental biases that can be divided into two main categories: misestimating probability and not correcting the estimates after getting new information.[177] Self-assessment is notoriously difficult in matters of skill and character, where one's own performance and the objective standard are often vague, and people compensate by viewing themselves more

174. *Ferber*, 458 U.S. at 759.

175. *Id.* at 760–61, 764–65.

176. *How Much Pornography?*, *supra* note 82 (stating that forty-three percent of men viewed pornography in the last week, compared to nine percent of women).

177. *See* Sean Hannon Williams, *Probability Errors: Overoptimism, Ambiguity Aversion, and the Certainty Effect*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 335, 335 (Eyal Zamir & Doron Teichman eds., 2014).

positively than they should.[178] This inability to accurately judge one's own performance does not occur when judging others—especially on objective matters, friends judge each other more accurately than individuals judge themselves.[179] But most people consider themselves "above average," even when they recognize that half of the population must by definition be below average.[180] This may happen because individuals do not have enough information about all of the relevant variables and fail to use the available information effectively.[181] Individuals consistently assume that they are less likely than their peers to personally experience a host of negative life events including alcoholism, car accidents, divorces, unemployment, unwanted pregnancy, criminal victimization, heart attacks, heart disease, strokes, and skin cancer. Put another way, people believe that they are above average when it comes to avoiding most negative events.[182]

Ignorance and self-flattery explain this. First, individuals struggle to identify the most relevant skills for any given task and to accurately assess their own relative share of those skills.[183] Information neglect means that individuals may ignore the most important factors and focus on their own controllable strengths, rather than the objective difficulty of a task.[184] Combine these tendencies with the flaws in information collection and prioritizing, and people are likely to believe that they are either more self-determined (controllable traits) or more insecure (uncontrollable traits) than they are in reality.

Second, the self-serving bias and attribution bias are two motivational biases that "lead people to systematically misinterpret data when they have some emotional stake in the outcome" and arrive at a more flattering conclusion.[185] The self-serving bias could mean changing what is "fair" based on whether the individual empathizes more with a victim or a

178. David Dunning et al., *Flawed Self-Assessment: Implications for Health, Education, and the Workplace*, 5 PSYCHOL. SCI. PUB. INT. 69, 71 (2004); *see also* THALER & SUNSTEIN, *supra* note 4, at 31–33.

179. Dunning, *supra* note 178, at 72.

180. *Id.*; THALER & SUNSTEIN, *supra* note 4, at 31–32.

181. Dunning, *supra* note 178, at 73.

182. *See, e.g.*, Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 742–44 (2009).

183. *Id.*

184. Dunning, *supra* note 178, at 74–75.

185. Williams, *supra* note 177, at 337–38.

defendant, or discounting one's own past behavior as an outlier.[186] The attribution bias means people "attribute negative outcomes to bad luck, while attributing positive outcomes to their own personal acumen."[187]

Pornography users are susceptible to the dangers of both of these biases. Some may be defensive about how they and Google Chrome spend the evenings and downplay the harms of pornography—failing to accurately assess their own risk of suffering its negative consequences.[188] Others may be overly pessimistic and feel a sense of dread and despair that they have forever ruined their lives and all of society.[189] Still other viewers may suffer from the "double curse of incompetence," because although it is easy to know when one is viewing pornography online, it may be difficult to know how far the addiction or desensitization has gone, particularly because of the diminishing returns.[190] Unlike the warning signs alcohol provides as it is consumed, pornography does not give such instant feedback, making it even more difficult to correct inaccurate self-assessments.[191]

"Pluralistic ignorance" presents another difficulty. Unlike people who assume they are above average at things that they—and most others—are good at, pluralistic ignorance means seeing oneself as the outlier in a homogenous crowd. For example, everyone in Tinytown publicly disapproves of drinking and playing cards, so Jane assumes her family's secret poker nights are very unusual. Pluralistic ignorance means that Jane is unaware that *most* of Tinytown's families also have secret poker nights and thus thinks her family is exceptional when it is not.[192] Interestingly, it is difficult to tell whether Americans approve of pornography or not. It certainly still has an immoral taint, but the sexual liberation countermovement has grown increasingly strong. Pornography is simultaneously snubbed and celebrated and viewing it both standard and shameful.[193] It may be

186. *Id.* at 338.
187. *Id.*
188. Dunning, *supra* note 178, at 80.
189. *Id.*
190. *Id.* at 73 (describing the inability of the illogical to grasp their own logical failures).
191. *See id.* at 91.
192. *Id.*
193. *See supra* notes 1–3. Perhaps the mixed reactions to Cameron's ISP default switch—that pornography is both essential and shameful—indicates that it is more like

common, but many are hesitant to admit to it.[194]

Although admitting the problem continues to be a difficult first step, overoptimism and the self-serving bias are not insurmountable. The strength of these biases may be reduced by affirming a porn user's self-worth *before* receiving the criticism and by providing "immediate, accurate, and unambiguous feedback."[195] Affirming self-worth reduces the defensiveness that can bar information about the dangers of pornography from taking root. Immediate, accurate, and unambiguous feedback effectively provides information about how often an individual uses pornography and provides data for further analysis regarding mood, stress levels, and other triggers. This in turn allows an individual to receive true information about his problem and accurately understand his behavior and risk. Returning to the food analogy, telling an obese man about the dangers of heart disease and diabetes for Americans likely will not inspire a lasting change in his diet. By contrast, telling him that he matters, giving him a fitness monitor to track his caloric intake, and *then* telling him about his increased risk of heart disease and diabetes allows him to internalize the risk and work to improve.

B. Avoiding Temptation in an Autodrive World

Viewing pornography and other harmful behaviors may be more automatic than willful, which makes BLE even more important. In *Nudge,* Thaler describes hosting a dinner party and placing a bowl of cashews on the table.[196] The guests—all economists—began snacking. Before long, everyone had eaten more than necessary, and all risked spoiling their dinner. Thaler removed the cashew bowl and was immediately met with a chorus of gratitude.[197] And this from economists—people supposed to be deeply rational and able to act with their heads, not their hearts or their stomachs.

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other addictions than dopamine studies can indicate. Like an alcoholic who still hides the bottle in the back cubby, pornography seems to be an essential secret for many.

194. *See* Chris Morris, *Will Porn Become a Mainstream Business?*, CNBC, Jan. 15, 2013, http://cnb.cx/1Es8G2y [perma.cc/G82V-84TM]; *see also* Amanda Hess, *How Many Women Are Not Admitting to Pew That They Watch Porn?*, SLATE, Oct. 11, 2013, http://slate.me/1AsKQsl [perma.cc/K2JS-TKAP].

195. Williams, *supra* note 177, at 339–40.

196. THALER & SUNSTEIN, *supra* note 4, at 40.

197. *Id.*

Sunstein and Thaler next consider Ulysses, who asked his men to tie him down so that he could listen to, but not act on, the beautiful song of the dangerous sirens.[198] Anyone can fall prey to temptation, and one of the best solutions is to get others to help. For the economists, Thaler's guests needed him to remove the cashews. Ulysses needed his men to tie him to the mast so he could safely hear the sirens' song.

Not only can individuals be tempted, they can also succumb to autopilot. In one study, individuals who received a larger bucket of free, stale popcorn ate more than those who received smaller buckets, despite not enjoying the so-stale-it-squeaked snack.[199] In a 2006 experiment, individuals were told to eat as much Campbell's tomato soup as they wanted, but they were not told that the bowls refilled themselves.[200] The participants ate soup until the experiment ended—Sunstein and Thaler note that combining self-control problems and mindless choosing results in "a series of bad outcomes for real people."[201] Similarly, mindless clicking on pornography leads to greater overall consumption, even when not pleasurable. In the food experiments, individuals ate significantly more of *both* kinds of food than they planned to eat.[202] Both the appeal and the tendency toward autopilot means not viewing pornography requires repeated active resistance.

Today's Internet is like a giant bowl of high-fat cashews before dinner, a beautiful siren song enticing shipwreck, and a bowl with an endless supply of canned soup, all only a URL away. Internet pornography is ubiquitous, tempting, and harmful. Like so many other addictive, sinful activities—overeating, gambling, drinking, and smoking—destruction follows the momentary pleasure. The instant gratification and delayed harms of pornography make it the siren song of the Internet—and too many wandering Odysseuses fail to ask friends to tie them to the mast of precommitment. Finally, like giant bowls of stale popcorn or canned soup that keep refilling themselves, Internet pornography is click-driven, so there are low barriers to viewing *just one more.*

198. *Id.* at 41–42.
199. *Id.* at 43.
200. *Id.*
201. *Id.* at 44.
202. *Id.*

These low barriers mean that hundreds of clicks can pull up hundreds of unique images, each of which the pornographers interpret as fresh demand. Pornography producers neither know nor care whether a single view was driven by sincere desire or simply a click-thru looking for a turn-on—they just see clicks as demand waiting to become cash. And because pornography viewers crave novelty, pornographers keep "refilling the bowl" with increasingly obscene content.[203] To finish the canned soup analogy, imagine that each refill injects a saltier liquid until the already salty soup is practically brine. To blithely construe this exclusively (or even principally) as a First Amendment speech issue, or simply as a representation of free choice, is to treat people as "Econs," not as human beings.

C. The Hot–Cold Empathy Gap

This compulsive or automatic consumption of pornography can be largely explained by the hot–cold empathy gap.[204] People tend to have a rational "cool self" that can think through decisions, arrive at logical and optimal outcomes, and commit to following through.[205] Whether a dieter determined to cut out sugar or a young professional committed to paying off loans, the cool self reads, studies, and analyzes the world, arriving at good and sensible solutions.[206] Conversely, the "hot self" wants what it wants, right then, with no eye for delayed gratification.[207] The hot self is appetitive and capricious: it eats the cashews, swims to the sirens, and shovels in the soup.[208] The difference—or gap—between these two selves occurs when people fail to consider their preferences when in the other state.

This phenomenon of the two selves holds true in matters pertaining to human sexuality. As Thaler and Sunstein explain, a man "thinks he will engage only in safe sex, but then must make all the crucial decisions while aroused."[209] As difficult as it is to override the hot self in moments of passion, sex education and

203. *NoFap Experiment*, *supra* note 57.

204. *See* Daniel Kahneman & Richard H. Thaler, *Anomalies: Utility Maximization and Experienced Utility*, 20 J. ECON. PERSP., 221, 224 (Winter 2006) (explaining the "hot–cold empathy gap" and comparing the state of the mind in a hot and desirous state to a cool and rational state).

205. THALER & SUNSTEIN, *supra* note 4, at 41–42.

206. *Id.*

207. *Id.*

208. *Id.* at 40–44.

209. *Id.* at 42.

public service announcements have somewhat reinforced the risks associated with unprotected sex, such as disease and unplanned pregnancy.[210] Although override is difficult, there is at least the possibility of very inconvenient consequences arising from *this* act in particular. Even if the hot self ultimately prevails over concerns about safe sex, the cold self acts as a sort of conscience that recognizes the possibility of negative consequences.

Pornography, however, presents a unique challenge for three reasons. First, there are all of the self-control problems of libido generally. Most people likely prefer encountering humans to encountering purely rational economists in the bedroom. The physiological reactions to arousal are difficult to overcome—and happily so. Otherwise the world would have missed the "heat and passion of the moment"—and consequently many human beings as well.

Second, unprotected sex has delayed consequences, but a single viewing of pornography has *very* delayed consequences.[211] The ramifications of unprotected sex may not be realized until the next check-up or a few months into pregnancy, and the pleasure and desire are waiting in the moment. With pornography, the effects tend to be aggregated—just like the first cigarette probably will not result in lung cancer, so too the first explicit film probably will not completely rewire one's views on sexuality. The first puff of smoke or the first sip of alcohol are often strong and unpleasant, and so too is the first encounter with hard-core pornography. After wearing down the threshold resistance, however, the action becomes pleasurable, the taste is acquired, and an appetite develops.

Third, pornography may be "stumbled upon," particularly in the first instance,[212] but before long it becomes part of overall pleasure seeking. A date may start out as a relatively tame dinner with good intentions and only later progress to a more intimate encounter. Pornography, however, hardly has a "goodnight kiss

210. *See* Douglas Kirby, *Effective Approaches to Reducing Adolescent Unprotected Sex, Pregnancy, and Childbearing*, 39 J. SEX RES. 51, 51–57 (2002).

211. *See* Brain Structure, *supra* note 64.

212. VICTORIA RIDEOUT, KAISER FAMILY FOUND., GENERATION RX.COM: HOW YOUNG PEOPLE USE THE INTERNET FOR HEALTH INFORMATION 12 (2001), *available at* http://bit.ly/1dsoc9G [perma.cc/NQ4X-HTST] (as early as 2001—when Yahoo was a far more popular search engine than Google—seventy percent of teens aged 15–17 said they had "accidentally stumbled across pornography online").

on the doorstep" option, particularly when used in conjunction with masturbation (*i.e.* nearly always).[213] Although the clicking itself can be mindless, the goal of seeking a more intense orgasm is narrowly focused and hard to override.

To return to the analogy of food and overeating, avoiding dessert for a diet is hard, even if swimsuit season looms. But it is nearly impossible to forgo dessert when it is offered as a reward—say, after a week of diligent dieting. On diet programs with a "cheat" day, often that day becomes worse than any "bad" day off the diet because of the psychology of justification. Similarly, the cool self will not inconvenience a willing pornography user's pleasure seeking. But the reluctant or compulsive pornography user may use a "cheat" day mindset after overriding the cool self's rationality to pursue the hot self's pleasure—in other words, he will want to "make it count."

Although BLE is fairly new as a dedicated discipline, it reinforces the wisdom of human history in many ways. For example, the hot-cold empathy gap is like the BLE shorthand for the parts of the classical conception of the tripartite soul. As Oxford professor C.S. Lewis explained in *The Abolition of Man*, in a well-ordered soul the "head rules the belly through the chest."[214] The idea is that the rational-self controls the appetitive self only through *thumos*—the will, or what might be called "the moxie of the ancients." Today, however, pornography's advocates insist on drugging willpower and self-control with the elixir of heightened "choice" or "liberation," and ignoring the consequences. Choice and liberation are both good, certainly, but if there is no chest, no moxie, no governing force, then appetites will run rampant. BLE suggests practical avenues for possible restraints in this area, but it cannot create the will to control them.

V. BLE, PORNOGRAPHY, AND GOVERNMENT

So is the answer to have the government take away everyone's bowl of nuts? Not necessarily. First, BLE must continually strike an essential balance—that between liberty and paternalism. In a

213. MARK REGNERUS & DAVID GORDON, AUSTIN INST. FOR THE STUDY OF FAMILY & CULTURE, SOCIAL, EMOTIONAL, AND RELATIONAL DISTINCTIONS IN PATTERNS OF RECENT MASTURBATION AMONG YOUNG ADULTS 10 (2014), *available at* http://bit.ly/1FOllEm [perma.cc/W2VB-Z95M] ("Frequent pornography use has come to be equated with masturbation . . . .").

214. C.S. LEWIS, THE ABOLITION OF MAN 15–16 (1st ed. 1947).

sense, this is simply good government: all public policies should help the most people avoid the worst harms, while imposing minimal costs on the rest of society. But what if government policies that start as nudges end up silencing free speech? This is one of the more troublesome aspects of applied BLE in general—it has the ability to subtly influence choice without citizens' knowledge and to manipulate rather than to encourage. Indeed, there is a dark and shadowy possibility that every nudge is another step away from freedom. The reply—that defaults must exist, so government should pick good ones—generates worthy debate.[215]

This is what makes Cameron's ISP default switch so interesting. Although it seems heavy-handed by contemporary First Amendment standards, it is fairly tame by BLE standards. To review, any choice architect must set defaults. To oversimplify a bit, there are three possible default settings: (1) automatic opt-in to pornography (with optional opt-out), (2) forced choice (when setting up the browser a user cannot continue until selecting either pornography or the filter), or (3) automatic opt-out of pornography (with optional opt-in). This is *not* a ban on Internet pornography. Instead, it is a simple switch from a default that allows pornography to a default that does not. By some accounts, it is not even that drastic—when the changes go into effect, there may be forced choice, in which everyone will have to tell their Internet provider whether they want pornography or the filter.

A. Pornography and the Constitution

While the technical aspect of Cameron's plan will likely be challenging, this is an interesting contrast to *United States v. Playboy Entertainment Group*, a case that highlights the difficulty with choosing pornography defaults and the importance of understanding BLE.[216] The case dealt with Section 505 of the Telecommunications Act of 1996, which required cable providers to fully "scramble" or block any adult programming so that non-subscribers would not receive it.[217] Until such

215. *See generally* CASS R. SUNSTEIN, WHY NUDGE? THE POLITICS OF LIBERTARIAN PATERNALISM (2014) (defending nudges and libertarian paternalism).

216. United States v. Playboy Entm't Grp., 529 U.S. 803 (2000); *see also* TUBBS, *supra* note 35, at 168–76 (discussing the court's view of children in *Playboy* and later cases).

217. *Playboy Enterprises*, 529 U.S at 803.

compliance had been met, adult programming could only be shown 10:00 PM–6:00 AM, when children were more likely to be asleep.[218] The Court ruled that the Government failed to show that this was the least restrictive means of addressing the problem and thus the regulation was unconstitutional.[219] Section 504 of the same act, however, required cable operators to scramble or otherwise fully block any channel the subscriber did not wish to receive, without charge and "*upon request.*"[220] Thus, it seems that the Court struck down a pornography-related, asymmetrically paternalistic nudge.

Justice Kennedy explained that "[w]hen a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals."[221] Kennedy concluded from the empirical evidence that Section 504 (the opt-in setting) "as promulgated and implemented before trial, generated few requests for household-by-household blocking," and over the course of a calendar year, cable companies received requests for full blocking from "fewer than 0.5% of cable subscribers," meaning it was not a plausible alternative.[222] Kennedy weighed alternative explanations for this data, surmising that the option may have been insufficiently publicized, which would lead to a tie that should be decided in favor of "free expression."[223] He even declared that it was "no response [to the low empirical numbers] that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time."[224] This should alarm anyone familiar with BLE, because it assumes that *defaults do not matter* and that people will always make the choice they prefer, regardless of the small obstacles in the way.

But that is not the case.[225] Instead, defaults can have tremendous "stickiness" in everything from cell phone presets to savings plans to automatic magazine renewal.[226] Thus, in

218. *Id.*
219. *Id.* at 826–27.
220. Telecommunications Act of 1996 § 504, 47 U.S.C.§ 560 (2013) (emphasis added).
221. *Id.* at 816.
222. *Id.*
223. *Id.* at 819.
224. *Id.* at 824.
225. THALER & SUNSTEIN, *supra* note 4, at 85–89.
226. *Id.* at 8, 12, 35.

determining the constitutionality of congressional choice architecture, Justice Kennedy ignored the most fundamental aspect of that decision: that many people's choices would be *permanently affected by the default settings allowed.* Justice Breyer began to notice these realities in his dissent, recognizing that in order for these defaults to work, parents would need to know their rights under the law, know that their children were watching signal bleed,[227] call the cable operator and ask for the blocking signal, wait for the blocking device installation, and possibly make a new request if the device failed.[228] For humans with limited time and resources, this was a nearly impossible feat—indeed, 0.5% of cable subscribers taking these steps is impressive.[229] By decreeing that Section 504's series of hoops to jump through to block pornography was the "least restrictive alternative," Justice Kennedy mandated that the default setting for American homes be uncontrolled signal bleed and the ensuing pornography. While this may have created more "choice" for programmers, it in effect forced homes that would prefer to block signal bleed to have pornography in their homes unless they went through a very difficult block request process.

Mishandling the BLE analysis can have pernicious effects. In this 5–4 decision, a slight difference in data interpretation—namely, whether the few homes using the Section 504 opt-out accurately represented the number of consumers who opposed signal bleed in their homes—could have been the determinative factor. If, for example, the Court concluded that more people objected to pornography than had gotten around to affirmatively opting out, then the outcome of its "least restrictive means" assessment presumably would have been different. Indeed, if many consumers objected to signal bleed but for some reason did not call their provider to opt out, the ostensible "least restrictive means" policy in Section 504 may in fact be a default that affected consumer behavior, not reflected consumer preference. In *Playboy Enterprises,* the Court's faulty understanding of how people make and act on decisions not

227. "Signal bleed" refers to the ability to receive cable content outside one's cable plan—here, adult programming. *See generally How to Prevent Viewing of Scrambled Cable TV Programs ("Signal Bleed")*, FCC, http://fcc.us/1LAdbhG [perma.cc/WBB7-D7TG] (last updated Oct. 22, 2014).

228. *Playboy Enterprises*, 529 U.S. at 843–44 (Breyer, J., dissenting).

229. There were also significant delays and technical difficulties with installation that led many to give up after multiple phone calls. *Id.*

only led it to overturn part of a law enacted by Congress, but made drawing a certain line *unconstitutional.* The rule (that the government should use the least restrictive method) is a good one. But the application here left much to be desired.

Today's Internet, with its cleavage-filled click-bait, enticing adverts, and easy image searches arguably contains far more "signal bleed" than did cable television in the 1990s, which makes the technical side of obscenity regulation challenging (as Prime Minister Cameron has found out). But *Playboy Enterprises* remains relevant as an example of poor analysis and bad choice architecture.[230] As a result of this case precedent, homes run by parents who *would have preferred* to not have pornography in their homes were *practically prevented from doing so* by the complicated choice architecture imposed by Section 504. Instead of favoring free speech in case of a draw, Justice Kennedy favored forcing pornography upon homes that did not want it. For all the talk of the importance of freedom, the Court cast a decisive vote against the freedom of families to not have smut delivered into their living rooms and failed to increase the liberty of those who did want adult programming.

B. From Television to Internet

Although there might have been an opportunity to revisit the cable decision upon a new showing of data, the move away from cable television and toward Internet streaming for all entertainment viewing—and particularly for pornography—makes the discussion somewhat moot for that particular technology. A better approach would instead recognize that in determining the least restrictive option, the number of individuals who affirmatively opt out should not be used as a proxy for consumer interest, and thus cannot be the determining factor in whether the Government has met its burden. Instead, courts should consider the burdens of all players in determining whether a default switch is least restrictive. The inquiry should ask whether those who want certain content are still able to receive it (avoiding the constitutional hurdles), and whether those who do not want

230. This does not suggest that courts should be choice architects, legislate from the bench, or decide the law on policy grounds. Rather, when the legal requirement is the "least restrictive means," it is important to accurately weigh benefits and burdens, which the Court failed to do—perhaps because it is a legislative task.

certain content will receive it anyway.

VI. PRIVATE SECTOR INITIATIVES TO REDUCE ACCESSIBILITY

Government intervention and legislation is unlikely in the United States for two reasons: first, the risk of being accused of censorship is a strong political incentive against state action. Second, government policy could fail the asymmetric paternalism framework and be both over- and under-inclusive. In that setting, freedom would be needlessly restricted without creating comparable gains. The application of BLE concepts to obesity and public policy has fallen largely along party lines, with Democrats supporting what they see as public health measures and Republicans opposing what they see as excessive government regulation. Government-mandated nudges away from Internet pornography would likely be political, but perhaps with a few surprising bedfellows.[231] Happily, this need not be addressed, as the most effective solutions are already occurring in the private sector.

A. Websites, Social Networking, and BLE

If government regulation is currently an unlikely avenue to aid individual resistance to temptation, what is the alternative? In short, civil society. In an unexpectedly redemptive tale, the Internet has created communities that combine the best of BLE concepts with other resources to help those struggling with pornography to quit. First, a Reddit forum called "NoFap" has created a surprisingly large and supportive online community for those who want to quit masturbating and looking at pornography.[232] Started by twenty-three-year-old student and actor Alexander Rhodes, the forum—which takes its name from "fapping," a slang term for masturbation—began "as a fun challenge to test your willpower, to put yourself against your instincts and see if you could do it."[233] The NoFap forum has

231. Pro-regulation Democrats would likely support restrictive measures to online pornography as part of increased Internet regulation; pro-family Republicans might join them. Libertarians, sexual progressives, free speech advocates, and small-government conservatives would likely oppose the measures as too restrictive.

232. *About NoFap® and FAQs*, NOFAP, http://bit.ly/1LAd9GD [perma.cc/XZ43-F5AP] (last visited May 31, 2015) [hereinafter *NoFap FAQs*].

233. Emily Witt, *Hands Off: Why Are a Bunch of Men Quitting Masturbation? So They Can Be Better Men.*, N.Y. MAG, Apr. 14, 2013, http://nym.ag/1JOo2pl [perma.cc/U6XQ-MKJA].

rewards in the form of community accolades, tales of success, and a personal counter for days without masturbation.[234] As of April 2013, the page had "400,000 *unique* visitors [each] month," and seemed to be helping people ask questions, share wisdom, and beat addiction.[235] NoFap posts frequently show up on a similar site, YourBrainOnPorn.com (YBOP).[236] YBOP is "maintained by a group effort" that includes men who have recovered from problems with online pornography and "a retired anatomy & physiology teacher."[237] It offers scientific studies and articles, answers to FAQs about pornography, information on how to "reboot" (reset the brain after pornography addiction), and other resources.[238] The secular site focuses on pornography's effects on the brain. The site skews male, but recently started a section for "Articles of Special Interest to Women."[239] The site claims that Internet pornography addiction exists, creates fundamental changes in the brain, can cause various physical ramifications, and can rewire adolescent sexuality—but also argues that giving up Internet pornography can lead to improvement in many of these areas.[240] YBOP does not seek to ban Internet pornography, and specifies that its findings and claims relate primarily to today's high-speed, hard-core content.[241]

These sites use BLE concepts to address some of the biggest problems with pornography addiction. Serving primarily as an information source, YPOB tries to correct the perils of flawed self-assessments. For those looking for answers about neuroscience and whether pornography is *actually* harmful, YBOP offers studies, analysis, reposted testimonials, and an unofficial reboot program. Importantly, YBOP tells its visitors not to try to battle pornography alone—instead, it stresses the importance of support.

Community involvement is a frequent feature of breaking

234. *Id.*

235. *Id.* (emphasis added).

236. *See generally* YOUR BRAIN ON PORN, http://bit.ly/1Q5qZBn [perma.cc/SP2R-HPDH] (last visited May 31, 2015).

237. *About Us*, YOUR BRAIN ON PORN (Nov. 29, 2010, 10:26 AM), http://bit.ly/1LvM46B [perma.cc/EYP5-R2YH].

238. *About This Site*, YOUR BRAIN ON PORN (Nov. 29, 2010, 10:23 AM), http://bit.ly/1F4xWwz [perma.cc/MJ3Q-HQW6].

239. *Articles of Special Interest to Women*, YOUR BRAIN ON PORN (July 8, 2013, 10:50 AM), http://bit.ly/1IU0MXu [perma.cc/NK8M-4GZE].

240. *About This Site*, *supra* note 238.

241. *Id.*

addiction, part of overall healthy habits, and the driving feature of NoFap. The site's users, dubbed "Fapstronauts," earn badges for every day they go without pornography and masturbation.[242] Users start with a smiley face and earn circle number badges for each day, star number badges for each month, and get the rocketship badge for a whole year without pornography or masturbation.[243] The site is posed as a customizable challenge, where users test the limits to see if they can go 30 or 90 days without "fapping."[244] In case of a slip-up ("reset,") the day counter resets—but the community offers overall positive reinforcement and users post success stories.[245] These stories range from tales of increased virility with a real partner to boldness in making eye contact with and talking to a cute girl on a bus to enjoying more time for leisure activities without fapping.[246] The page encourages users to get an accountability partner through the site, and also offers a free web browser filter—the password to which should be given to a close and trusted friend.[247] The site has various sister sites and forums, and has even generated its own vocabulary and dictionary.[248]

In other words, YBOP gives people the information they need to quit viewing pornography. NoFap gives them a community to belong to—it is quirky enough to have some brand identity and decidedly welcoming. Thaler and Sunstein spend a whole chapter detailing the importance of social nudges, noting that a "herd" mentality can affect teen pregnancy, obesity, broadcast programming choices, academic effort at the college level, and federal judges' voting records.[249] These sites give visitors a place to belong and a chance at friendship in an addiction that is notoriously lonely.

Importantly, NoFap challenges its users to bypass the flawed self-assessment stumbling blocks and attempt something objective, rather than wondering how comparatively damaging their relationship with pornography is to those of "most people." In case of overoptimism, the term "reset" applies

242. Witt, *supra* note 233.
243. *See id.*; *NoFap FAQs*, *supra* note 232.
244. *NoFap FAQs*, *supra* note 232.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. THALER & SUNSTEIN, *supra* note 4, at 55.

before the very serious term "relapse."[250]

Fight The New Drug is another website that has launched a broad initiative to educate individuals about the harms of pornography.[251] The site also offers a "Get Help" tab that encourages individuals to not fight pornography alone, and offers BLE-inspired tools like a Personalized Battle Tracker Calendar, badges and progress tracking, inventories and personal surveys to discover the root of the addiction, a 52-video lesson plan, and a personalized recovery plan.[252] The site does not stop with individual recovery, however. It offers a pledge to join with "the thousands who have committed to take a stand against pornography," shareable videos, opportunities to join the "street team," fundraise, and ways to bring speakers to a group.[253] The blog offers timely information and opinions on a variety of porn-related subjects,[254] and it offers the opportunity to "learn the facts" about how pornography harms the brain, relationships, and social ideas about sex.[255] Wrapped up in trendy web design, Fight The New Drug offers information and community to both users and non-users alike.

B. Private Companies Reducing Access

Private businesses can and are taking a leading role in creating smart defaults and choice architecture. Google has made a series of anti-pornography moves by voluntarily blocking searches for child pornography,[256] banning pornographic apps from Google Glass and Google Play,[257] and no longer accepting AdWords ads that promote "hardcore pornography; graphic sexual acts

250. *NoFap FAQs*, *supra* note 232.

251. *FAQ: Questions? We've Got Answers*, FIGHT THE NEW DRUG, http://bit.ly/1ep29Rr [perma.cc/QFW3-CWCL] (last visited May 31, 2015).

252. *FTND Resources for Help*, FIGHT THE NEW DRUG, http://bit.ly/1HrjCzv [perma.cc/7334-R4Q5] (last visited May 31, 2015).

253. *5 Ways to Join the Fight*, FIGHT THE NEW DRUG, http://bit.ly/1F4xXR4 [perma.cc/6RU3-TCJP] (last visited May 31, 2015).

254. *Blog*, FIGHT THE NEW DRUG, http://bit.ly/1IU0T5p [perma.cc/7766-WGVX] (last visited May 31, 2015).

255. *Get the Facts*, FIGHT THE NEW DRUG, http://bit.ly/1AonB2S [perma.cc/UY9T-VYF3] (last visited May 31, 2015).

256. *Update 1–Google, Microsoft Tighten Online Searches to Combat Child Porn*, REUTERS, Nov. 18, 2013, http://reut.rs/1LAdwRt [perma.cc/U6RS-PCK4] (Microsoft also took this step).

257. Chris Chavez, *Google Bans Erotic Apps From the Play Store According to New Developer Policies*, PHANDROID, Mar. 28, 2014, http://bit.ly/1IYjFqU [perma.cc/4KJS-KDBG] (noting Google Play banned "erotic" material as well as sexually explicit material); Salvador Rodriguez, *Google Bans Porn From Glass, Forcing Changes to First Porn App*, L.A. TIMES, June 4, 2013, http://lat.ms/1HF7Owp [perma.cc/EW84-XKS2].

including sex acts such as masturbation; genital, anal, and oral sexual activity."[258] Google also recently banned "graphic nude images or video" from Blogger, unless the site is set to private or the material offers "substantial public benefit," such as exists in "artistic, educational, documentary, or scientific contexts."[259] Although Google is by no means the only way to access pornography, as the world's leading search engine, its move is both a practical and symbolic stance against smut. Hotel chains that profit off guests who pay for pornography would do well to follow Google's maneuver.

VII. MORE BLE SOLUTIONS TO REDUCE PORNOGRAPHY VIEWING

In contemplating how to best move forward, BLE concepts can and should be used beyond government policy. Churches and other social institutions, friends, and individuals wanting to reduce their pornography consumption can all apply BLE insights to the problem of Internet pornography use. Many of the following suggestions are derived from general principles of BLE. They are meant primarily to contribute to discussion and experimentation, rather than to provide definitive answers or solutions to problems.

1. Gender-specific affirmative messages on a web filter. People respond far more favorably to criticism after they have been *affirmed*—more than a compliment, affirmation speaks to the core character of a person. Consider this the Surgeon General's warning from your grandfather. If web filters blocked the problematic site with a message like, "You're a good man who can rise to a challenge. You don't need this," or "You're a beautiful, kind, intelligent woman. This website doesn't know that," people might experience a renewed commitment to beating addiction. The sexual nature of this addiction makes the gender-specific messages important, because viewing pornography often involves frustrations with the opposite sex. Thus, sex-based affirmation makes the message more powerful.

2. Web filter messages to move the individual from the

258. Austin Ruse, *Google Out of Porn Biz?*, BREITBART, June 6, 2014, http://bit.ly/1cVorcp [perma.cc/6THK-JUBQ].

259. *Breaking News: Google Says No More Porn on Blogger*, FIGHT THE NEW DRUG (Feb. 24, 2015), http://bit.ly/1RfEVex [perma.cc/9SAA-ZDP4].

immediate urge to the big picture. Because pornography is so appetite-driven, using messages like the following could help to shift the would-be user's mind from the appetitive to the rational and thus re-engage the cold self. "This website contributes to human trafficking and other forms of modern slavery. Your participation is destroying the futures of people you've never met," or "You have goals and dreams. Are any of them clicking?" or "Go get some fresh air. There are better ways to burn off that energy."

3.Changing the messaging of self-assessment. This could be another web filter message that resets expectations about what "normal" sexual behavior and activity looks like. A picture of a caveman could be paired with something like, "Humans have been repopulating the earth for a long time now. They didn't need Internet porn to have fulfilling sex lives. You don't either."

4.Daily web browser reports. Similar to the idea of the badges at NoFap, this would create instant feedback to help individuals better monitor their screen time. By combining a stopwatch timer, Internet filters, and pie chart data, this browsing tool could help illustrate to those struggling with pornography how pervasive their problem is. There may be a problem from overoptimism and self-serving biases negating this information if individuals are "not as bad" as expected.

5.Eliminate de facto net neutrality and have service providers reduce bandwidth to pornography. Net neutrality is a hot-button issue regarding whether Internet service providers must treat all data equally.[260] In a world without net neutrality, ISPs could reduce the bandwidth provided to pornography websites, thereby reducing the incentive to visit such sites, the pleasure from doing so, and some of the negative consequences of quick click-thru.[261] In the absence of mandated net neutrality, ISPs could do this themselves. Alternatively, Congress could pass legislation mandating various rankings of Internet data.

260. *See, e.g.*, Nicholas Rizzuto, *Is All Internet Data Created Equal?*, FEDERALIST, Jan. 22, 2014, http://bit.ly/1HDY3Bn [perma.cc/Q7V5-5SRR].

261. *Id.*

These suggestions all focus on changing the messaging used for individuals who find themselves alone with a computer, and maybe without a NoFap accountability partner online. They are suggestions and do not necessarily satisfy the requirements of asymmetric paternalism. For example, many would argue that reducing bandwidth to pornographic material is a censorship issue, particularly because of the "common carrier" arguments surrounding Internet providers. The question of how to measure overall welfare as it relates to asymmetric paternalism and nudges generally is entangled in a number of ethical and policy considerations and cannot be fully extrapolated here. The strategies outlined by the NoFap community are brilliant and easily fulfill the asymmetric paternalism paradigm by being completely private and optional. Indeed, if pornography users who wanted to stop knew about websites like this, change could come very soon.

VIII. CONCLUSION

Although pornography enjoys protection under First Amendment case law and is typically thought of as a private choice, there are still reasons to apply asymmetrically paternalistic nudges to reduce its consumption. Minimum harm to those who do not make errors could lead to maximum gains for the error-prone, leading all to a happier, healthier life.

Americans ought to embrace BLE insights to reduce pornography consumption in the United States. Pornography at the very least poses a degree of real harm to a subset of society. At least some of those individuals want to quit being harmed by its use, production, and dissemination. BLE offers key insights into how to help those people and the solution should transcend party lines. Those on the Left should see this as a simple and effective way to change the view of and opportunities for working-class women, particularly ethnic minorities used for specific kinks. Pornography frequently exploits its "stars" for the pleasure and profit of men—hardly a progressive value. Those on the Right should see this as a small-government mechanism to affect moral choices. Libertarians and other independents should see this as a rational and beneficial way to help some members of society through the actions of government, businesses, intermediary institutions, and individuals without inconvenience to others. Although particular measures may

require further discussion, asymmetrically paternalistic BLE principles should be used to reduce pornography use.


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